THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1611 OF 2021

(Arising from Civil Suit No. 0464 of 2021)

1. SIMBAMANYO ESTATES LIMITED } …… APPLICANTS
2. PETER KAMYA }

VERSUS

1. MEERA INVESTMENTS LIMITED }
2. LUWULUWA INVESTEMENTS LIMITED } …… RESPONDENTS
3. THE COMMISSIONER LAND REGISTRATION }
4. EQUITY BANK UGANDA LIMITED }

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicants sued the respondents jointly and severally seeking, inter alia, a declaration that the sale by mortgagee of their property comprised in LHR Volume 2220 Plot 2 Folio 33 Lumumba Avenue, otherwise known as "Simbamanyo House," and Kyadondo Block 243 Plots 95, 487, 957, 958 and 2794 at Mutungo, otherwise known as "Afrique Suites Hotel," was unlawful and fraudulent. The applicant's seek recovery of that property, general and aggravated damages, a permanent injunction and costs.

b. The application.

The application is made under the provisions of section 33 of *The Judicature Act,* section 98 of *The Civil Procedure Act,* and Order 41 rules 1 (a) and 2 (i) of *The Civil Procedure Rules*. The applicants seek a temporary injunction order, restraining the respondents from selling, alienating, mortgaging, transferring, encumbering or in any other way creating third party interests and rights in property comprised in LHR Volume 2220 Plot 2 Folio 33 Lumumba Avenue otherwise known as "Simbamanyo House" and Kyadondo Block 243 Plots 95, 487, 957, 958 and 2794 at Mutungo, until the final determination of the suit now pending before this court. It is the applicants' case that

the jointly filed a suit against the respondents jointly and severally, by which they seek to have the sale of the said properties to the 4th respondent declared null and void for fraud and illegalities committed in the process leading up to that sale. The respondents used brute force to gain physical possession of the property before the sale, thereby interfering with the applicants' rental and hotel business conducted therein, and eventually sold it off at a gross undervalue. That suit has a high likelihood of success yet the 4th respondent intends to alienate the said property further before the final disposal of that suit.

c. The 1st respondent's affidavit in reply.

By its Managing Director's affidavit in reply, the 1st respondent contends that the relief sought if granted will have the effect of preventing the 1st respondent from enjoying and exercising its proprietary rights. The claims raised in this suit are the subject of a previous suit filed by the applicants over the same subject matter. The applicants are yet to prove the fraud alleged in both suits. The 1st respondent bought the property at plot 33 legally at an auction conducted by the 4th respondent as mortgagee. The 1st respondent subsequently caused a transfer of the property into its name and to-date has physical possession of the property. It has since let out the property to rent paying tenants. The 1st respondent neither purchased nor acquired any business of the applicants conducted on that property, their assets, trade fixtures, tenants or goodwill. The allegation that the 1st respondent intends to alienate the property is speculative.

d. The 2nd respondent's affidavit in reply.

By its Legal Officer's affidavit in reply, the 2nd respondent contends that the 2nd respondent bought the property comprised in Kyadondo Block 243 Plots 95, 487, 957, 958 and 2794 at Mutungo legally at an auction conducted by the 4th respondent as mortgagee. The 2nd respondent subsequently took over physical possession peacefully and caused a transfer of the property into its name and to-date has physical possession of the property. The 2nd respondent neither purchased nor acquired any business of the applicants conducted on that property, their assets, trade fixtures, tenants or goodwill. The applicants are yet to prove the fraud alleged in this suit and a previous one relating to the same subject matter, to which the 2nd respondent is not a party. The allegation

that the 2nd respondent intends to alienate the property is speculative. The relief sought if granted will have the effect of preventing the 1st respondent from enjoying and exercising its proprietary rights.

e. The 3rd respondent's affidavit in reply.

By an affidavit in reply sworn by its Registrar of titles, the office of the 3rd respondent contends that there is no threat by the 3rd respondent that warrants the grant of the order sought against it. The 3rd respondent has never connived with any of the other respondents to fraudulently or illegally sale and transfer any of the two properties in issue. The 3rd respondent never cause nor participated in causing the acquisition of any business of the applicants conducted on that property, their assets, trade fixtures, tenants or goodwill. The 3rd applicant has never used any crude means in gaining physical possession of any of the properties in issue, nor is it aware of any such conduct. The applicants have no valid cause of action against the 3rd respondent. The 3rd respondent acted lawfully and within its mandate when it case a transfer of the properties into the names of the 1st and 2nd respondents respectively on basis of valid instruments of transfer presented to it. None of the two transferees has since ten lodged any instrument indicating an intention to transfer any of the two properties further. There is no proof of any irreparable injury likely to be suffered by the applicants in the event that the injunction is not granted.

f. The 4th respondent's affidavit in reply.

By an affidavit in reply sworn by its Head legal, the 4th respondent contends that the application is premised on allegations of fraud and illegality yet to be proved. The suit has no possibility of success and does not raise serious questions for the court's decision. The 4th respondent lawfully sold off both properties as mortgagee at a public auction and the purchasers have since caused a transfer of the titles into their respective names and taken over physical possession thereof. The 4th respondent has the capacity to indemnify the applicants in the event that they succeed in their suit. The applicants previously attempted to sell of the properties to the Electoral Commission which is poof of the fact that the applicants are not interested in preserving the status quo. The 2nd respondent acquired the property on basis of a loan extended to it by the 4th respondents. The 4th

respondent has since then registered a mortgage on the property and any injunction of the nature sought will be an interference with its proprietary rights. The applicants do not stand to suffer any irreparable injury.

g. Submissions of counsel for the applicant.

M/s Muwema and Co. Advocates, on behalf of the applicant submitted that there is a *prima facie* case. Annexure "A" is the plaint with attachments. Page 8 of the plaint para l is to the effect that the sale was pre-meditated. The US $ 1,000,000 was transferred from the 1st to the 2nd respondent which is just a front. It has no capacity to compensate. That prejudices the interest of the applicants. The principal has to guarantee. The properties were sold below value. The 1st respondent may not have the capacity to compensate the applicant for the true market value. It cannot come from the bar. It cannot be taken that the 1st respondent has the capacity to fully compensate. The market value was over US $ 11,000,000. The applicants suffer that loss without any assurances that thy will promptly and surely be compensated for the loss. The preservation of the property is therefore in the interests of justice. The balance of convenience is about not transferring or creating new interests. Alienation should be prevented. The status quo needs to be maintained. Section 38 (3) of *The Judicature Act* provides that the High Court may injunct on basis of apprehension. The respondent have a claim by virtue of being holders of title. Para 9 of the affidavit in support of the application shows that there was a meeting in June, 2021 there are bidders attempting to sell it to the Electoral Commission. The 2nd applicant had to borrow in order to purchase. The fact that the property is already transferred to the 1st and 2nd respondents does not preclude the court from granting the order sought.

h. Submissions of counsel for the 1st respondent.

M/s Walusimbi and Co. Advocates together with M/s Magna Advocates on behalf of the 1st respondent submitted that the main purpose of granting an injunction is the maintenance of the status quo. The status quo is that the title and possession are in the hands of the 1st respondent. Until the title is impeached, the 1st respondent cannot be restrained in the enjoyment of its proprietary rights. The 1st respondent is not privy to any fraud in the acquisition of the property.

There are not triable issues in the suit filed by the applicants and it has no reasonable chances of success. The applicants are unlikely to suffer irreparable injury. A property tendered as security for a loan cannot have sentimental, spiritual value or sanctity. The applicants' fear of alienation is speculative. The balance of convenience favours the 1st respondent whose proprietary rights ought not to be fettered, most especially since it is also n physical possession of the property. The rest of the respondents did not file submissions.

i. The decision.

It has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now, well settled. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (see *E.A. Industries v. Trufoods, [1972] E.A. 420*). The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have been well laid out as the following:-

1. The Applicant has shown a *prima facie* case with a probability of success.
2. The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.
3. Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (see *Fellowes and Son v. Fisher [1976] I QB 122*).

These principles can be found in such cases as *American Cyanamid Co v. Ethicon Limited [1975] AC 396*; *Geilla v Cassman Brown Co. Ltd [1973] E.A. 358* and *GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013*.

i. Whether the applicants have a *prima facie* case against the respondents.

First, a preliminary assessment must be made of the merits of the suit that has been filed against the respondents, to ensure that there is a "serious question to be tried." One of the criteria to be applied when considering whether or not to grant a temporary injunction is disclosure by the applicant's pleadings, of a "serious triable issue," with a possibility of success, not necessarily one that has a probability of success (see *American Cyanamid v. Ethicon [1975] AC 396; [1975] ALL ER 504; Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others, [2001 –2005] HCB 80* and *Nsubuga and another v. Mutawe [1974] E.A 487*). There is no need to be satisfied that a permanent injunction is probable at trial; the court only needs be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. A serious question is thus any question that is not frivolous or vexatious. As long as the claim is not frivolous or vexatious, the requirement of a *prima facie* case is met.

The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried, and that there is at least a reasonable chance that the applicant will succeed at trial. The applicant needs to show only a reasonable likelihood of success on the merits. The applicant's burden on this part of the test is relatively low, and in most cases an applicant will be able to show that there is a serious question to be tried. The applicant is required to provide reasonably available evidence to satisfy the court with a sufficient degree of certainty that the applicant is the rights-holder and that his or her rights are being infringed, or that such infringement is imminent. The applicant must show a strong probability that the feared conduct and resulting damage will occur.

Although the merits of the parties' respective cases and their relative strengths are not to be considered at this stage, the court should bear in mind what the applicant must plead in order to succeed. The applicants seek declarations that the sale was in violation of their right of redemption as mortgagors, the sale was tainted by fraudulent and illegal acts, the property was sold at a gross undervalue, the applicants' businesses operated from the said properties were wrongly sold, and so on. These claims are premised on facts pleaded attributing fraud to the respondents. They further contend that the underlying credit arrangement that led to the exposure of bot properties as security

was illegal. In their respective written statements of defence, the respondents contest the claims. The pleadings of both parties raise pertinent issues of law and fact. I am therefore satisfied that the claim is not frivolous or vexatious; there are serious questions of law and fact to be tried. Accordingly, a *prima facie* case has been established.

ii. Whether the applicants will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue.

Second, the applicant must show that she will suffer irreparable harm if the court refused to grant the injunction and the respondents were allowed to continue in their course of conduct. "Irreparable" in this context refers not to the size of the harm that would be suffered, but its nature. If the harm could not be quantified by payment of money, or if the harm is not readily calculated or estimated, this part of the test will usually be satisfied. In some cases, the availability of damages often precludes such a finding.

Irreparable damage has been defined by *Black's Law Dictionary*, 9th Edition page 447 to mean; "damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement." It has also been defined as "loss that cannot be compensated for with money" (see *City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000*). The purpose of granting a temporary injunction is for preservation of the parties, legal rights pending litigation. The court doesn't determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants' ability to assert their claimed rights over the land, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money.

The Court may grant a temporary injunction if it is apparent that the respondent is about to embark on a course of action that would infringe an applicant's rights. The court will particularly be inclined to grant the injunction where there appears to be a *prima facie* breach of property rights, or where the potential harm that could flow should a court order not be granted is difficult or impossible to calculate and quantify at a later stage in the suit.

As an injunction is an equitable and discretionary remedy, it is a general rule that an injunction will not be granted where damages are an adequate remedy. Before an injunction is ordered, it must be established that an award of damages is not an adequate remedy. That type of claim can be made in exceptional cases involving breach of contract, akin to a breach of fiduciary duty, where the normal remedies are inadequate and where deterrence of others is an important factor. An injunction ought not to have been granted where the respondent would be restored to the financial position it would have been in. In order to establish that damages are not adequate, the innocent party will generally have to evidence either that a) the subject matter of the contract is rare or unique or b) damages would be financially ineffective.

Examples of rare or unique subject matters might be the sale of an interest in land (as no two pieces of land are the same) or a one-off antique vase. In both scenarios, damages may not be an adequate remedy because no market substitute exists, and the innocent party would therefore be unable to secure equivalent performance (no matter what the price). Examples of circumstances where damages may be financially ineffective might be where the defaulting party is insolvent and unable to pay; if damages would be difficult to quantify (e.g. a contract to indemnify); if an order for the payment of damages would be difficult to enforce (e.g. because any enforcement would need to be in a foreign country); or if an express term of the contract restricts or limits the damages recoverable for that particular breach.

I find that the pleadings show that it is common ground that the property comprised in LHR Volume 2220 Plot 2 Folio 33 Lumumba Avenue, otherwise known as "Simbamanyo House," is developed with rental units from which rental income is drawn, while the property comprised in Kyadondo Block 243 Plots 95, 487, 957, 958 and 2794 at Mutungo, otherwise known as "Afrique Suites Hotel," is one on which is operated a hotel business. The nature of both properties is purely economic with no aesthetic or sentimental overtones. The transaction that has exposed the property to the danger of being lost too is of a purely commercial nature. In the plaint, the applicants seek general and aggravated damages.

The very essence of taking property as security for a loan is that the security can be realised in the event of default. The general rule thus is that sale of property which is pledged as security in a loan

agreement or mortgage cannot lead to irreparable loss *per se* (see *Matex Commercial Supplies Ltd and another v. Euro Bank Ltd (in liquidation) [2008] 1 EA 216*). Any kind of property offered to a bank as security for a loan is made on the understanding that the property stands the risk of being sold by the lender if default is made on the payment of the debt secured. In *Maithya v. Housing Finance Company of Kenya and another [2003] 1 EA 133*, it was held that securities are valued before lending and loss of property by a sale is contemplated by the parties even before signing the mortgage.

This therefore essentially is a case in which, if the applicants succeed, the court will be required to make an award of damages to compensate them, as rights holders, for economic injury suffered through the violation of property rights, if proved, and this is not such a daunting task. I therefore do not find this to be case in which the applicants are likely to suffer loss or injury that cannot be quantified by payment of money, or that is not readily calculated or estimated. The applicants therefore have not satisfied this requirement.

iii. Balance of convenience (whether the threatened injury to the applicants outweighs the threatened harm the injunction might inflict on the respondents).

Since the court is in doubt considering the outcome of its consideration of the first two factors, the third part of the test involves the court assessing which of the parties would suffer greater harm from the granting or refusal of the injunction pending trial. Unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the applicant has any real prospect of succeeding in his or her claim at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

This part of the test is referred to as the "balance of convenience." Balance of convenience means comparative mischief or inconvenience that may be caused to the either party in the event of refusal or grant of injunction. It is necessary to assess the harm to the applicant if there is no injunction, and the prejudice or harm to the respondent if an injunction is imposed. The courts examine a

variety of factors, including the harm likely to be suffered by both parties from the granting or refusal of the injunction, and the current *status quo* as at the time of the injunction.

The Court has the duty to balance or weigh the scales of justice by ensuring that the suit is not rendered nugatory while at the same time ensuring that a respondent is not impeded from the pursuit of his or her contractual rights. No doubt it would be wrong to grant a temporary injunction order pending disposal of the suit where the suit is frivolous or where such order would inflict greater hardship than it would avoid. Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application, some disadvantages which his or her ultimate success at the trial may show he or she ought to have been spared and the disadvantages may be such that the recovery of damages to which he or she would then be entitled would not be sufficient to compensate him or her fully for all of them.

The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his or her succeeding at the trial is always a significant factor in assessing where the balance of convenience lies. The governing principle is that the court should first consider whether if the applicant were to succeed at the trial in establishing his or her right to a permanent injunction, he or she would be adequately compensated by an award of damages for the loss he or she would have sustained as a result of the respondent's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the respondent would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the applicant's claim appears to be at this stage.

If, on the other hand, damages would not provide an adequate remedy for the applicant in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the respondent were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated by the applicant for the loss he or she would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages would be an adequate remedy and the applicant would be in a financial

position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

For example, if the *status quo* is that the respondent has been carrying on the activity complained of for a long period of time, and the applicant knew or should have known of the activity, but has not previously objected, the court will be reluctant to make an order preventing the respondent from continuing the conduct. On the other hand, if the respondent has only recently embarked on the conduct and has not expended significant resources, then this may well place the balance of convenience in favour of the applicant.

To the contrary, if the respondent is enjoined temporarily from doing something that he or she has not done before, the only effect of the interlocutory injunction in the event of his or her succeeding at the trial is to postpone the date at which he or she is able to embark upon a course of action which he or she has not previously found it necessary to undertake; whereas to interrupt him or her in the conduct of an established enterprise would cause much greater inconvenience to him or her since he or she would have to start again to establish it in the event of his or her succeeding at the trial.

The injunction seeks to prevent the 1st and 2nd respondent from exercising proprietary rights of charging or otherwise alienating the property as part of their ordinary course of business. Ordinarily the remedy for persons claiming interest in property registered to another is the lodgement of a caveat. A caveat prevents registration of any further dealings with the land that affects the caveated interest, unless the caveator consents or the caveat lapses, is cancelled, rejected by the Registrar of titles or is withdrawn by the caveator. Lodging a caveat allows time for both parties to claim their interest in court. No other transactions can be registered against the title until the caveat is resolved. During court proceedings, it's up to the caveator to provide proof of the caveat's validity. If the court deems the caveat claim to be invalid, then it will be removed from the property title. This process balances the rights of the parties' fairly in that the effect and duration of the caveat is subject to adjudication in a fairly expeditious process. The rights of either party may be determined quickly on a case by case basis. The applicants though have pleaded in paragraph 14 (e) of the plaint that the caveats they lodged on 8th September, 2020 were vacated in

order to allow for the transfers that followed the sale that took place on 8th October, 2020. If that is the case, then they are barred by section 22 (2) of *The Registration of Titles Act* which prohibits the renewal of a caveat by or on behalf of the same person in respect of the same estate or interest.

The other relevant consideration is that the two properties have since 8th October, 2020 or thereabout, been transferred and are in the physical possession of the 1st and 2nd respondents. The implication is that the *status quo* for the last one and a half years is that the two respondents have been exercising the rights attendant to being the registered proprietors in possession, of the two properties. The applicants seek the interlocutory injunction so as to protect themselves against injury by violation of their claimed property rights, for which I have already found they could be adequately compensated for in damages if the uncertainty were resolved in their favour at the trial.

The applicants' need for such protection must be weighed against the corresponding need of the two respondents to be protected against injury resulting from being prevented from exercising their own legal rights, for which they may not be adequately compensated in damages, if the uncertainty were resolved in its favour at the trial. Considered in the light of the effect of the delays inherent in the administration of justice, a temporary injunction will have a disproportionate effect on the respondents as an impediment from the pursuit of their proprietary rights, in a manner that would have the undesirable effect of pre-determining some of the issues due for trial. I therefore find that the balance of convenience in favour of the respondents. In light of all the foregoing, the order, if granted, would inflict greater hardship than it would avoid, hence the balance favours not granting the temporary injunction order. The application is accordingly dismissed. The costs of this application will abide the result of the suit.

Delivered electronically this 12th day of April, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
12th April, 2022.