THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL No. 0687 OF 2021

5 **(Arising from Miscellaneous Application No. 1327 of 2021)**

NAKATO MARGARET ………………………………………………… APPELLANT

VERSUS

10 **1. HOUSING FINANCE BANK LIMITED ………………………… 1ST RESPONDENTS**
2. MANDE CONSTANT

Before: Hon Justice Stephen Mubiru.

15 **JUDGMENT**

a. Background.

The appellant is the wife of a one 2nd respondent. Sometime during the month of August 2013 the 2nd respondent secured a home improvement loan of shs. 375,000,000/= from the 1st respondent 20 bank. As security for that loan, he mortgaged land comprised in Kyadondo Block 255 Plot 898 at Munyonyo on which is situated a residential house that he occupies with the appellant. When he defaulted on that loan, the 1st respondent issued a demand and later default notice upon him. The 2nd respondent filed a suit on 28th August, 2018 against the 1st respondent seeking a declaration that the notices were unjustified, null and void in law. That suit was subsequently dismissed. The 25 appellant then filed a suit on 14th October, 2021 seeking, *inter alia*, a declaration that her matrimonial home was unlawfully mortgaged to the 1st respondent and that the process of foreclosure undertaken by the 1st respondent is unlawful. That suit is still pending before this court. The appellant in the meantime on the same day filed an application seeking a temporary injunction restraining the 1st respondent from selling off the mortgaged property, until the final determination 30 of the suit. The learned Registrar granted the application on 30th November, 2021 on condition that the appellant deposited 30% of the amount claimed by the 1st respondent, not later than 30th December, 2021. The appellant was dissatisfied with that order and filed this appeal.

b. <u>The ground of appeal</u>.

The appellant contends that the learned Registrar erred in law and fact when he imposed a condition requiring the appellant to pay 30% of the sum claimed by the respondent within 30 days of that order, as part of the order granting a temporary injunction restraining the respondent from selling of the property mortgaged to it by the 2nd respondent.

c. <u>Submissions of counsel for the appellant</u>.

M/s Madibo, Mafabi Advocates and Solicitors on behalf of the appellant submitted that Regulation 13 (6) of *The Mortgage Regulations*, provides that in application by a spouse, the court has to consider the circumstances and ability of the spouse to pay the 30% in the ruling, the Registrar did not attempt to look at the capacity of the spouse. The evidence of inability to pay is based on her illiteracy. Had he considered that he was a wife with ten children, he would not have imposed the condition. Had the learned Registrar considered the facts in the application that the appellant was a spouse resident in the suit property with her ten children, he would not have imposed the condition. She averred that she had nowhere else to live. That together with her illiteracy and ten children demonstrates that she is unable to pay.

d. <u>Submissions of counsel for the 1st respondent</u>.

Mr. Brian Kajubi on behalf of the 1st respondent submitted that the affidavit in reply shows that the discretion was undeserved to be exercised in favour of the appellant. There was no evidence before the court regarding her impecuniousness. This is a court of law no that of assumption. It is the duty of the litigant through counsel to convince or persuade the court. Attempt to fault the Registrar in exercising the discretion would be an attack of the duties of the judicial officer. Illiteracy, children and occupancy are not a basis for exercising the discretion. Not every illiterate person is unable to pay. The appeal should be dismissed with costs. The second respondent was unrepresented and did not present any submissions.

e. <u>The decision</u>.

The power to grant temporary injunctions is discretionary (see *Kiyimba Kaggwa v. Haji A.N. Katende [1885] HCB 43* and *Robert Kavuma v. M/s Hotel International, S.C. Civil Appeal. No. 8 of 1990*). Discretion is the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable. "Discretion" cases involve either the management of the trial and the pre-trial process; or where the principle of law governing the case makes many factors relevant, and requires the decision-maker to weigh and balance them. Just as the factors for consideration could never be absolute, there could never be a gauge to measure the accuracy of such decisions. Unless the exercise of discretion is obviously perverse, an appellate court should be slow to set aside discretionary orders of courts below.

In the instant appeal, while counsel for the appellant contends it was an improper exercise of discretion when the learned Registrar imposed the condition of depositing 30% of the amount in dispute as part of the grant of the order of a temporary injunction, counsel for the respondent contends it was a proper exercise of discretion to which this court ought to defer by not interfering.

It is trite that an appellate court is not to interfere with the exercise of discretion by a court below unless satisfied that in exercising that discretion, the court below misdirected itself in some matter and as a result came to wrong decision, or unless manifest from case as whole, the court below was clearly wrong in exercise of discretion and injustice resulted (see *National Insurance Corporation v. Mugenyi and Company Advocates [1987] HCB 28; Wasswa J. Hannington and another v. Ochola Maria Onyango and three Others [1992-93] HCB 103; Devji v. Jinabhai (1934) 1 EACA 89; Mbogo and another v. Shah [1968' E.A. 93; H.K. Shah and another v. Osman Allu (1974) 14 EACA 45; Patel v. R. Gottifried (1963) 20 EACA, 81;* and *Haji Nadin Matovu v. Ben Kiwanuka, S. C. Civil Application No. 12 of 1991*). A Court on appeal should not interfere with the exercise of the discretion of a court below merely because of a difference of opinion between it and the court below as to the proper order to make. There must be shown to be an unjudicial exercise of discretion at which no court could reasonably arrive whereby injustice has been done to the party complaining.

The appellate court will intervene where the Registrar acted un-judicially or on wrong principles; where there has been an error in principle (see *Sheikh Jama v. Dubat Farah [1959] 1 EA 789; Hussein Janmohamed and Sons v. Twentsche Overseas Trading Co Ltd [1967] 1 EA 287; Banco Arabe Espanol v. Bank of Uganda, S. C. Civil Appeal No. 8 of 1998* and *Thomas James Arthur v. Nyeri Electricity Undertaking [1961] 1 EA 492*). As such, the Registrar is entitled to deference in the absence of an error in law or principle, a palpable and overriding error of fact, or unless the decision is so clearly wrong as to amount to an injustice. Generally, appellate courts will only interfere with exercise of discretion by a Registrar where he or she has incorrectly applied a legal principle or the decision is so clearly wrong that it amounts to an injustice. Although there is a presumption in favour of judicial discretion being rightly exercised, an appellate court may look at the facts to ascertain if discretion has been rightly exercised.

Therefore, allowing an appeal from a discretionary order is predicated on proof of: (i) "specific error," i.e. an error of law (including acting upon a wrong principle), a mistake as to the facts, relying upon an irrelevant consideration or ignoring a relevant consideration, or (exceptionally) giving inappropriate weight to such considerations (relevancy grounds); and (ii) "inferred error," i.e. where, in the absence of identification of specific error, the decision is regarded as unreasonable or clearly unjust. Where inferred error is found, this will have been brought about by some unidentifiable specific error.

In his ruling, the learned Registrar found that the appellant had proved that she had a *prima facie* case, that she stood to suffer irreparable damage if the sale went ahead and that the balance of convenience was in her favour. He however went on to observe that the subject matter of the suit has previously been the subject of a suit by the 2nd respondent in the year 2018, during which a similar application had been dismissed. He then invoked Regulation 13 of The Mortgage Regulations, thereby imposing the condition that the appellant deposits 30% of the sum claimed by the respondent within 30 days of that order, as part of the order granting the temporary injunction.

Since the promulgation of *The Mortgage Regulations, 2012* the question has arisen as to whether a temporary injunction should be granted conditionally and specifically upon a deposit of 30% of

the forced sale value of the mortgaged property or outstanding amount, where the effect of the injunction is to stop the sale of the mortgaged property, as it will be in almost all applications for temporary injunctions involving mortgaged property. Regulation 13 of *The Mortgage Regulations, 2012* provides as follows;

5

> 13. Adjournment or stoppage of sale.
>
> (1) The court may on the application of the mortgagor, spouse, agent of the mortgagor or any other interested party and for reasonable cause, adjourn a sale by public auction to a specified date and time upon payment of a security deposit of 30% of the forced sale value of the mortgaged property or outstanding amount.
>
> (6) Notwithstanding sub-regulation (1) where the application is by the spouse of a mortgagor, the court shall determine whether that spouse shall pay the thirty percent security deposit.

10

15

The position now is that applications for temporary injunctions involving mortgaged property have to be dealt with in conformity with the statutory provisions for mortgages under The Mortgage Act, 2009. The statutory requirements under the Mortgage Regulations thereby override traditional considerations for the grant of a temporary injunction (see Willis International Engineering and Contractors Ltd and another v. DFCU Bank, H. C. Miscellaneous Application No. 1000 of 2015 and *Miao Huaxian v. Crane Bank Limited and another, H. C. Misc. Application No 935 of 2015*).

20

This position is buttressed by the Court of Appeal decision in Ganafa Peter Kisawuzi v. DFCU Bank Ltd, C. A. Civil Application No. 64 of 2016 where the Court refused to grant an order of a temporary injunction to the applicant holding that the remedy was not available to him on the ground that the applicant had not complied with regulation 13 (1) of *The Mortgage Regulations 2012*, which required him to deposit 30% of the forced sale value of the mortgaged property or the outstanding amount before stoppage of sale. In that case, Counsel for the respondent submitted that the applicant had not deposited 30% of the value of the mortgaged property contrary to The Mortgage Regulations. Counsel for the applicant conceded this but submitted that the applicant was willing to deposit the said amount if ordered by the court. The Court of Appeal therefore did not have the occasion to specifically state this as a general principle.

25

30

Regulation 13 of *The Mortgage Regulations, 2012* is an enactment of the principle "pay now, argue later." It is designed to restrict the ability of the mortgagor to use litigation or the courts, to vexatiously delay the realisation of money due to the mortgagee. It is intended to reduce the number of frivolous objections to sales by a mortgagee and guarantee that the mortgagee will not be unnecessarily prejudiced by a delay in payments, inevitably occasioned by litigation. It ensures that the mortgagees are not left out of pocket due to the time that lapses over the course of litigation, while on the other hand encouraging a mortgagor to hasten the progress of litigation so as to improve on its ability to expand its business, or pay debts, or to mitigate any detrimental effect imposition of the condition may have had on the mortgagor's liquidity.

It applies to situations where a dispute arises between the mortgagor and the mortgagee regarding their respective rights under the mortgage, before the mortgagee can exercise their power of sale or foreclosure. Although payment of loan instalments is not suspended pending a suit, unless directed otherwise, the practical reality is that litigation has tended to have that consequence. This provision therefore strikes a balance between the competing desire of the mortgagee to realise the security following default and that of the mortgagor to have his or her day in court on questions regarding the legality or propriety of events triggering that process, whilst the mortgagor pursues his or her various remedies.

While on the one hand the court should be alive to the potential of the mortgagee abusing this provision by invoking the power of sale maliciously or unlawfully, it should at the same time be mindful of the purpose of this provision being undermined by a disgruntled mortgagor making unfounded assertions of illegality, dispute over the amount outstanding, the value of the property, and so on, purposely to avoid or delay the sale. While the potential abuse by the mortgagee is mitigated by the fact that the amount paid by the mortgagor will eventually be refunded with interest by the mortgagee when the court establishes that the mortgagee's computation of the disputed outstanding amount or value of the property was incorrect, if the "pay now, argue later" rule were not enacted, there would be an incentive for a mortgagor to dispute a sale, which the mortgagor would not otherwise have done.

The considerations underpinning the "pay now, argue later" concept enacted in Regulation 13 of *The Mortgage Regulations, 2012* include the public interest in obtaining full and speedy settlement of commercial disputes and the need to limit the ability of recalcitrant debtors to use objection and appeal procedures strategically to defer the payment of borrowed funds. It was argued by counsel for the appellant that a dispute over the legality of the mortgage, the procedure of its enforcement or the amount outstanding is reason enough not to impose the 30% deposit requirement. If this were to be adopted as a valid reason, then the entire purpose of the provision would be defeated. All it takes is for the mortgagor to raise such a claim in the plaint, however frivolous. The legislative intent on the other hand can be achieved by interpreting "amount outstanding," to mean the amount as claimed by the mortgagee at the time the suit is filed.

Similarly, it is equally disingenuous to seek to defeat the purpose of the provision by adverting to Regulation 11 (2) of *The Mortgage Regulations, 2012* which requires a valuation report to be made not more than six months before the date of sale. That requirement is specific to the value at the time of sale by the mortgagee, not necessarily for purposes of the adjournment or postponement of a sale. For the purposes of Regulation 13 (1), the value of the property at the time of execution of the mortgage would suffice. This is more so since it is a pre-dispute value that was agreed upon by the parties.

It is only under Regulation 13 (6) of *The Mortgage Regulations, 2012* that discretion is conferred on the court to determine whether or not the 30% requirement should be imposed. Under that provision, "where the application is by the spouse of a mortgagor, the court shall determine whether that spouse shall pay the thirty percent security deposit." The court may then take into account such factors as; - how long the spouses were cohabitating before the default; the financial resources of the spouse applying; the availability of alternative accommodation; whether there are children of the relationship; the amount of debt involved, the risk of dissipation of the property by the mortgagor during the period of suspension; whether the applicant is able to provide adequate security for the payment of the amount involved; whether the payment of the amount involved would result in irreparable financial hardship to the applicant; whether fraud is involved in the origin of the dispute, etc. This may be propelled by the fact that the property in issue also serves as the matrimonial home or family land.

In *Nakayaga v. FINA Bank and another, H. C. Misc Application No 471 of 2014,* the applicant was the wife of the mortgagor who had mortgaged the title deed to land constituting their matrimonial home to FINA Bank Ltd for a loan. She filed a suit protesting the imminent sale of that property on grounds that she never granted consent to the mortgage variation between her husband and the bank and that she had not obtained independent advice in respect of the mortgage of the family/matrimonial property. She contended therefore that the intended sale was unlawful and illegal. When she sought a temporary injunction pending the disposal of that suit, the learned Judge declined to order the applicant to deposit 30% of the forced sale value of the suit property as security on grounds that Regulation 13 (1) of *The Mortgage Regulations*, 2012 presupposes that the mortgagee's right to foreclose is not in dispute. The learned trial Judge did not avert to Regulation 13 (6) which in my view was the one applicable.

Despite that, it seems to me that Regulation 13 (6) of *The Mortgage Regulations, 2012* is intended to allow the court, on a case by case basis, where the property mortgaged is a matrimonial home or family land, to balance the interests of the mortgagee and the mortgagor's spouse's right of occupancy of the matrimonial home guaranteed by section 39 (1) of *The Land Act*. In a deserving case, the court may find that the right of the spouse to have access to and live in the matrimonial home or on family land should unconditionally prevail over the prospect of the mortgagee's cash flow being interrupted and hence the mortgagee being out of pocket during the litigation. Needless to say, payments and when they are due are a crucial factor in any arrangement of borrowing but so are the rights and remedies available to a spouse when either the mortgagee or mortgagor, or both, have prima facie failed to follow the correct process for mortgaging such land.

In order to merit waiver of the requirement to deposit 30% of the amount in dispute where the property about to be sold by the mortgagee is a matrimonial home, the applicant ought to satisfy court that eviction therefrom will occasion the applicant undue hardship, i.e. significant difficulty, expense or disruption. It should be hardship which is excessive or disproportionate in all the circumstances of the case, considering the fact that whoever mortgages property ought to foresee the fact that it may be sold upon default.

When determining the magnitude of hardship the eviction from a matrimonial home is likely to cause, the court will consider, among other factors; (i) the nature of the transaction that exposed the spouses to eviction therefrom; (ii) the size of the family; (iii) the period for which they have occupied the home; (iv) the availability of alternative, reasonable accommodation; (v) any unique qualities of the home; (vi) whether there are likely to be serious safety or health issues emanating from the eviction such as those related to childcare, or responsibilities of caring for an elderly, disabled, or sick family member; (vii) whether loss of that accommodation will substantially affect the applicant's viability as a cohesive family, and so on.

Alongside this, based on the evidence before it, the court will undertake an evaluation of the means of the applicant, taking into account the applicant's income, assets, and liabilities, to determine whether or not: the order should be granted unconditionally, or conditionally upon a payment of a lower percentage of the sum in dispute, or that the applicant is ineligible for waiver of any part of that condition. This requires evidence to be placed before the court, regarding the applicant's income, assets and liabilities. An applicant's income and assets includes the income and assets of any person who: usually gives the applicant financial support, can be reasonably expected to give the applicant financial support, or usually receives financial support from the applicant.

These considerations must be evaluated on a case-by-case basis and therefore the exercise of that discretion must be based on an individualised assessment of current circumstances that show that the eviction would cause significant difficulty, expense or disruption, beyond that to which every mortgage in default is necessarily subjected when foreclosure ensues and he or she is deprived of his or her property in consequence. The burden rests on the applicant to provide evidence in respect of these considerations if arguing that loss of possession of the property would cause undue hardship. These circumstances cannot be inferred from the illiteracy of the applicant, having ten children whose ages and circumstances are undisclosed and a mere averment that it is the only house she can live in, as proposed by counsel for the appellant.

The court must be satisfied that eviction will be unduly costly, extensive, substantial, or disruptive, or that it would fundamentally affect the applicant's ability to pursue the suit. Examples of when a stay of execution from matrimonial home may be ordered by reason of undue hardship include;

where eviction is likely to render the applicant a homeless destitute, a significant and unpredictable change in the applicant's circumstances (e.g. a major health issue), inability to afford alternative reasonable accommodation for the duration of the litigation, due to significant loss of household income or an inevitable significant increase in necessary out-of-pocket expenses on necessities for
5 the family's upkeep. Courts are persuaded with evidence not mere argument. A Registrar cannot make speculative findings of fact based on mere conjecture.

Having perused the record, I have come to the conclusion that Registrar was not availed any material upon which he ought to have exercised his discretion in favour of the applicant by waiving
10 the condition. Had he done so he would have exercised that discretion whimsically and arbitrarily. I have neither found specific error can the decision be regarded as unreasonable or clearly unjust, On that account there is no basis for tis court to interfere in what was a proper exercise of discretion. Consequently, the appeal fails and is hereby dismissed with costs to the 1st respondent.

15 Delivered electronically this 5th day of April, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
5th April, 2022