

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS APPEAL NO. 0014 OF 2023
(ARISING FROM MISCELLANEOUS APPLICATION NO 0444 OF
2023)
ARISING FROM CIVIL SUIT NO. 295 OF 2023
LUCY KAGORO MURAMUZI=====APPELLANT/APPLICANT
VERSUS
CAIRO BANK UGANDA LTD=====RESPONDENT
Before Hon. Lady Justice Patricia Kahigi Asimwe
Judgment

Introduction

1. This matter was brought under Section 33 of the Judicature Act Cap 13, Sections 98 and 82 of the Civil Procedure Act 71, Order 50 Rule 8, Order 44 Rule 1 of the Civil Procedure Rules SI 71-1.
2. The Appellant/Applicant being dissatisfied with the orders of the Assistant Registrar made in HCMA No. 444 of 2023 seeks orders that:
 - a) Court sets aside and varies orders made in HCMA No. 0444 of 2023;
 - b) Court reviews and varies orders made in HCMA No.0444 of 202; and
 - c) costs be provided for by the Respondent.
3. The grounds of appeal stated in the Notice of Motion are as follows:
 - I. The Assistant Registrar erred in law and fact in granting a prayer of payment of 30% of the forced sale value of the

mortgaged property or the outstanding amount within 30 days from the date of determination of the application yet it was never prayed for by the Respondent

- II. The Assistant Registrar erred in law and fact in relying on the wrong provision of the law that does not apply to the Appellant to make an order of payment of 30% of the forced sale value of the mortgaged property or the outstanding amount within 30 days from date of determination of the Application.
 - III. The Assistant Registrar erred in law and fact by prematurely determining the main suit on merit by ordering the payment of the outstanding amount within 30 days from the date of determination of the application.
 - IV. The Assistant Registrar erred in law and fact in holding that the Appellant would be more inconvenienced and yet went ahead to make orders for payment of 30% of the forced sale value of the mortgaged property or the outstanding amount within 30 days from the date of determination of the application.
4. The Application/ Appeal was supported by the affidavit sworn by Lucy Kagoro Muramuzi the Appellant herein who stated as follows:
- a) She is the legal wife of the 2nd Respondent in MA No. 0444 of 2023 and they have been married since 10th June 1989.
 - b) The Assistant Registrar heard MA No. 0444 of 2023 and granted her a temporary injunction on condition she deposits 30% of the forced sale value of the mortgaged property or the outstanding amount within 30 days from the date of determination of the Application.
 - c) She is dissatisfied with part of the condition of paying 30% of the forced value of the mortgaged property or the outstanding amount within 30 days.

- d) The Assistant registrar erred in law and fact in granting a prayer of payment of 30% of the forced sale value of the mortgaged property or the outstanding amount within 30 days yet it was never prayed for.
- e) The Assistant Registrar erred in law and fact in relying on the wrong provision of law that does not apply to her to make an order of payment of 30% of the forced sale value of the mortgaged property or the outstanding amount within 30 days from date of determination of the Application.
- f) The Assistant Registrar erred in law & fact by prematurely determining the main suit on merit by ordering the payment of the outstanding amount within 30 days from the date of determination of the application.
- g) The Assistant Registrar erred in law and fact in holding that the Appellant would be more inconvenienced and yet went ahead to make orders for payment of 30% of the forced sale value of the mortgaged property or the outstanding amount within 30 days from the date of determination of the Application.
- h) The provision relied on by the Court is only applicable to the borrower because she never utilized any part of the borrowed money, ordering her to pay part of it would be condemning her without being heard.
- i) Court could have granted the order of 30% of forced sale value or the outstanding amount if it was pleaded in the Respondent's affidavit in reply.

5. The Respondent opposed the Appeal via an Affidavit in Reply sworn by Stella Ladona Wattanga, the Head of Legal & Company Secretary of the Respondent. She stated as follows:

- a) By a letter of offer dated 18th September 2018 the Respondent granted a loan facility of UGX 1,500,000,000 to the Applicant's husband.
- b) The purpose of the loan was to purchase properties on Plot 1 8th Street Namuwongo and have them renovated.
- c) The loan was secured by suit properties comprised in LRV 2755 Folio Plot 3 measuring 0.3 hectares on Namuwongo Road Kampala, LRV 2755 Folio Plot 1 measuring 0.042 hectares on Namuwongo Road Kampala, LRV KCCA 437 Folio 22 Plot 1 Church Close Mbuya Kampala District.
- d) The loan was to be repaid from rental proceeds of the suit properties in 24 quarterly installments of UGX 62,500,000 over which the Appellant's husband signed novation agreements assigning his landlord rights to the Respondent.
- e) The Appellant's husband breached the loan repayment prompting the Respondent to enforce its rights as a mortgagee by issuing a Notice of Default, Notice of Sale of Mortgage, and advertising of the same.
- f) The Applicant instituted a suit vide HCCS No 295 of 2022 attempting to halt the sale of the securities and claiming her spousal consent was not obtained.
- g) The Applicant also filed MA No.0444 of 2023 to stop the sale of the mortgaged property wherein she was granted a temporary injunction on condition she pays 30% of the forced sale value or outstanding amount.
- h) I know that to stop the sale the Applicant is required to deposit 30% of the mortgage loan outstanding or forced sale of mortgage security.
- i) The Assistant Registrar was right to impose such a condition of 30%, and that the said condition is to protect the bonafide mortgagee's interests and remedies available to the mortgage under the laws.

Representation

6. The Appellant was represented by Newmark Advocates and the Respondent was represented by KSMO Advocates.

Resolution:

Preliminary Objection:

7. The Respondent raised a preliminary objection which I will address before addressing the grounds of appeal. Counsel submitted that any Application seeking to vary or review a decision should be made to the judicial officer who passed the order. Counsel submitted that this Application is improper before this Court.
8. Counsel for the Applicant submitted that Order 50 Rule 8 of the Civil Procedure Rules which is to the effect that any person aggrieved by any order of the Registrar may appeal from the Order to the High Court. Counsel cited **Attorney General & Anor V James Mark Kamoga 7 Anor SCCA NO.8 of 2004** in support of the submission.
9. I have considered the submissions of the parties on this objection. *Order 50 of the Civil Procedure Rules* provides as follows:

Any person aggrieved by any order of a registrar may appeal from the order to the High Court. The appeal shall be by motion on notice.
10. In the supreme court case of **Attorney General & Anor V James Mark Kamoga 7 Anor (supra)** cited by the Appellant it was held that:

Clearly, the power to review judgments or orders of the High Court, (including those entered by the registrar) is not among the powers delegated to the registrar.

11. In the case of **Buwule Kasasa V NWSC MA NO.002 of 2016** in Anglin J, while relying on the case of **Attorney General & ANOR V James Mark Akmoga & Anor** held that the Registrar had no jurisdiction to set aside his order and ought to have referred the matter to the trial judge.
12. I, therefore, agree with Counsel for the Appellant that the Assistant Registrar has no powers to review her decision and therefore this Application is properly before this court. The preliminary objection fails.

Grounds of Appeal

13. I will resolve grounds 1, 3, & 4 together because they are related.

Ground 1: The Assistant Registrar erred in law and fact in granting a prayer of payment of 30% of the forced sale value of the mortgaged property or the outstanding amount within 30 days from the date of determination of the application yet it was never prayed for by the Respondent

Ground 3: The Assistant Registrar erred in law and fact by prematurely determining the main suit on merit by ordering the payment of the outstanding amount within 30 days from the date of determination of the application.

Ground 4: The Assistant Registrar erred in law and fact in holding that the Appellant would be more inconvenienced and yet went ahead to make orders for payment of 30% of the forced sale value of the mortgaged property or the outstanding amount within 30 days from the date of determination of the application.

14. Counsel for the Appellant submitted that the Assistant Registrar erred in law by granting a prayer which was not made in the pleading of the Respondent.
15. Counsel for the Respondent submitted that under Section 98 of the Civil Procedure Act Court has inherent power to make all orders as may be necessary for ends of justice. Counsel also cited Section 33 of Judicature Act Cap 33 which provides that the High Court shall in the exercise of the jurisdiction grant absolutely or on such terms and conditions as it thinks just all such remedies as of the parties to a matter is entitled to in respect of legal or equitable claim.
16. Counsel further cited **Ganafa Peter Kisawuzi V DFCU Bank Ltd Civil Application No.0064 of 2016** to support the submission that grant of an order of injunction is not available to the Applicant who is in breach of Regulation 13(1) of the Mortgage Regulations.
17. The parties did not file submissions on the 3rd and 4th grounds.
18. Regulation 13 (1) of the Mortgage Regulations which provides as follows:

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.
19. I note that the above provision is not mandatory it is discretionary. In the case of **Nakato Margaret V Housing Finance Bank LTD & Anor Civil Appeal No.0687 of 2021**, Mubiru J held as follows:

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 the case as whole, the court below was clearly wrong in the exercise of discretion and injustice resulted.

...

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.

20. The learned judge further held that “The position now is that applications for temporary injunction involving mortgage property have to be dealt with in conformity with the statutory provisions for mortgages under the Mortgage Act, 2009.”
21. I have reviewed the decision of the Registrar and I find that it was made in accordance with the Mortgage Act and Regulations thereunder. The requirement to deposit the 30% is provided for under Regulation 13 (1) of the Mortgage Regulations and there was no need for the Respondent to specifically make that prayer for that condition to be met by the Appellant. Section 98 of Civil Procedure Rules gives the High Court power to make decisions as may be necessary for the ends of justice. The Registrar addressed all the conditions to be satisfied for the grant of a temporary injunction as set out under the law and in case law. I find no justifiable reason to set aside her decision. Grounds 1, 3, and 4 therefore fail.

Ground 2: Whether the Assistant Registrar erred in law and fact in relying on the wrong provision of the law that does not apply to the Appellant to make an order of payment of 30% of the forced sale value of the mortgaged property or the outstanding amount within 30 days from date of determination of the Application.

22. Counsel for the Appellant submitted that there was no evidence of a valuation report and therefore the Assistant Registrar was wrong to apply Regulation 13 of the Mortgage Regulations. Counsel for the Appellant cited the case of *Parul Ben Barot V Victoria Finance Company Ltd HCMA No. 319 of 2017* to support his position. The Respondent did not respond to this issue. I do however note that this is evidence from the bar.
23. In the case of **Nakato Margaret V Housing Finance Bank Ltd & Anor Civil Appeal** No. 0687 of 2021 Court held that;
*“It is disingenuous to seek to defeat the purpose of Regulation 13 of the Mortgage Regulations by adverting to Regulation 11(2) which requires a valuation report to be made 6 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 adjournment or postponement of sale.
For purposes of Reg 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.”*
24. Therefore, it is not necessary to have a valuation report as provided for under Regulation 13 (2) prior to a decision being made directing a mortgagor, spouse, agent of the mortgagor, or any other interested party to deposit 30% of the value of the property. As was held by his lordship Justice Mubiru in the

above-cited case, the value at the time of taking the loan is sufficient.

25. I, therefore, find that the Registrar did not rely on the wrong provision of the law in directing that the Applicant pays 30% of the forced value of the suit property.

Application for Review of the Registrar's decision:

The Applicant also applied for review of the Registrar's decision.

Issue: Whether the Applicant is entitled to an Order for Review of the Registrar's Order before this Honorable Court

26. Counsel for the Applicant cited Order 46 Rule 1 (a) on the application for review and supported the application with the same submissions made with respect to ground 1 and ground 2. Counsel for the Respondent reiterated his submissions on the preliminary objection.

27. Order 46 Rule 1 (a) provides as follows:

*(1) Any person considering himself or herself aggrieved—
(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred and who from the discovery of a new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order.*

28. The case of **Nyamogo & Nyamogo Advocates V. Kago** [2001] 2 EA 173 defined an error apparent on the face of the record as:

An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

29. I have reviewed the decision of the Registrar and have not found any error apparent on the face of the record. This issue is answered in the negative.
30. In conclusion, the appeal and the application for review fails. The costs shall follow the main cause.

Dated this 6th day of October 2023



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Patricia Kahigi Asimwe
Judge
Delivered on ECCMIS