

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]

MISC APPLICATION NO. 0523 OF 2023

(Arising from Civil Suit No. 0297 OF 2023)

NAMAKAJO SEWAVA HABIB

**(administrator of the Estate of =====APPLICANT
the late Sewava Musa)**

VERSUS

1. KCB BANK(U) LTD]

2. MUJAASI DAVID]=====RESPONDENTS

Before Hon. Lady Justice Patricia Kahigi Asimwe
Ruling

Introduction

1. The Applicant instituted Civil Suit No. 0297 of 2023 against the Respondents for orders of cancellation of a mortgage registered on the suit land. Pending the determination of the main suit, the Applicant filed an Application seeking an Interim Order restraining the Respondents from auctioning transferring alienating, or in any way dealing with the suit property. The Applicant also filed the present Application for a temporary injunction restraining the Respondents' agents and servants from evicting, intimidating, and threatening the Applicant's use of the suit land.
2. The Application for the interim order was heard and granted by the learned registrar on condition that the Applicant pays 30% of the forced sale value of the suit property. The learned Registrar also directed the 2nd Respondent to provide the Applicant with a valuation report of the suit property. The Applicant contested the validity of the report. The Registrar then referred the present

Application to this court for resolution under Order 50 Rule 7 of the Civil Procedure Rules.

3. This Application was brought by way of Chamber Summons under Section 98 of the Civil Procedure Act and Order 41 Rule 1 & 2 of the Civil Procedure Rules SI 71-1.
4. The grounds of the Application are contained in the Affidavit in Support sworn by Namakajo Sewava Habib, the Applicant herein, who stated that:
 - i) On 11th September 1994, his late father purchased the suit property as a kibanja from Christopher K. Byekwaso and Roza Nantongo.
 - ii) Immediately after payment of the full purchase price certificate of title comprised in Busiro Block 333-335 Plot 724 was issued, his late father built commercial rental houses thereon. The said houses are being managed by their family.
 - iii) His father believed that the title deed corresponded to his land, however in 2019, his father found out that the title deed he obtained did not correspond with his land, and that the right title for his land was that comprised in Busiro Block Plot 221.
 - iv) On 1st July 2019 in a letter addressed to the administrator of Kabusu's Estate and which was duly received by Mubiru Cyrus Kabusu, his late father informed them that he was ready and willing to swap the title for Plot 724 with that of Plot 221 on which suit property was situated.
 - v) Nothing was done to actualize the swapping of the titles, much as Mubiru Cyrus Kabusu had committed to rendering assistance for the swapping of titles.
 - vi) Albeit not being in possession of the suit property, the 2nd Respondent transferred the title deed for Plot



221 into his name and was duly registered on the title on 12th August 2021.

- vii) His late father tried to trace the 2nd Respondent for a swap of title deeds but all efforts were futile.
- viii) The 2nd Respondent illegally and fraudulently mortgaged the property to the bank.
- ix) Neither the Applicant nor his family noticed any officials from the 1st Respondent conducting due diligence on the ground before the mortgage was registered, and before it advanced the loan amount to the 2nd Respondent.
- x) The family was shocked when they received an eviction notice from the 1st Respondent's auctioneers who had instructions to proceed and recover the loan amount in default through auctioning of the property.
- xi) There is an imminent threat of eviction and auctioning of their property by the 1st Respondent which can only be halted by the grant of this Application.
- xii) He instituted a main suit against the Respondents seeking among other orders cancellation of a mortgage registered on suit land which suit has a high likelihood of success.
- xiii) The family shall suffer irreparable loss in the event that the Respondents proceed with the auction and or deal in the suit land which loss would not be adequately compensated by an award of damages.

5. The 1st Respondent opposed the Application by way of Affidavit in Reply sworn by Timothy Nabaala the Collections and Recoveries Manager of the 1st Respondent, who stated as follows:

- i) The 2nd Respondent obtained a credit facility from the 1st Respondent on 21st October 2021 in the sums of UGX 400,000,000 payable in a period of 60 months at an interest rate of 21% per annum.
- ii) The said loan was secured by land at Busiro Block 333 Plot 206, and Plot 221 at Nabbingo registered in the name of Mujaasi David.
- iii) On 14th September 2021, the 1st Respondent valued the suit land at UGX 160,000,000.
- iv) The 2nd Respondent defaulted on his loan obligations and upon default the 1st Respondent proceeded to issue demand notices, relevant statutory notices, and notice of sale of the mortgaged properties.
- v) Through its agents the 1st Respondent advertised the said mortgaged properties including suit property.
- vi) The 1st Respondent has dealt with the 2nd Respondent as the registered proprietor of the land and even after its due diligence, it has never come to its attention and or knowledge that the Applicant has any interest in the suit land.
- vii) Since the Applicant has applied for an adjournment and or stoppage of sale and the 2nd Respondent has never disputed indebtedness to the 1st Respondent, the Applicant should pay 30% of the forced sale value of the land valued at UGX160,000,000.
- viii) The outstanding amount as of 19th September 2022 was at UGX 397,260,987.

6. The 1st Respondent filed a Supplementary Affidavit in Reply in which he stated that:

- i) At the time of executing the mortgage, a valuation exercise was conducted for the properties which constituted security for the loan advanced.



- ii) The valuation report did not apportion separate market values for each property but rather indicated one block value of UGX 630,000,000 for all the 3 properties.
- iii) It became necessary to apportion a value for each of the properties including the suit property, the valuer who initially valued the land did an apportionment for each property and the suit property Plot 221 Block 333 was valued at UGX 160,000,000 as it's forced sale market value.
- iv) Stanfield Property Partners Ltd changed its name to Stanfield Partners to comply with the directive issued by the Regulator of Surveyors that the Surveying Profession in Uganda is only open to registered surveyors of Uganda as sole practitioners or partnerships among the registered surveyors of Uganda and is not open to any form of limited liability corporate company.
- v) The first valuation report and the later valuation report breaking down the Market value for each plot were authored by the same entity which was first known as Stanfield Property Partners Ltd but later came to be known as Standfield Partners.

7. The Applicant in rejoinder stated that:

- i) His family has an equitable interest in the suit property, having enjoyed quiet possession since 1994 when his late father purchased it.
- ii) All utilities like electricity are in his father's name as owner of the property.
- iii) Neither his late father nor his family consented and was privy to the fraudulent mortgage transaction between the Respondents, therefore that default should not be visited on him and his family.

- iv) The 2nd Respondent has never been in possession of the suit land, and the 1st Respondent should have conducted a thorough check on the 2nd Respondent and extensive due diligence on the ground, then it would have discovered that the Applicant was in possession and management of the suit property.
- v) The 1st Respondent did not conduct a mandatory valuation on the suit property before it disbursed the loan facility to the 2nd Respondent and the valuation report annexed to the affidavit in reply is a forgery and fabrication.
- vi) The purported valuation report by Stanfield Partners is dated 14th September 2021 and signed by Nassir Mwanje, Stanfield Partners was incorporated and registered on 15th day November 2021 vide Registration Number 80020003368254. Since Stanfield Partners was nonexistent by 14th September 2021, it could not have authored the impugned valuation report.
- vii) The valuation report was fraudulently submitted and received by the bank on 9th May 2023 after the loan had already been disbursed.
- viii) The Applicant is not obliged to make a 30% deposit of the forced sale value of the property based on a fraudulent and forged valuation report.

8. The Applicant filed a Supplementary Affidavit in Rejoinder in which he stated that:

- i) Her Worship Mastula Mulondo in Misc App No.0511 of 2023 directed the 1st Respondent to serve the Applicant with a valuation report clearly indicating the forced sale value of the suit property before the loan advance to the 2nd Respondent to be the basis for determining the 30% security.



- ii) In the valuation report dated 14th September 2021 authored by Stanfield Partners and signed by Nassir Mwanje the forced sale value of the suit property was indicated as UGX 160,000,000.
- iii) He conducted a formal search at URSB on Stanfield Partners which revealed that it was registered as a business name/partnership by NASSIR MWANJE on 21st November 2021.
- iv) The valuation report was not authored by the initial valuers of Stanfield Property Partners Ltd who had made an omnibus valuation of all three properties.
- v) Stanfield Partners was registered on the 21st of November 2021, and the valuation report it purportedly authored is dated the 14th of September 2021, the report was therefore authored by a non-existing legal entity at the time and is to that extent incurably defective.

Representation

9. The Applicant was represented by M/S Edward Ocen Advocates, Kakungulu Road Ntinda Kampala, and the 1st Respondent was represented by M/S AF Mpanga Advocates DFCU Towers Kyadondo Road Kampala. The Applicant and the 1st Respondent filed their Written Submissions. The 2nd Respondent did not file an Affidavit in Reply to the Application nor written submissions.

Issues

- i. Whether the Applicant should be exempted from paying the security deposit of 30% of the forced sale value of the suit property or outstanding amount
- ii. Whether the Applicant should be granted a temporary injunction restraining the Respondents, their agents, and servants from evicting, intimidating, or threatening them

from land comprised in Busiro Block 333 Plot 221 at Nabingo Wakiso

iii. What remedies are available?

Submissions

Applicant's Submissions

Whether the Applicant should be exempted from paying the security deposit of 30% of the forced sale value of the suit property or the outstanding amount

10. Counsel submitted that the Court should not make a conditional grant of a temporary injunction because the valuation report is not credible since the author of the impugned report Stanfield Partners was nonexistent at the time the said report was made.
11. Counsel further submitted that to compel the Applicant to pay 30% security deposit on the money he did not borrow would infringe on his constitutional right to property.

Whether the Applicant should be granted a temporary injunction restraining the Respondents, their agents, and servants from evicting, intimidating, or threatening them from land comprised in Busiro Block 333 Plot 221 at Nabingo Wakiso

12. Counsel cited the conditions for the grant of a temporary injunction as held in the case of Mutegeki John V Mutabazi Joseph & 2 Others Misc App No. 109 of 2016 as follows:

Prima Facie case

13. Counsel submitted that this Application raises a series of questions to be determined by the Court. Firstly, the Applicant avers that his family has been in possession of the suit property from 1994 to date when his father purchased it, and the 1st Respondent contends that it never came to its attention or knowledge that the Applicant has an interest in the suit



property. The Applicant imputes fraud on the Respondents, and this is heavily contested by the 1st Respondent. Counsel submitted that the above issues would merit the status quo to be maintained until the main suit is determined.

Irreparable damage

14. Counsel submitted that the suit property is in imminent danger of being sold by the 1st Respondent and this would occasion the Applicant substantial loss which cannot be atoned by monetary compensation, and that the 1st Respondent shall suffer no loss if the unconditional grant is made since it is at liberty to dispose of the other securities.

Balance of convenience

15. Counsel submitted that the Applicant's family is in possession of the suit property from which it derives sustenance, they are bound to suffer irreparable loss if it were to be sold and therefore the balance of convenience lies in his favour.

1st Respondent's Submissions

Counsel addressed the court on the issue of whether the Applicant should be granted a temporary injunction

Prima facie case

16. Counsel submitted under Section 59 of the Registration of Titles Act that since the suit property was in the name of the 2nd Respondent the 1st Respondent was entitled to conclude, that the said 2nd Respondent had the power to mortgage the land. The Plaintiff shows no pleaded facts that the Bank was party to the fraudulent acquisition of the title by the 2nd Respondent. The alleged error in the misdescription of the plots cannot be attributed to the Bank.

Irreparable loss

17. Counsel cited the case of *E.L.T Kiyimba Kaggwa V Hajji Abdu Nasser Katende [1985] HCB 43* where irreparable loss was defined as that which would not be adequately compensated by an award of damages. The suit property is a commercial property which has a value, damages would be an adequate remedy.

Balance of convenience

18. Counsel submitted that the Applicant is not at a risk of suffering any loss as she is not the registered owner of the mortgaged property and has no known legal interest in the suit land. The balance of convenience lies with the Respondent as it already advanced monies to the 2nd Respondent who defaulted on his loan obligations and the outstanding balance due to the bank is UGX 397,260,987 which remains unpaid to date exposing the 1st Respondent to suffer financial loss.

Regulation 13(1)

19. Counsel cited the case of *Kingston Enterprises Ltd & 2 Others V Standard Chartered Bank Ltd Cc Civil Appeal No.446 of 2021* where it was held that the requirement to deposit 30% is mandatory.

Submissions in Rejoinder

20. Counsel for the Applicant submitted that whereas the certificate of title is proof of ownership of land under Section 59 of the Registration of Titles Act, Section 77 of the same provides for cancellation of title in case of fraud and the Applicant pleaded fraud. Counsel submitted that Regulation 13 of the Mortgage Act applies on a case by case basis and the provision does not cover every Applicant.

Resolution

21. The conditions for the grant of an interlocutory injunction are 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 **American Cyanamid Co v. Ethicon Limited [1975] AC 396**, and **GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013**)

Prima facie Case

22. **The Black's Law Dictionary 8th Edition** page 3767 defines prima facie as what is determined "at first sight; on first appearance but subject to further evidence or information."
23. In the case of **Godfrey Sekitoleko & others V. Seezi Peter Mutabazi and Others [2001 – 2005] HCB 80** cited in **Akello Olak & Others V Bonnie S Rwamukaaga Misc Application No. 0127 of 2019**, it was held that for a prima facie case to be found, what is required is for the court to be satisfied that the claim is not frivolous or vexatious and that there are serious questions to be tried.
24. In the case of **Kigongo Edward Nakabale Vs. Kakeeto Rogers & Another Misc. Application No. 144 of 2017**, **Musene J** held that a prima facie case with a probability of success is no more than that the Court must be satisfied that the claim is not frivolous or vexatious. In other words, there is a serious question to be tried.

25. In the case of **Ndungo Seti & Others V Sekiziyivu Sammy Jones & Another Civil Suit No. 286 of 2011** Court held that “Frivolous connotes the absence of seriousness or the lack of validity or legitimacy.” The court further held that a vexatious case is oppressive to the opposing party, obstructs the court from gaining a full understanding of the issues and a party acts with an ulterior motive.
26. In **Robert Kavuma vs M/S Hotel International SCCA No. 8 of 1990** Wambuzi CJ as he then was stated that an Applicant for a temporary injunction is required to show a prima facie case and a probability of success but not success.
27. The Applicant’s submission is that the suit property was mistakenly registered in the name of a third party and that his late father was in the process of correcting this error before he passed on. The commercial building was constructed by his late father and all proceeds were paid to his late father. The 2nd Respondent obtained the suit land fraudulently and the 1st Respondent accepted the suit land as mortgage without due diligence which would have shown that the land belonged to the Applicant.
28. Counsel for the 1st Respondent submitted that the Applicant has no legal or equitable interest in the land. The main suit is frivolous and vexatious since there is no fraud imputed on the 1st Respondent. The title is in the name of the 2nd Respondent and therefore he is the owner since a certificate of title is evidence of ownership. Due diligence is only imputed in situations where the mortgaged property is matrimonial property, and the Mortgagee has to ensure the spouse gave her/his consent.

29. In the case **Akello Olak & Others V Bonnie S Rwamukaaga Misc Application No. 0127 of 2019**, Mubiru J held that:

By finding that there exists a prima facie case in favour of the applicants, the court does not profess to anticipate the determination of the suit but merely gives as its opinion that there is a substantial question to be tried and that till the question is ripe for trial, a case has been made out for the preservation [of the] property in the meantime in status quo.

30. In the instant case, I find that there is a substantial question regarding the ownership of the suit property and therefore prima facie case. I note that the 2nd Respondent, whose name is on the title did not defend this Application despite being served. In the case of **Serefaco Consultants Ltd V Euro Consult BV & Anor Court of Appeal Civil Application No.16 of 2007** the Court held that “if the applicant supports his application by affidavit or other evidence and the Respondent does not reply by affidavit or otherwise, and the supporting evidence is credible in itself, the facts stand as unchallenged.”

Irreparable injury

31. In the case of **American Cynamid V Ethicon [1975] 2 WLR 316**, the court held that:

The governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant’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 an adequate remedy and the defendant would be in a financial position to pay them, no Interlocutory Injunction should normally be granted...”

32. In the case of **Kiyimba Kaggwa Vs. Katende Abdu Nasser (supra)**, the court held that irreparable injury does not mean that there must not be the physical possibility of repairing the injury, but means that the injury must be a substantial or material one, that is, one that cannot adequately be compensated for in damages.
33. I find that the loss the Applicant may suffer if an order for a temporary injunction is not granted is not irreparable. The Applicant can be compensated for in monetary terms.

Balance of convenience

34. In the case of **Legal Brains Trust (LBT) Ltd V AG Civil Application No.56 of 2023** Kihika JOA held that:
...balance of convenience lies more on the one who will suffer more if the Respondent is not restrained in the activities complained of...
35. In this case I note that the suit property is a commercial property from which the Applicant's family derives income, if the property is sold there will be a loss of income. On the other hand, as pointed out by counsel for the Applicant, the Respondent has 3 properties to sell off including the suit property to recover the monies due from the 2nd Respondent. Therefore, halting the sale of the suit property will not inconvenience them as much as it will inconvenience the Applicant. While the loss the Applicant may suffer can be recovered in monetary terms if they are successful in the main suit, they will be more inconvenienced than the Respondents if the sale of the suit property is not halted.

36. The balance of convenience is therefore in favour of the Applicant.
37. In conclusion I therefore find that the Applicant has made a case for the grant of a temporary injunction.

Whether the Applicant should pay the 30% security deposit

38. Regulation 13(1) of the Mortgage Regulations provide that:

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.

39. In the recent case of **Ferdsult Engineering Services Ltd & Mugisha Ferdinand Vs The Attorney General & Absa Bank Uganda Constitutional Petition No.18 of 2021**, the Constitutional court settled the issue of whether or not the payment of 30% security deposit is mandatory in order for a court to stop the sale of the mortgaged property. The court held as follows:

A reading of Regulation 13 (1) and (5) of the Mortgage Regulations indicates that the court will only stop or adjourn the sale of mortgaged property upon payment of a security deposit of 30% of the forced sale value of the mortgaged property or outstanding amount and 50% of the outstanding amount where the mortgagor requests court to stop or adjourn the sale for purposes of redemption.

40. The Applicant therefore has to pay the security deposit of the forced sale value of the mortgaged property or outstanding amount.
41. The Applicant challenged the authenticity of the 1st Respondent's valuation report by Stanfield Partners on the ground that it was not registered at the time of issuance of the report. I agree with counsel for the Applicant that a non-existent entity cannot author a report. However, as stated above the deposit has to be paid in order for a temporary injunction to be granted.
42. In conclusion the Application is granted on the following terms:
- a) The 1st Respondent is directed to contract a firm to value the suit property and submit the report to the Applicant within two weeks from the date of this ruling;
 - b) The Applicant shall deposit 30% of the forced sale value of the suit property within two weeks of receipt of the valuation report; and
 - c) The costs shall abide the outcome of the main suit.

Dated this 17th day of October 2023


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Patricia Kahigi Asiiimwe

Judge

Delivered on ECCMIS