THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPEAL NO. 0018 OF 2023
ARISING FROM MISCELLANEOUS APPLICATION NO. 0690 OF 2023
ALL ARISING FROM CIVIL SUIT NO. 393 OF 2023

I&M BANK UGANDA LTD :: APPELLANT

VERSUS

1. NADIA MANJI (SUING THROUGH HER LAWFUL ATTORNEY PAUL AKOL]
2. FONTANA AUTO PARTS (U) LTD :::::::::::::::::::::::::::::::::::: RESPONDENTS

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

This is an appeal against part of the ruling and orders of the learned Deputy Registrar, Her Worship Juliet H. Hatanga in Misc. Application No. 0690 of 2023. The brief background to the appeal is that through its directors the 1st respondent and the late Anverali Manji, the 2nd respondent obtained loans under various facility letters from the appellant. The loans were secured by, inter alia, mortgages on land. The 2nd respondent defaulted on repayment and, after several demands, the appellant advertised the security for sale.

The 1st respondent filed Civil Suit No. 393 of 2023 ("the main suit") contesting the authenticity of the documents used by the 2nd respondent to obtain the loans. She also filed Misc. Application No. 0690 of 2023 seeking a temporary injunction stopping further performance or enforcement of the loan facility until the disposal of the main suit. On 21st July 2023, the learned Deputy Registrar allowed the application but declined to condition the injunction on deposit of security as required by Regulation 13(1) of the Mortgage Regulations.

The Appeal

The appellant was aggrieved with part of the ruling and lodged this appeal by way of Notice of Motion under Sections 33 and 38 of the Judicature Act Cap 13,

Section 98 of the Civil Procedure Act Cap 71 and Order 50 rule 8 of the Civil Procedure Rules SI 71-1. Briefly, the grounds of this appeal are that:

> *"1. The learned Deputy Registrar erred in law when she granted the 1st respondent an order for a temporary injunction whose effect was to stop and, or, adjourn the sale of mortgaged properties, without simultaneously conditioning it on the 1st respondent's prior payment of a security deposit of 30% security deposit as required by Regulation 13(1) and (4) of the Mortgage Regulations.*
>
> *2. The learned Deputy Registrar erred in law and fact when she failed to follow the law as set out in applicable decision of the Court of Appeal in Ganafa Peter Kisawuzi versus DFCU Bank Limited, CA Civ. Application No. 64 of 2016 which decision is binding upon her.*
>
> *3. The learned Deputy Registrar erred in law and fact when she failed to evaluate the evidence properly and to use the outstanding loan amount of USD 3,067,498.91 to determine the 30% deposit.*
>
> *4. The learned Deputy Registrar erred in law when she sought to defeat the purpose of Regulations 13(1) and (2) by applying the requirement for a valuation report in circumstances where it is not applicable.*
>
> *5. The learned Deputy Registrar erred in law and fact when she failed to find that the grant of the application to restrain the further performance or enforcement of the loan facility would have the effect of stopping or adjourning the sale of the mortgaged property which had been advertised thereby arriving at wrong conclusions and causing a miscarriage of justice."*

The appeal was supported by the affidavit of Charles Kiirya, the appellant's Head of Credit. He recounted the history of the loans and stated that the 2nd respondent is now indebted to the appellant in the sum of USD 3,067,498.91. He contended that Misc. Application No. 0690 of 2023 was intended to stop the process of sale of the security that had already commenced, and that the Court should have conditioned its grant on prior deposit of security.

The 1st respondent swore an affidavit in reply opposing the appeal. She stated that the 2nd respondent has since repaid over USD 7,000,000 to the appellant.

She contested the authenticity of her alleged signature on the offer letters and on the board resolution authorising the borrowing. She contended that since the grant of an injunctive order is discretionary, the Court properly exercised its discretion in declining to apply Regulation 13 of the Mortgage Regulations.

The 2nd respondent also opposed the application through an affidavit in reply sworn by Zakir Manji, its managing director. He stated that the 2nd respondent and the appellant had a series of intertwined transactions between 2015 and 2021. During this period, the appellant committed several breaches, like failure to avail working capital facilities on several occasions and failure to avail bid bonds, among others, thereby causing losses to the 2nd respondent. He denied the existence of the claimed loan debt.

In rejoinder, Charles Kiirya swore two affidavits on the appellant's behalf separately responding to the 1st and 2nd respondent's affidavits in reply. He denied the breaches alleged by the 2nd respondent and maintained that the 2nd respondent is indebted to the appellant.

Representation and hearing

At the hearing, the appellant was represented by Mr. Fredrick Mpanga of M/s AF Mpanga Advocates, the 1st respondent was represented by Mr. Jordan Kinyera of M/S Adalci Advocates and the 2nd respondent was represented by Mr. John Paul Kyeyune of M/S Nangwala, Rezida & Co. Advocates.

Issues arising

This appeal discloses the following issues:

1. Whether the appeal and the 1st respondent's affidavit in reply to the appeal are properly before the Court.
2. Whether the learned Deputy Registrar erred in law and fact when she declined to enforce Regulation 13 of the Mortgage Regulations, 2012 while determining Misc. Application No. 0018 of 2023.
3. What remedies are available to the parties.

Duty of a first appellate court

This is a first appeal. In the case of **Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997**, it was held that the first appellate court has a

duty to review the evidence of the case and to reconsider the materials before the trial court. The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it. I shall bear these principles in mind as I determine this appeal.

Determination of the appeal

Issue 1: <u>Whether this appeal is properly before the Court.</u>

This issue deals with two preliminary objections. The 1st preliminary objection was raised by the 1st respondent against the appeal. Counsel for the 1st respondent submitted that the appeal was served out of the time prescribed. Counsel argued that since the motion was endorsed by the Court on 29th August 2023, the appellant ought to have served the 1st respondent by 19th September 2023. In reply, counsel for the appellant clarified that while it is true that the motion was admitted and signed by the learned Deputy Registrar of the Court on 29th August 2023, the same was not assigned a hearing date, and could not be served, until 19th September 2023.

Having reviewed the Court record, I find no merit in this objection. While the appeal was admitted and signed by the learned Deputy Registrar on 29th August 2023, it could not be served on any of the respondents until it was assigned a hearing date. The motion remained incomplete until the Court assigned it a hearing date on 19th September 2023. Since the timelines for service began to run on 19th September 2023, the appellant was well within time when it served the appeal two days later on 21st September 2023.

The second preliminary objection was raised by the appellant against the 1st respondent's affidavit in reply. Counsel for the appellant averred that the jurat of the 1st respondent's affidavit in reply is incurably defective because while that jurat states that the affidavit was sworn by the 1st respondent at Kampala on 11th October 2023, the same jurat also states that the affidavit was sworn before a one Carla Pires de Carvalas, a notary public in Portugal. In reply, counsel for the 1st respondent submitted that the issue of the affidavit being sworn in one place and the Commissioner for Oaths having a different address is mere technicality which should not go to the root of the 1st respondent's case. He submitted that the Notary Public indicated that the affidavit was sworn before him in Portugal hence curing the irregularity.

As held in **J. B. Magara v Katehangwa, HCMA No. 0143 of 2000**, an affidavit, like a testamentary disposition, is self-evident. It speaks for itself. Counsel for the 1st respondent cannot, at the point of submissions, provide factual clarity about the place where the affidavit was sworn. In any case, while I acknowledge that it is no longer necessary to follow the strict requirement concerning form when dealing with rules of procedure, the requirement for properly noting the place where an affidavit in sworn is not a matter of mere form but of substance. **Article 126(2)(e)** of the **Constitution of the Republic of Uganda, 1995** cannot be used to wish away this requirement because it is one of substance and not form.

In the instant case, the 1st respondent's affidavit in reply states that it is sworn at Kampala before a notary public in Portugal. Legally, the two events of swearing and notarising the affidavit could only have happened at the same time and in the same place. The 1st respondent could not have been in Kampala swearing an affidavit while, at the same time, in Portugal appearing before a notary public. I am alive to the position that the address in the stamp/seal of a commissioner of oaths/notary public only indicates that person's place of business and does not necessarily confirm the place of swearing the affidavit.

However, in this case, counsel for the 1st respondent clarified that the notary public was in Portugal and he did not explain why the affidavit still indicated that it had been sworn in Kampala. Contrary to Section 6 of the Oaths Act Cap 19, the place where the affidavit was sworn remains unclear. Since this defect has not been explained away, the 2nd preliminary objection succeeds and the 1st respondent's affidavit in reply is hereby struck off the record.

Issue 2: <u>Whether the learned Deputy Registrar erred in law and fact when she declined to enforce Regulation 13 of the Mortgage Regulations, 2012 while determining Misc. Application No. 0018 of 2023.</u>

In her ruling, the learned Deputy Registrar found that there was no advertised sale of the security at the time and, accordingly, declined to enforce the Regulation 13(1) of the Mortgage Regulations. Counsel for the appellant faulted this decision. He argued that since the temporary injunction will, in effect, stop the process of sale of the security which had already commenced, learned Deputy Registrar was duty-bound to condition the injunction of prior deposit of security. In reply, counsel for the 1st respondent submitted that the Court was

right in declining to apply Regulation 13 because the sale process was not yet underway by the time the application was filed. Counsel for the 2nd respondent submitted that since there are inconsistencies in the appellant's claim, there was no rationale for the Court to order payment of security.

I have carefully reviewed the materials on record, the submissions of the parties and the laws and authorities cited. With the greatest respect, I do not agree with the conclusions of the learned Deputy Registrar. By the time Misc. Application No. 0690 of 2023 was filed, heard and determined, the process of sale of the security had already commenced. It is now trite law that the process of sale of security is said to have commenced at the time of issuance of a notice of default under Section 19 of the Mortgage Act. Indeed, in **Performance Furnishings (U) Ltd & Anor v Diamond Trust Bank (U) Ltd, High Court Misc. Application No. 278 of 2020**, it had been contended by a borrower that Regulation 13(1) of the Mortgage Regulations did not apply since there was no ongoing sale of any of the mortgaged properties at the time of applying for a temporary injunction. In dealing with that proposition, it was held that:

> *"… before the process of sale commences, one cannot legally refer to adjournment or stoppage of a sale. In my considered view, the application of Regulation 13 of the Mortgage Regulations is triggered by a notice of default or a demand notice issued by the mortgagee to the mortgagor or such other interested party …"* Emphasis mine.

Contrary to the 1st respondent's submissions, it is clear that there need not be a notice of sale in respect of mortgaged property or a publication of the advertisement of the sale in order for Regulation 13(1) of the Mortgage Regulations to become applicable. The issuance of a notice of default, which signifies the commencement of the foreclosure process, is sufficient to trigger the application of Regulation 13. It is, therefore, my considered finding that the learned Deputy Registrar erred in law and fact when she misconstrued the legal significance of the notice of default which the appellant had already issued by the time Misc. Application 0690 of 2023 was filed.

The appellant also took issue with the learned Deputy Registrar's application of the requirement for a valuation report as further justification for declining to condition the injunction upon the deposit of security. In my considered view, Regulation 13(1) leaves the Court with the option to decide whether the 30%

deposit is calculable basing on the forced sale value of the mortgaged property or on the outstanding amount. Undoubtedly, the learned Deputy Registrar erred when she found that a valuation report was a prerequisite for the application of Regulation 13 of the Mortgage Regulations. The absence of a valuation report does not proscribe the application of the provision. In the absence of a valuation report, the Court is still at liberty to order that the 30% deposit is calculable basing on the outstanding loan debt as stated in the notice of default.

Additionally, contrary to the 2nd respondent's submissions, it is my considered view that the applicability of Regulation 13 to the Mortgage Regulations is largely mechanical in applications for orders that would effectively stop or postpone foreclosure on mortgages under the Mortgage Act. The only exception in which the application of that provision would be "rationale based" is a case in which the person applying for such an order is the spouse of the mortgagor as clearly stipulated in Regulation 13(6). Once a Court finds that the process of foreclosure has commenced through the issuance of a notice of default and a person who is not the spouse of the mortgagor applies for an injunction that would effectively stop the sale of the land mortgaged to secure the loan, the Court must in all such cases order the payment of the 30% security as a condition for the grant of that injunction.

The 2nd respondent's arguments on the existence and accuracy of the debt are not relevant to this appeal. This appeal is about a narrow legal and factual contention relating to the applicability of Regulation 13 to the facts of this case. The existence or inexistence of the 2nd respondent's indebtedness, and the 1st Respondents claims of forgery or fraud shall be considered and determined at the trial of the main suit.

For the above reasons, the appeal succeeds.

Issue 4: <u>What remedies are available to the parties.</u>

Considering the above findings, the orders of the learned Deputy Registrar are hereby set aside and substituted with the following orders:

i. Subject to the prior deposit of USD 865,235.21 (United States Dollars Eight Hundred Sixty Five Thousand Two Hundred Thirty Five and Twenty One Cents) being 30% of USD 2,884,117.35 (United States Dollars Two Million Eight Hundred Eighty-Four Thousand One Hundred

Seventeen and Thirty-Five Cents) which is the outstanding amount on the loans set out in the two notices of default dated 22nd May 2023 and 23rd May 2023, respectively, served on the respondents within 45 (forty-five) days from the date of this ruling, a temporary injunction doth issue restraining the appellant, its agents or other persons claiming under it from enforcing the security for the loans until the disposal of the main suit.

ii. Costs of the appeal and those of Misc. Application No. 0690 of 2023 shall abide by the outcome of the main suit.

.....

Patricia Mutesi

JUDGE

(29/11/2023)