

temporary injunction on condition that the appellant pays a security deposit of 30% of the forced sale value of the suit land or outstanding amount within 30 days from the date of that ruling.

The appeal

The Appellant was aggrieved with the ruling and she filed this appeal by notice of motion which was brought under Article 139(1) of the Constitution of the Republic of Uganda, Section 33 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 S.I. 71-1, on the following grounds:

“1. That the learned Assistant Registrar erred in law and fact when she failed to consider whether the appellant pays or can be exempted from paying the security deposit of 30% of the forced sale value of the suit land or outstanding amount hence occasioning an injustice to the appellant.

2. That the learned Assistant Registrar erred in law and fact when she failed to evaluate the appellants evidence of inability to pay the 30% security deposit hence reaching an unjust decision thereby occasioning an injustice to the appellant.”

The appeal seeks an order setting aside the decision of the learned Assistant Registrar requiring the applicant / appellant to pay a security deposit of 30% of the forced sale value of the suit land or the outstanding amount under the mortgage within 30 days from the date of determination of Misc. Application No. 0540 of 2023, an order granting the appellant an unconditional temporary injunction and an order that costs of this application be in the cause. The application is supported by an affidavit sworn by the applicant.

In her affidavit supporting the appeal, the Appellant stated that she is an unemployed housewife who has no source of income, with a 7-year-old minor to look after. She also stated that she was, at the time of filing the appeal, 8 months pregnant. She maintained that her evidence of inability to pay the security was never disputed by the Respondents yet it was disregarded by the learned Assistant Registrar in reaching her decision.

The 1st Respondent opposed the application through an affidavit in reply sworn by Isiko Charles, its Legal Officer. He stated that the Appellant did not adduce any evidence of her inability to pay the statutory 30% before the Learned Assistant Registrar and that allowing this appeal will be a misuse of the court process and a mockery of the mortgage laws. He maintained without any such evidence of inability to pay, the Learned Assistant Registrar cannot be faulted for her decision. The 2nd and 3rd respondents neither filed any affidavits in response to the appeal nor entered appearance when the appeal was called on for hearing.

Representation and hearing

At the hearing, the Appellant was represented by M/S Erisata & Erisata Advocates while the 1st Respondent was represented by M/S Kagera Advocates. Contrary to Court's directions, the Appellant filed her affidavit in rejoinder and submissions belatedly after the 1st Respondent had already filed its submissions. Since the 1st Respondent did not get the opportunity to review and address the affidavit in rejoinder in their submissions, it would not be fair to found any part of this decision on such an affidavit. Accordingly, the affidavit in rejoinder is expunged from the record. However, I do not find that any prejudice will arise from consideration of the Applicant's submissions and I will, consequently, consider them in resolving this application, along with other materials on the record.

Duty of a first appellate court

This is a first appeal against the decision of the learned Assistant Registrar. 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 the above principles in mind as I determine this appeal.

Issue arising

1. Whether the learned Assistant Registrar erred in law and fact in conditioning the temporary injunction order on the prior payment of a security deposit of 30% of the value of the suit land or the outstanding amount.

Regulation 13(1) of the **Mortgage Regulations, 2012** provides that the court may on 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 the payment of a security deposit of 30% of the forced sale value of the suit land or the outstanding amount. In the recent decision of **Ferdsult Engineering Services Ltd & Anor v The Attorney General, Constitutional Petition No. 18 of 2021** (judgment of 6th October 2023), the Constitutional Court of Uganda explained that:

*“The requirement to make a deposit under **Regulation 13(1)** is clearly devised to stop frivolous and vexatious mortgagors from frustrating mortgagees seeking recovery of monies rightfully owed. The Regulation is necessary to protect mortgagees from unnecessary adjournments or stoppage of sales that would result in satisfaction by defaulting mortgagors...”* per Cheborion Barishaki, JCC.

Therefore, the said **Regulation 13** 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. See **Housing Finance Bank Ltd v Silk Events Ltd & Anor, High Court Civil Appeal No. 0300 of 2021**.

However, **Regulation 13(6)** of the **Mortgage Regulations, 2012** sets out an exception to the general rule in **Regulation 13(1)**. This provision states that where the application for adjournment of the sale is by the spouse of the mortgagor, the court shall determine whether or not that spouse shall pay the 30% deposit. In **Nakato Margaret v Housing Finance Bank Limited & Anor, HCCA No. 0689 of 2021**, Justice Stephen Mubiru opined 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 crucial factors 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.” Emphasis mine.

In the instant case, in paragraphs 5 and 9 of the affidavit in support of the chamber summons in Misc. Application No. 0540 of 2023 from which this appeal arises, the appellant stated that she is unable to pay the security deposit of 30% since she is a full time house wife, who is 8 months pregnant with a 7-year-old minor child. In this appeal, the appellant has argued that those facts were sufficient to assure the learned Assistant Registrar that she was entitled to the exemption under **Regulation 13(6)** of the **Mortgage Regulations**. These same facts have been repeated in paragraphs 5 – 8 of the appellant’s affidavit in support of this appeal.

On its part, the 1st Respondent has submitted that the appellant failed to adduce evidence before the learned Assistant Registrar to prove the period for which she has occupied the suit land, her income, assets, liabilities or the income and assets of the person who usually gives her financial support, among other details, which the Court could have based on to evaluate her means to determine whether or not she was entitled to the exemption. The 1st Respondent has stressed that the Appellant has merely put forward arguments and not actual evidence of her inability to pay.

The 1st Respondent has also argued that the Appellant has come to Court with unclean hands since she was absent from the suit land when the pre-mortgage

inspection was conducted in September 2019. Additionally, the 1st Respondent submitted that the 2nd respondent, who is the alleged husband of the appellant, deliberately deceived the 1st respondent by obtaining credit facilities for the 3rd Respondent secured by a mortgage over the suit land upon the fraudulent misrepresentation that he was unmarried whereas not.

It seems to me that the 1st Respondent was the victim of a well-orchestrated fraud by the 2nd respondent who obtained a loan from the 1st Respondent upon the fraudulent misrepresentation that he was unmarried whereas not. According to the marriage certificate adduced by the appellant, the 2nd Respondent is said to have been customarily married to the appellant since sometime in 2016. When the 1st Respondent made the pre-mortgage due diligence visit to the suit land in 2019, the said matrimonial home was incomplete and the Appellant was not staying on the suit land.

I have also noted that apart from the averments in the affidavit supporting Misc. Application No. 0540 of 2023 and the affidavit supporting this appeal, the Appellant did not adduce any compelling corroborative evidence supporting her claim of dire impecuniousness. The Appellant has told the Court that she is an unemployed pregnant housewife who also takes care of her 7 year old son and that she has no means of income which would enable her to pay the security deposit. She has not told Court about the source of her livelihood. Apart from producing the birth certificate for her son, there is no evidence to show that the appellant is struggling financially to provide for this son. Apart from describing her circumstances, the appellant has not adduced any corroborative evidence to prove that she is indeed struggling financially and unable to pay any security deposit.

Furthermore, the period of her occupation of the said matrimonial home also remains unclear. The appellant has had the resources to hire advocates to come to this Court and pursue this litigation on her behalf, and there was no indication to me or to the learned Assistant Registrar that these advocates were representing her on a pro bono basis. In **Nakato Margaret v Housing Finance Bank Limited & Anor, HCCA No. 0689 of 2021**, Justice Stephen Mubiru emphasized that in these

kinds of cases, courts must only be persuaded by actual evidence and not mere argument and conjecture.

It is my considered finding that while there seems to be prima facie evidence that the appellant is the 2nd Respondent's spouse through the copy of the marriage certificate adduced, there is very thin and unconvincing evidence on the appellant's means and her inability to pay the security. In these circumstances, the learned Assistant Registrar cannot be faulted for determining that, in principle, the issuance of the temporary injunction order ought to be conditioned on the deposit of security in order to safeguard the interests of the 1st Respondent pending the disposal of the main suit.

However, it remains unclear whether or not the Appellant knew about the mortgage at the time it was entered. She was not on the suit land when the pre-mortgage inspection was done so she could not have seen the 1st Respondent's officials when they went there. She did not sign any spousal consent to the mortgage and it appears that the 2nd respondent orchestrated his fraud on his own without her knowledge and involvement.

This case also reveals a latent lacuna in the law governing mortgages over matrimonial homes. It appears that the suit land was mortgaged to the 1st Respondent in 2019 with an incomplete structure of a residential house thereon. There was no residential house on the suit land in which the Appellant and the 2nd Respondent ordinarily resided. After the loans were disbursed and the suit land was mortgaged, the residential house was completed and the Appellant started staying there. Therefore, this seems to be a situation in which the suit land initially did not have a matrimonial home and was not subject to spousal consent legally, yet the house was eventually constructed making any mortgages on the suit land subject to spousal consent. The Mortgage Act and Mortgage Regulations remain silent on situations where the status of already mortgaged land changes from one in which no spousal consent was legally required as a precondition for the mortgage to one in which such spousal consent is a prerequisite.

Considering these unique circumstances, I am of the view that a security deposit of 30% of the forced sale value of the suit land or the outstanding amount is excessive. The temporary injunction should be conditioned upon the payment of a security deposit of 10% of the amount outstanding on the loan, as at the date of filing the main suit, within 45 days from the date of this ruling.

Consequently, I make the following orders:

- i. Subject to the payment of a security deposit of 10% of the amount outstanding on the loan at the date of filing this suit within 45 (forty five) days from the date of this ruling, a temporary injunction doth issue maintaining the status quo on the suit land comprised in Kyadondo Block 180 Plot 1890 at Kitukutwe, Kiira Town, Wakiso District and restraining the 1st Respondent, its agents, assignees, employees and or anyone deriving title from the 1st Respondent from disposing, selling or dealing with the suit land in any way, and from evicting the applicant and her family from the suit land pending the determination of the main suit.
- ii. Costs of this Application shall abide by the outcome of the main suit.



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Patricia Mutesi

JUDGE

(20/10/23)