

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA**

MISCELLANEOUS APPLICATION NO.41 OF 2003

JANE FRANCES MPUNGUAPPLICANT

VERSUS

DFCU BANK LTD..... RESPONDENT

RULING

This ruling is in respect of an application for a temporary injunction. The applicant made the application by way of Chamber Summons under Order 37 rule 1 of the CPR and section 101 of the CPA. Among other things, she sought a court order to restrain the respondent's officers and agents from selling, disposing of or otherwise interfering with the suit premises (i.e. Kibuga Block 16 Plot 98) situate at Rubaga in Kampala District until further orders of Court. The applicant swore an affidavit dated 27th January 2003 which accompanied the Chamber Summons.

Briefly, the background to the application is as follows. Sometime in the year 2000, the applicant's husband gave an irrevocable power of attorney to A.V. Enterprises Ltd. The power of attorney, among other things, authorised the said company to borrow money on the strength of the suit premises as security. Subsequently, A.V. Enterprises Ltd. borrowed money from the respondent which in turn registered a legal mortgage in respect of the suit premises in its favour. A.V. Enterprises Ltd failed to pay the money it borrowed from the respondent. Therefore, the respondent sought to exercise its power of sale of the suit premises under the mortgage. In November 2001, the respondent advertised the suit premises in the New Vision newspaper with a view to selling it on 3rd December 2001. The applicant then lodged a caveat on the title for the suit premises forbidding any dealing with it without notice to her. Later on, she filed High Court Civil Suit No. 369 of 2002 against the respondent and sought, among other things, a court order invalidating the mortgage in respect of the suit premises. The respondent contested the said suit which was eventually set down for hearing on 13 December, 2002. However, on that day, Court dismissed the suit for want of prosecution. Following that event, the applicant filed

Miscellaneous Application No. 830 of 2002 and sought to have the order of dismissal of High Court Civil Suit No. 369 of 2002 set aside and the suit reinstated. That application has not yet been heard. The applicant now wishes to obtain a temporary injunction restraining the respondent's officers or agents from among other things, selling the suit premises pending the disposal of Miscellaneous Application No. 830 of 2002.

At the time of hearing the application Mr. Kibedi represented the applicant and Mr. Adriko represented the respondent. In essence, Mr. Kibedi submitted that the applicant had a good case for the grant of a temporary injunction because she had fulfilled the legal criteria for such an order. For example, Mr. Kibedi pointed out that despite the dismissal of High Court Civil Suit No. 369 of 2002, there is a suit in existence in terms of section 2 of the CPA. That suit is Miscellaneous Application No. 830 of 2002. It has the probability of success because its substance shows that the applicant was not to blame for the dismissal of High Court Civil Suit No. 369 of 2002. That aside, Mr. Kibedi submitted that if Court did not grant the temporary injunction, the applicant would suffer irreparable injury which damages cannot atone. He pointed out that the suit premises is the applicant's matrimonial home and only source of sustenance, which should not be sold before these matters are disposed of. Finally, Mr. Kibedi submitted that even the balance of convenience is in favour of the applicant, for she is presently in possession of the suit premises. He therefore prayed Court to grant the application.

Mr. Adriko opposed the application basically on the ground that it hangs in the air, for it is not based on any suit in existence. In his view, as long as the dismissal order of High Court Civil Suit No. 369 of 2002 remains in existence, there is no pending suit. Therefore, the application which is the subject of this ruling cannot stand. Finally, Mr. Adriko urged Court to dismiss the application.

It is now settled law that before a court of law grants an application for a temporary injunction the applicant must prove the following things,

1. That the purpose of the temporary injunction is to preserve the status quo until the head suit is finally disposed of. (See **Noor Mohammed Janmohamed v Kassamali Virji (1953)**).

2. That the applicant has a prima facie case which has the probability of success. (See **Geilla v Cassman Brown Co. Ltd (1973) E.A. 358**).
3. That if the court does not grant a temporary injunction the applicant would suffer irreparable injury, which damages cannot atone. (See **Noor Mohammed Janmohamed v Kassamali Virji (Supra)**).
4. Where a court cannot make up its mind after considering the above three requirements it would then decide the application on the balance of convenience. (See **E.A. Industries v Traffords (1972) E.A. 420**).

Court will, below, examine whether or not the applicant proved the above requirements of the law.

With regard to the first requirement, that is to say, that the purpose of the temporary injunction is to preserve the status quo until the head suit is finally disposed of, Court has this to say. Firstly, Court agrees with Mr. Kibedi that despite the fact that High Court Civil Suit No. 369 of 2002 was dismissed the application that is the subject of this ruling is not hanging in the air. It is based on Miscellaneous Application No. 830 of 2002 which is a “**suit**” under section 2 of the CPA.

Be that as it may, Court will proceed to examine the evidence which the applicant led in respect of the requirement under consideration. The applicant’s affidavit dated 27th January 2003 reveals that although, presently, the applicant has possession of suit premises the respondent intends to wrest it from her and sell it before Miscellaneous Application No. 830 of 2002 has been disposed of. For that reason, the applicant seeks a court order to restrain the respondent from selling the suit premises.

In its affidavit in reply, the respondent did not lead any evidence to contradict the applicant’s evidence referred to above. Therefore, Court is satisfied that the applicant proved, on a balance of probabilities, that the purpose of the temporary injunction is to preserve the status quo Until Miscellaneous Application No. 830 of 2002 has been disposed of.

With regard to the second requirement, that is to say, that the applicant has a prima facie case which has the probability of success, a perusal of Miscellaneous Application No. 830 of 2002

and its accompanying affidavit suggests that the applicant was not to blame for the dismissal of High Court Civil Suit No. 369 of 2002.

In its affidavit in reply, the respondent did not refute the above suggestion. For that reason Court is satisfied that the applicant proved, on a balance of probabilities, that she has a prima facie case, under Miscellaneous Application No. 830 of 2002, which has the probability of success.

With regard to the third requirement, that is to say, that if a temporary injunction is not granted the applicant would suffer irreparable injury, which damages cannot atone, Court has this to say. Paragraphs 8 and 9 of the applicant's affidavit show that the suit premises have been the applicant's matrimonial home for the last 30 years. It is her major source of sustenance and that she has no alternative place to go to. However, paragraph 7 of the same affidavit reveals that the respondent advertised the suit premises with a view to selling it by 5th February 2003.

In its affidavit in reply the respondent did not challenge or contradict the evidence in paragraphs 7, 8, and 9 of the applicant's affidavit. Therefore, Court is of the opinion that the applicant's evidence referred to above represents the truth. From the foregoing, it seems reasonable to conclude that if the applicant's matrimonial home is sold before Miscellaneous Application No. 830 of 2002 is disposed of and later on the applicant succeeds in these matters, her predicament would be such that even damages would not easily compensate her. For those reasons Court is satisfied that the applicant has proved, on a balance of probabilities, that if a temporary injunction is not granted she would suffer irreparable injury which damages cannot atone.

All in all, Court has determined the first three crucial requirements for the grant of a temporary injunction in favour of the applicant. In essence, that means that her application has succeeded. In any case, even the balance of convenience lies in the applicant's favour because the evidence on record shows that she is presently in possession of the suit premises.

In conclusion, Court has no choice but to grant the application that is the subject of this ruling; and it is doing so under these terms:

(a) the respondent, its officers and agents are hereby restrained from selling, disposing of or otherwise interfering with the applicant's quiet possession of the suit premises comprised in

Mailo Register Kibuga Block 16 Plot 98 situate at Rubaga in Kampala District until further orders of this Honourable Court.

(b) The costs of this application shall abide the final outcome of Miscellaneous Application No. 830 of 2002.

E.S. Lugayizi

(Judge)

10/3/2003

Read before: At 9.35 a.m.

The Applicant

Mr. Adriko for the Respondent

Mr. Sewanyana - Court Clerk

E.S. Lugayizi

(Judge)

10/3/2003.