

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA MISCELLANEOUS
APPLICATION NO. 180 OF 2003 (ARISING OUT OF CIVIL SUIT NO. 168 OF 2003)
IRENE MUTUMBA..... APPLICANT/PLAINTIFF
VERSUS
CRANE BANK LTD RESPONDENT/DEFENDANT
BEFORE: THE HON MR. JUSTICE E.S. LUGAYIZI

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 rules 1 and 2 of the CPR and section 101 of the CPA. The application had two affidavits accompanying it namely, Irene Mutumba's and Serubiri Charle's affidavits.

In reply to the application, the respondent filed an affidavit that Francis Kakurugusi swore and is dated 8th April 2003.

Before Court goes into the merits of the application it is prudent to know its background which is briefly as follows. The applicant is married to one Patrick Sejongo Mutumba. The couple and their children are living at Kyadondo Block 210 Plot 676 that is situated at Kyebando. Sometime at the end of the year 2001 Patrick Sejongo Mutumba mortgaged the above premises (ie. the suit premises) to the respondent with a view to enabling Heki Technical Services to obtain a loan. Thereafter, Heki Technical Services got a loan of shs. 15 million from the respondent and defaulted in paying it. For that reason, the respondent sought to exercise the power of sale of the suit premises under the mortgage. Accordingly, it advertised the suit premises in the New Vision newspaper of 31 March 2003 with a view to selling it to recover the unpaid loan. When the applicant got wind of that news she filed High Court Civil Suit No. 168 of 2003 and challenged the validity of the mortgage under which the respondent seeks to sell the suit premises. Soon afterwards she filed this application and sought to restrain the respondent from selling the suit premises before the head suit is disposed of. At the time of hearing the - application Messrs Majori and Nangwala, respectively, represented the parties.

In essence, Mr. Majori submitted that his client who is the wife of the mortgagor is entitled to the grant of a temporary injunction. He pointed out that the suit premises is the applicant's matrimonial home and the mortgagor who is her husband did not obtain her consent before he mortgaged it to the respondent. For that reason, (Mr. Majori argued) that there was a serious question under the head suit, that Court had to investigate. He accordingly prayed Court to grant the application pending the determination of the head suit.

On his part, Mr. Nangwala, essentially submitted that the application has no merit. In his opinion it does not fulfill one of the important conditions for the grant of the order sought, namely, that the applicant has a prima facie case, under the head suit, which has the probability of success. Mr. Nangwala insisted that although the applicant's affidavit showed that the suit premises was her matrimonial home and she did not consent to the said mortgage, the said affidavit did not indicate that she derived sustenance from the suit premises. For that reason, Mr. Nangwala concluded that the applicant failed to prove that the mortgage in question is invalid under section 40 of the Land Act. That means, too, that the applicant failed to prove that she has a prima facie case, under the head suit, which has the probability of success. Therefore, Mr. Nangwala urged Court to dismiss the application with costs.

In the alternative, Mr. Nangwala requested that should Court determine the application in favor of the applicant it should, in compliance with Order 37 rule 2 of the CPR, require the applicant to place down the amount that is due to the respondent, under the mortgage, as security for costs.

Be that as it may, it is now settled law that before a court of law grants a temporary injunction the applicant must satisfy it with the following,

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) 20 E.A.CA 80).**
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 court does not grant the 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, the applicant must satisfy it that the balance of convenience lies in his or her favor. (See E.A. **Industries v Trafords (1972) E.A. 420**).

Court will examine below whether or not, the applicant satisfied it in respect of the above requirements.

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. In her affidavit in support of the application, the applicant showed that rc1 March 2003 the respondent advertised the suit premises on which she is living with her family; and that it did so with a view to selling the suit premises in order to recover the money it lent to Heki Technical Services. In the same affidavit the applicant also showed that she challenged the impending sale of the suit premises by filing High Court Civil Suit No. 180 of 2003 which has not yet been disposed of.

The respondent did not challenge or contradict the above facts in its affidavit in reply. For that reason, Court is satisfied that the applicant proved, on a balance of probabilities, that the purpose of the temporary injunction is to maintain the status quo until the head suit is finally disposed of.

The respondent did not challenge or contradict the above facts in its affidavit in reply. For that reason, court is satisfied that the applicant proved on a balance of probabilities that the purpose of the temporary injunction is to maintain the status quo until the head suit is finally disposed of.

With regard to the second requirement, that is to say, **that the applicant has a prima fade case which has the probability of success**, Court thinks that it would pre-empt the outcome of the head suit if it were to base the determination of that aspect of the application on the merits of the head suit. Therefore, it is enough for the applicant to show that the plaint, in the head suit, raises a serious question that Court must investigate. For that reason, the vital

question is whether the applicant succeeded in showing that the plaintiff, in the head suit, raises such a question? Court thinks that the applicant succeeded in doing so; and the question she showed the plaintiff, in the head suit, raises is whether the mortgage that is the subject of the head suit is valid.

All in all, Court is satisfied that the applicant proved, on a balance of probabilities, that she has a prima facie case, under the head suit, which has the probability of success

With regard to the third requirement, that is to say, **that if Court does not grant the temporary injunction the applicant would suffer irreparable injury, which damages cannot atone**; the applicant had this to say in paragraph 6 of her affidavit.

“... if the ... sale is not restrained, my children and I will suffer irreparable damages.”

It is worth noting that the applicant did not elaborate on what she meant in the above area of her affidavit. Indeed, it would be wrong for Court to speculate as to what she could have meant. In reality, therefore, Court is not satisfied that the applicant proved, on a balance of probabilities that if a temporary injunction is not granted to her she would suffer irreparable injury, which damages cannot atone.

All in all, the sum total of the above is this. The applicant has been able to prove only two of the three essential requirements for the grant of a temporary injunction. Perhaps she could have done better if her advocate had cared to include in her affidavit more evidence that showed what she meant under paragraph 6. For that reason, Court thinks that before deciding the fate of the application it must also consider the fourth requirement, that is to say, **where the balance of convenience lies. (ie. Does it lie in favor of the applicant or the respondent?.)** Court thinks that the said balance lies in favor of the applicant (ie. granting the application). For both affidavits that accompany the application clearly state that the applicant and her family are presently in possession of the suit premises on which they reside. That state of things was not challenged or contradicted by the respondent which is currently only in possession of the title deeds for the suit premises. Therefore, going by the above state of affairs, it would appear to be easier or more convenient (for all the parties concerned) if Court granted the application with the result that the applicant and her family remained where they are now until the head suit is disposed of than doing otherwise. The latter course would result in a lot of difficulties and inconveniences for all the parties concerned. For it would

mean upsetting the status quo on the suit premises without any guarantee, at present, that such position will not change when the head suit is finally disposed of.

In conclusion, Court is of the opinion that as the balance of convenience lies in favor of the applicant (ie. granting the application) it has no choice but to order so. Therefore, the application that is the subject of this ruling is hereby granted. The temporary injunction will take effect as from today and it will remain in force for a period of 90 days. Contrary to what Mr. Nangwala requested (in the alternative), Court declines to make an order requiring the applicant to place down the outstanding debt as security for costs. Order 37 rule 2 of the CPR is not mandatory and Court is not satisfied that the applicant might not be able to pay the respondent's costs if she lost the head suit.

Court further orders that the costs of the application will abide the outcome of the head suit.

Read before: At 3.45 p.m.

Mr. C. Majori for Applicant

Mr. Bwango Badru for Respondent

Mr. Sewanyana court Clerk

(Judge)

28/4/2003

(Judge)

28/4/200 3