



**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HIGH COURT CIVIL APPEAL 19 OF 2023**

**(ARISING OUT OF HIGH COURT MISCELLANEOUS APPLICATION 25 OF 2023)
(ARISING OUT OF HIGH COURT CIVIL SUIT 07 OF 2023)**

EQUITY BANK (U) LTD ----- APPELLANT.

VERSUS

HARD RUBAHIMBYA----- RESPONDENT

BEFORE: Hon. Justice Nshimye Allan Paul M.

RULING

REPRESENTATION

The appellant was represented by Adv. Bright Bujara and Adv. Bridget Atukunda of M/S Muhumuza-Kiiza Advocates & Legal Consultants, while the respondent was represented by M/S Abenaitwe and Ahumuza Advocates.

BACKGROUND

This Application was brought by way of a Notice of Motion under Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Regulation 13 of the Mortgage Regulations 2012, Order 44 Rule 1 (u) and Order 50 Rule 8 of the Civil Procedure Rules (CPR) SI 71-1 seeking orders that;

1. The Learned Deputy Registrar's Ruling in Miscellaneous Application 25 of 2023 be set aside.
2. The Learned Deputy Registrar erred in law and fact when she ruled that the respondent's case falls within the provision of the law where the payment of the 30% can be waived.

3. The respondent pays security deposit of 30% of the outstanding amount of UGX 991,254,129/= which is UGX 297,376,230/= as a condition for the grant of the temporary injunction.
4. The costs of this Appeal.

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The Notice of Motion is supported by an affidavit in support sworn by Charles Isiko. The respondent also swore an affidavit in reply that was filed on court record.

10 **GROUND**

The grounds as stated in the notice of motion are;

1. That on the 27th day of August 2020 the appellant granted to the respondent a loan facility at an aggregate maximum amount of UGX 900,000,000/= (Uganda shillings Nine Hundred Million only) which the
15 respondent defaulted upon and is outstanding at UGX 991,254,129/=
2. That the respondent filed High Court civil suit no 007 of 2023 against the appellant claiming for orders of specific performance of UGX 991,254,129/= being the sum insured and the subject of indemnity and the insured value of subject matter of insurance contract, permanent
20 injunction, general damages interest and costs of the suit.
3. That the respondent further applied for a temporary injunction vide Miscellaneous Application No 25 Of 2023 restraining the appellant from trespassing, interfering, and intermeddling with the quiet possession and enjoyment of the land until determination of the main suit.
- 25 4. That the appellant opposed the said application and prayed that if court is to grant and temporary injunction, the applicant must pay 30% of the outstanding amount which stands at UGX 991,254,129/= which is UGX 297,376,230/= as provided for under Regulation 13 of the Mortgage Regulations, 2012.
- 30 5. That however on the 6th day of June 2023, the Honourable Learned Deputy Registrar, granted a temporary injunction and ruled that the respondent case falls within the provision of the law where the payment of 30% can be waived and that it was in the interest of justice that the applicant be exempted from payment of 30%.



6. That the Learned Deputy Registrar erred in law and fact when she exempted the respondent from paying the deposit of 30% stipulated under Regulation 13 of the Mortgage Regulations.
7. That the respondent's case does not fall within the provision of the law where the payment of 30% can be waived.
8. That the appellants prays that this appeal be allowed, that the order of the Learned Deputy Registrar be set aside, and the honourable court orders the respondent to deposit security 30% of the amount outstanding of UGX 991,254,129/= before halting the sale of the Security.

DETERMINATION

I will handle all the grounds together. I have also considered the submissions of both parties in the determination of this appeal.

It is the law that any person aggrieved by any order of a Registrar may appeal from the order to the High Court and the appeal shall be by motion on notice as is provided in Order 50 Rule 8 of the Civil Procedure Rules. I find that the appellant filed the appeal in accordance with the law.

I want to make observations of salient timelines I identified after perusal of the court record.

1. On 10th January 2023, the appellant issued a statutory notice pursuant to Section 26 of the Mortgage Act for the sale mortgaged property belonging to the respondent (*See annexure F to the WSD in CS 07 OF 2023 on Court record*)
2. On 2nd February 2023, the respondent filed a plaint in the High Court against the appellant seeking for orders for specific performance of UGX 991,254,129/=. (*See plaint in CS 07 OF 2023 on court record*)
3. On 6th June 2023, The Learned Deputy Registrar granted a Temporary Injunction in HCMA 25 of 2023 (*arising from CS 07 of 2023*) where she ordered that the appellant herein and its agents are restrained from selling the property of the respondent herein until the determination of CS 07 of 2023.



I note that the appellant had initiated the process of exercising its power of sale of the mortgaged property as provided in Section 26 (1) of The Mortgage Act, which stipulates that;

5 *"26. Mortgagee's power of sale.*

(1) Where a mortgagor is in default of his or her obligations under a mortgage and remains in default at the expiry of the time provided for the rectification of that default in the notice served on him or her under section 19 (3), a mortgagee may exercise his or her power to sell the
10 *mortgaged land"*

This means that by the time the respondent herein filed HCCS 07 of 2023 and HCMA 25 of 2023, the appellant had already commenced steps to sell the Mortgaged property by issuance of a Notice under Section 26 of the Mortgage
15 Act 2009.

In principle the Court can Stop the sale of Mortgaged property as is stipulated in Regulation 13 (1) of the Mortgage Regulations, which states that;

20 *"13. Adjournment or stoppage of sale.*

(1) 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
25 *mortgaged property or outstanding amount"*

The evidence on court record shows that Honourable Learned Deputy Registrar on 6th June 2023 granted a temporary injunction to the respondent in this appeal, making orders that the appellant in this appeal is restrained from selling
30 the land in dispute and waived the requirement of payment of 30% deposit payment (see paragraph 7, 8 and 9 of the affidavit in support as well as the ruling of the Learned Deputy Registrar which is annexure A of the affidavit in support)

The appellant in its submissions in support of the appeal referred to the case of
35 **MUTEGEKI V MUTABAZI & 2 ORS (MISC. APPLICATION NO.109 OF 2016)** where court stated that the exemption of nonpayment of the 30% security deposit is

open only to a spouse under Regulation 13 (6) but even then, such a spouse still has the obligation to advance reasons why court's discretion should be exercised to afford them exemption from paying the security deposit. (See page 4 of the appellant's submissions)

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The respondent in his submissions opposing the appeal referred to the case of **NAKAYAGA VS FINA BANK LTD & ANOR (HCT-00-CC-MA 471 OF 2014)**, where it was stated that;

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"It is pertinent to note that the requirement for deposit of security under Regulation 13 (1) of the Mortgage Regulations 2012, as clearly spelt out in that provision, only applies where court for reasonable cause, adjourns a sale by public auction to a specified date and time, which in my view presupposes that the mortgagee's right to foreclose is not in dispute like in the instant case. The above regulation is therefore not applicable to this application for a temporary injunction pending determination of the rights of the parties in the main suit and for that reason, I decline to make the order for deposit of security." (see page 2 of the Respondents submissions)

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In my analysis of the evidence on record and the parties' submissions, I find that both counsel are alive to the mortgagee's right and power of sale under the Mortgage Act.

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I respectfully find that the **NAKAYAGA VS FINA BANK LTD & ANOR (HCT-00-CC-MA 471 OF 2014)** case raised by counsel for the respondent in opposition of this appeal is distinguishable, because in the Nakayaga case, the applicant was the wife of Mr. Nywevu John Bosco, the 2nd respondent who was the registered proprietor of property comprised in Mailo Register Kyadondo Block 266 Plot 1216 Land at Seguku (hereafter called the suit property) which was the matrimonial home of the applicant therein and their children. The Property had also been mortgaged without obtaining spousal consent, which prompted the Applicant therein to seek court redress. The Court that handled the Nakayaga case granted an injunction to allow the addressing of the pertinent issues regarding spousal consent to be addressed.

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In the appeal before this court, the respondent mortgaged his property and only filed the suit for specific performance against the appellant after the Mortgagee had initiated its right to sale the mortgaged property by issuing a notice under Section 26 of the Mortgage Act. Therefore, the net effect of Her Worships order was to stop the selling Mortgaged Property after the right to sale had been commenced by the appellants issuance of a notice under section 26 of the Mortgage Act. It therefore follows that the Learned Deputy Registrar ought to have enforced the provisions of Regulation 13 (1) of the Mortgage Regulations for payment of 30% of the forced sale value of the mortgaged property or outstanding amount, since the respondent does not fall within the exception in Regulation 13 (6) of the Mortgage Regulations.

It should be noted that in the case of **GANAFA PETER KISAWUZI VS. DFCU BANK LTD COA CIVIL APPLICATION NO. 0064 OF 2016**, The Court of Appeal refused to grant an order of a temporary injunction to the Applicant holding that the remedy was not available to him on the ground that the Applicant had not complied with Regulation 13 (1) of the Mortgage Regulations which required him to deposit 30% of the forced sale value of the mortgaged property or the outstanding amount before stoppage of sale.

I therefore conclude that the Learned Deputy Registrar erred when she stated that the respondent's case before her fell within the provision of the law where the payment of the 30% can be waived.

The grant of an injunction after the appellant had commenced steps to exercise its power of sale under Section 26 of the Mortgage Act, without enforcing the provisions of Regulation 13(1) of the Mortgage Regulations, was also not proper.

I note that it is now more than six months since the mortgagee issued a notice under Section 26 of the Mortgage Act, it follows therefore that the valuation of the mortgagor's property needs to be redone, if the mortgagor is still in default and the mortgagee is still interested in pursuing its right to sale. It would also be prudent to reissue a notice under Section 19 (3) of the Mortgage Act informing the mortgagor of the current outstanding loan amount, if any, and requiring him to settle it. Once in default, after issuance of the notice under Section 19(3) of



the Mortgage Act, the mortgagee can then pursue the remedies in Section 20 of the Mortgage Act in accordance with the law.

I therefore order that

1. This Appeal is allowed.
2. The Learned Deputy Registrar's ruling and orders in High Court Miscellaneous application 25 of 2023 are set aside.
3. The Mortgagee shall issue a fresh notice under section 19 (3) of the Mortgage Act to the Mortgagor, if he is still in default on his obligations in the Mortgage.
4. The respondent shall pay costs of this appeal to the appellant.



NSHIMYE ALLAN PAUL M.

JUDGE

04-04-2024