

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

MISC. APPLICATION NO. 456 OF 2012

(Arising from Civil Suit No. 222 of 2012)

MIREMBE REBECCA MATOVU APPLICANT

VERSUS

STANDARD CHARTERED BANK (U) LTD & ANOTHER RESPONDENTS

Hon. Lady Justice Monica K. Mugenyi

RULING

The applicant instituted legal proceedings against the respondent seeking a permanent injunction against the latter in respect of the sale of property that was the subject of a mortgage with the respondent bank. The 1st respondent bank sought to sale the mortgaged property upon the default by the applicant of his loan repayment obligations towards the mortgage. The present application for a temporary injunction was subsequently instituted by the applicant as an interim measure pending the determination of the substantive suit.

The background to this application is that in May 2006 the 2nd respondent created a mortgage with the 1st respondent bank in respect of the suit premises for the sum of Ushs. 133,000,000/=. In April 2007 the 2nd respondent executed an additional loan facility with the same bank and in respect of the same premises for an additional Ushs. 182,740,627/=. The 2nd respondent defaulted on his loan obligations to the 1st respondent whereupon the latter sought to sale the suit property to realise the loan amount. The applicant, the 2nd respondent's wife, then lodged a suit seeking a permanent injunction against the sale of her matrimonial home by the 1st respondent without her consent contrary to section 39 of the Land Act (as amended).

At the hearing of the application it was argued for the applicant that the substantive suit in respect thereof did establish a *prima facie* case against the respondents and the sale of the suit premises would cause irreparable damage to the applicant. In that regard, learned counsel referred this court to the case of **Francis Babumba & Others vs. Erusa Bunju High Court Civil Suit No. 679 of 1990**. Conversely, it was argued for the 1st respondent that the substantive suit did not establish a *prima facie* case given that it was premised on the false notion that the suit premises were indeed the matrimonial home of the applicant and 2nd respondent yet that was not the case; the said property having been incomplete, un-inhabitable and un-occupied when the

2 loan facilities were executed. Learned counsel further argued that the applicant did acknowledge the existence of the loans but did not object to them. On the contrary, she executed a memorandum of understanding (MOU) undertaking to pay off the loan but reneged on this undertaking. It was counsel's contention that the applicant's failure to service the loan was tantamount to coming to court with unclean hands. On the issue of irreparable damage, counsel argued that should his client be permitted to sale the suit premises, the respondent bank was able to sufficiently recompense the applicant for any loss suffered in the event that she one the substantive suit. The positions advanced by learned respondent counsel were largely premised on the decision in **Herbert Kabunga Traders vs. Stanbic Bank Misc. Application No. 159 of 2012** (High Court). In a brief reply, it was argued that the decision in **Herbert Kabunga Traders vs. Stanbic Bank** (supra) was inapplicable to the present application given the issue of the matrimonial home under consideration presently that did not arise in the cited case. Counsel further argued that the MOU executed by the applicant was not binding upon her given that a pre-condition imposed upon the 2nd respondent to make her a joint proprietor to the suit premises prior to her making repayments towards the mortgage had been flouted.

Order 41 rule 1(a) of the Civil Procedure Rules (CPR) mandates courts to grant a temporary injunction to restrain any party to a suit from 'wasting, damaging or alienating any property in dispute in a suit'. It is now well settled law that the grant of a temporary injunction is an exercise of judicial discretion intended to preserve a *status quo* until questions for determination in the substantive suit have been disposed of. An applicant must establish 2 ingredients – first, the existence of a prima facie case or triable issue(s) in the substantive suit and, secondly, that non-grant of the temporary injunction might expose him/ her to irreparable damage or loss that would not be justly compensated by award of damages; where the courts are in doubt as to proof of the foregoing ingredients by an applicant, they are enjoined to decide the application on the balance of convenience. See **Giella vs. Casman Brown (1973) EA 358** (CA) and **E.L.T Kiyimba-Kaggwa vs. Haji Abdu Nasser Katende (1985) HCB 43**.

In my view, what would amount to a triable issue for purposes of an application for temporary injunction is aptly summed up in **Halsbury's Laws of England, 4th Edition, Vol. 24, para. 855** as follows:

“On an application for an interlocutory injunction the court must be satisfied that there are serious questions to be tried. The material available to court at the hearing of the application must disclose that the Plaintiff has real prospects for succeeding in his claim for a permanent injunction at the trial.” (*emphasis mine*)

Halsbury's Laws of England (supra) posits that the grant of an injunction should not merely be premised on the existence of serious triable issues but also on the disclosure by the application of real prospects for success by the applicant in the substantive suit. In the present case, read in isolation the application does disclose a triable issue with real prospects of success; but read together with the affidavit in reply for the 1st respondent, as well as supportive documentation

appended thereto, the suit's probability of success becomes debatable. Therefore the material available to this court at the hearing of this application is not conclusive on the substantive suit's probability of success.

Be that as it may, it would appear to me to be rather premature and unjust to conclude on the basis of this issue alone that there is no merit in the present application. Quite clearly, the suit property is the subject of the present application. In the substantive suit the applicant seeks a permanent injunction prohibiting the sale of her allegedly matrimonial home by the 1st respondent. Non-grant of a temporary injunction would obviously render the substantive suit redundant should the respondent bank go ahead to sale off the suit property as it appears inclined to do. This court does not subscribe to the notion posited by learned respondent counsel that such sale would be adequately recompensed by an award of damages by the respondent bank. In my view, the remedy sought by the applicant, namely, a permanent injunction against sale is quite instructive on the substantive justice she seeks from this court. She seeks to avert the sale of the property. Secondly, while this court is well aware that the respondent is in a position to recompense the applicant should the need so arise, it is also mindful of the familial value attached to matrimonial homes. Indeed, section 39 of the Land Act (as amended) would appear to seek to uphold this tenet of family values. No evidence was adduced by the respondent bank as would dispute the suit premises having been for residential purposes and thus rebut the applicant's assertion that she was living in the incomplete structure. The documentary evidence adduced by the 1st respondent simply indicates that the said property was incomplete and inhabitable. In my view, what would amount to an inhabitable structure is quite relative. Indeed, whether or not the suit property was un-occupied can only be factually established through more detailed evidence adduced at trial, the truth of which may be tested by cross examination. Therefore, I am unable to agree with learned respondent counsel that non-grant of the temporary injunction sought would not cause irreparable damage to the applicant or indeed that such damage can be adequately recompensed by an award of damages.

The question, then, would be how the 'balance of convenience' may be determined in the present application. It was learned respondent counsel's contention that the balance of convenience tilted towards the respondent bank which stood to suffer more than the applicant if the temporary injunction sought was granted. In my view, the answer to that question would lie in the cardinal principle underlying the grant of injunctions, to wit the preservation of the status quo pending the determination of the substantive suit. Thus where, as is the case presently, a trial court can not judiciously determine on the basis of available affidavit evidence whether on the face of it (without recourse to the merits thereof) the substantive suit presents a triable issue with strong prospects of success, yet an award of damages does not appear to represent adequate recompense in the event that the plaintiff emerges successful in the substantive suit; then the balance of convenience should favour the preservation of the pre-application status quo.

In my judgment, the justice of the present application dictates that the issue of whether or not the mortgage of the suit premises did require spousal consent, be determined at trial. I would

therefore exercise my judicial discretion in favour of a preservation of the pre-application status quo, and do hereby grant a temporary injunction in this matter subject to the following conditions:

1. The substantive suit shall be prosecuted within 2 months from the date hereof, failure thereof at the instance of the applicant/ plaintiff, the temporary injunction shall lapse.
2. The temporary injunction shall be subject to periodic review during the prosecution of the substantive suit.

Monica K. Mugenyi
JUDGE

13th September, 2013