

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**

**HCT-04-CV-MA-0009/2013**

**(ARISING FROM CIVIL SUIT NO. 0001/2013)**

**PACIFIC SUMMI HOTEL LTD.....APPLICANT  
VERSUS  
1. DFCU BANK (U) LTD  
2. OCHWO JOHN  
T/a ROCKLAND GENERAL AUCTIONEERS  
3. STEEL & TUBE INDUSTRIES.....RESPONDENTS**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**RULING**

In this application the applicant moved court under O.41 r.1 and 2 and O.52 r.1-3 of the Civil Procedure Rules for grant of a temporary injunction pending determination of the main suit.

The application is supported by the affidavit of **Mwanga F.K**, the Managing Director. The order sought is to restrain the respondents or any of their agents from transferring the suit property comprised in Vol. 3455/ Fol 18 Bugwere Road, Mbale until the disposal of the main suit, and an order of temporary injunction restraining respondents from evicting the Applicant till disposal of the main suit.

Respondents filed affidavits in reply, as per affidavit of **Mayanja** for 1<sup>st</sup> Respondent, and **Nilex Bhat** for 3<sup>rd</sup> Respondent.

**Counsel Mutembuli** for applicants addressed court on the three conditions necessary for grant of a temporary injunction as being;

- (1) Applicant has a *prima facie* case with probability of success. He quoted paragraph 9 of the affidavit and paragraph 15 of the affidavit of **Mwanga F.K.** In paragraph 9 applicant deponed that “the sale of applicant’s mortgaged property is illegal and unfair...”

In paragraph 15 he depones that, “it is just and equitable that the order is granted until disposal of the main suit which has substantial questions of law to be determined by this court.”

- (2) That applicant will suffer irreparable damage not compensatable by damages.

Here he referred to paragraph 12 of the affidavit in support, where applicant depones that **Mr. Muwanga**’s family stays on the suit property and have paid till 2014; and that if evicted he will suffer irreparable damage as it is not easy to get accommodation in Mbale. He further referred to paragraph 14 where he depones that if the application is not granted it will render the suit nugatory; and that paragraph 8 shows that there is an eviction note already issued against them and that if their evicted they will suffer irreparable damage.

- (3) That if court is doubtful, it will decide on a balance of convenience. It was argued by **Mutembuli** for applicant, that the applicant is in possession of

suit property, yet respondents are threatening to evict him and the tenants. He argued that the balance of convenience is in favour of applicant who is in possession, unlike respondents who just intend to take possession. They should be protected.

Here he referred to ***KIYIMBA KAGWA V, KATENDE 1955 HCB*** where it is stated that the grant of a temporary injunction is an exercise of Judicial discretion. He prayed that court exercises its discretion and grants the orders sought.

Earlier, Counsel had referred to the case of ***Robert Kavuma v. Hotel International SCCA.8/1990***, referred to by **DCJ Mukasa Kikonyogo** in ***Godfrey Kikonyo v. Mutabazi CA.165/2001***, where courts are cautioned to confine itself strictly to the immediate object sought and that the court is enjoined as far as possible from prejudging the matters in issue in the main suit.

In response, **Martin Asingwire** (counsel for the 1<sup>st</sup> Respondent), attacked the applicant's application that it does not state the grounds and only relays on the affidavit, which is defective.

He contended that the affidavit in support has falsehoods especially paragraphs 5 and 9. He referred court to annex 'E' and annex 'F' and 'A' all which indicate that applicant has failed to make good the default, hence making paragraph 5 and 9 false.

He also attacked paragraph 20 of applicant's affidavit and pointed out that it offends O.19 r.3 of the Civil Procedure Rules.

He referred to ***Uganda Journalist Safety Committee and 2 Others v. A.G. Const Petition 7/97***; which states that averments that are based on information the information must be stated and if it is on belief, the belief must be stated. If it is not done the affidavit falls on the wayside.

On falsehoods he referred to the ***Makerere University v. St. Mark Education Institute Others 1994 KLR 682*** holding that an affidavit that contains lies and untruth cannot be relied upon for being defective and unreliable.

Counsel argued that the affidavit falls short of the requirements of an affidavit making it incurably defective and that it ought to be struck off. He argued that since the application does not contain any ground, it should be also struck off.

On the requirements for grant of a temporary injunction, he argued that none of them were proved by the appellant. He referred to annex 'E' to the application and said that it indicated a failure to pay and hence respondent had a right to sale.

On irreparable damage he referred court to ***Fredrick Zabwe v. Mars Trading Co. & OR 1998 KLR***, focusing on the principle that irreparable damage is damage not atonable in damages.

He argued that loss of property is atonable in damages and the applicant didn't show anywhere that in this case the injury is not atonable for in damages. He argued that as a person who mortgaged his property for money, he can as well be

compensated by money as a result of the mortgage. He prayed for dismissal of the application on the above grounds.

Counsel for 3<sup>rd</sup> Respondent, **Mr. Seruwoza**, argued in association with first Respondent's submissions.

He emphasized that the 3<sup>rd</sup> Respondent is a bonafide purchaser. He responded to an advert, bidded and paid for the property. He argues that by the time of completion of this transaction, the applicant had waived off his equitable right of redemption by virtue of his annexes 'E' and 'F'. He referred to ***Halisburys Law Reports Par. 722-25 Vol. 32 4<sup>th</sup> Edn***, where it says that where a right of sale has arisen the mortgage cannot be restrained from selling, and where the mortgage has sold to a purchaser the mortgagors right of redemption is extinguished. He referred to ***Edward F. Coosins LAW OF MORGAGES Pg.226-228***, emphasizing that the purchaser is protected. He also said that no *prima facie* case was made out by applicant. He is to suffer no irreparable loss citing ***Maitha v. Housing Co. of Kenya & or 2003 Vol.1 EAR 133***, where it was said that securities are valued before lending is contemplated by the parties and before the sale is contemplated therefore damages would be an adequate remedy. Referring on ***LUYIGA V. STANBIC BANK (U) LTD*** (Unreported) ***MSC 2002/12***, he concluded that where damages can atone, then temporary injunction should not issue.

On balance of convenience he argued that since the sale was completed the applicant is illegally in the premises and courts should not allow him to continue his illegality. Convenience is therefore against the applicants.

He referred court to the case of **SAVOURS INT. (U) LTD V. DFCU BANK LTD MSC. 283/2002, arising from 239/2002** where **J. Okumu Wengi** held that Court should not grant an injunction restraining a mortgagee from exercising his statutory powers. For those reasons, he prayed that court dismisses the application.

In cross reply **Mr. Mutembuli** argued that counsel were going into the merits of the main suit and insisted that he had shown that applicant's case satisfied the principles required to grant a temporal injunction. He referred to O.41 r.1 of the Civil Procedure Rules, that his application is by chamber summons whose grounds are contained in affidavit. The evidence is in the affidavit. He defended his arguments that the issues raised as falsehoods that they are truthful. He argued that the balance of convenience disfavors applicants who have no alternative accommodation, and argued that the issue of bonafide purchaser is for the main suit. He therefore maintained his previous prayers.

The duty of this court is to examine whether the applicant has satisfied the conditions laid down under O.41 r.1 and 2 and O.52 r.1 and 3 CPR and I will dispose them off in the order argued by applicant.

However before this is done, the Respondent (1<sup>st</sup>), raised two points of law, which must be resolved first, before going into the merit of the application. These relate to;

- 1) Whether the failure to place grounds within the chamber summons and only placing them in the affidavit was fatal to applicant's case.
- 2) Whether paragraphs 5 and 9, and paragraph 20 of the affidavit of the applicant render the affidavit defective rendering the application irregular.

Under order 41 of the Civil Procedure Rules, provisions are made regarding the procedure for applications for temporary injunctions and interlocutory orders.

O.41 r.1 states that “ *where in any suit it is proved by affidavit or otherwise....*”

Rule 9, (O.41 r.9) then states, applications under rules 1 and 2 shall be summons in chambers.

The rules above indicate that the evidence in cases of temporary injunction can be provided by affidavit. The proof is therefore by affidavit. Failure to place grounds in the motion is not fatal as it was not specifically covered under the rule above. The affidavit of the applicant is not faulty for containing the grounds of the motion it supports in this matter.

Turning to the specific paragraphs found offensive that is paragraphs 5 and 9, and 20, I find that the contents of paragraphs 5 and 9 are not falsehoods. They relate to the case for applicant regarding the sequencing events leading to his case. I agree with **Counsel Mutembuli** that the counsel for respondent did not specify how these paragraphs allude to falsehoods. This matter without wasting time on it did not warrant the attack it received.

However paragraph 20 of the affidavit states as follows:

*“That whatsoever I have stated herein above is true and correct to the best of my knowledge, belief and information.”*

This according to respondent's counsel offends O.19 r.3, of the Civil Procedure Rules, and is for that reason incompetent for reasons discussed in the cited case; as already discussed.

The law governing affidavits in O.19 r.3 is to the effect that,

*“Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted provided that the grounds thereof are stated.”*

In ***Premchard Richard v. Ouamy Services Ltd (1969) EA 514 at 517 Spry J*** as he then was said,

*“It has repeatedly been said by this court that affidavit based on information must disclose the source of information (see **Standard Goods Corporation Ltd vs. Harakchard Nahus and Co. (1950) 17 EACA 9**) on this ground alone the Judge would have been entitled to refuse to act on the affidavit, this is not merely a matter of form, but goes to the essential value of the affidavit.”*

Also in ***Eseza Namirembe v. Musa Kizito (1972) ULR 88*** which was a case by originating summons the application was dismissed amongst other reasons because the supporting affidavit did not set forth the plaintiff's means of knowledge or her grounds of belief and did not distinguish between matters stated on information and belief and those deponed to on the deponents knowledge.

The above seems to be the strict interpretation of the requirements of O.19 r.3 of the Civil Procedure Rules by the Courts. Numerous authorities have continued to emphasize that an affidavit which does not conform to the above requirement is defective and must be rejected.

**Hon. J. Okello** emphasized this position in *Allen Isingoma v. Alex Muhairwe & 2 Others HCCCNo.39/92*, when he held that,

*“It is clear that disclosing the source of information, of facts deponed to information and giving ground of belief where facts are deponed to on belief and distinguishing between those facts which are deponed to on information, belief and knowledge of the deponent are fundamental requirements in the drafting of an affidavit. An omission in any of them goes to the essential root of the affidavit. It renders the affidavit incurably defective.”*

Applying the above holdings to the issue at hand, an examination of the affidavit sworn as a whole would be helpful to determine whether the same offends the above standard.

According to the matters deponed to in the affidavit deponent avers to issues of personal knowledge, but does not distinguish them from those that are in his belief so that he points out the grounds on which he bases to believe so. He has deponed to matters within his information, again without distinguishing them from those within his knowledge and belief. The affidavit is presented as a whole without taking heed to the requirements that govern affidavits in support of interlocutory matters under O.19 r.3.

As pointed out by counsel in the case of *Uganda Journalist Safety Committee and 2 Others v. AG Const. Pet. 7/97* and the case of *Allen Isingoma v. Alex Muhairwe & 2 Others* cited already, I will adopt the approach of **J. Okello**, who stated that in applications of that nature, the affidavit goes to the root, and it is incurably defective, thus rendering the entire application defective since the chamber summons it is filed in support contains no grounds for the application. **J. Okello** states thus:

*“It is clear that disclosing the source of information of facts deponed to information and giving ground of belief where facts are deponed to on belief and distinguishing between those facts which are deponed to on information, belief and knowledge of the deponent are fundamental requirements in the drafting of an affidavit. It renders the affidavit incurably defective.”* I agree

This affidavit is found to be in violation of the above legal requirement and is therefore incurably defective.

I am alive to the current practice where courts have since the Supreme Court decision of *Kiiza Besigye v. Museveni*, and the provisions of Article 126 of the Constitution relaxed this position to allow parties save parts of affidavits not found offensive in the name of substantive justice; as discussed by **J. Lugayizi** in *Italian Ashalthaulage Ltd & 2 Ors v. Assist (U) Ltd CA No. 90 of 2000*.

However this practice is distinguishable from the circumstances of this application, where there was a total failure to conform to the rules making it impossible for this court to save the affidavit.

In the case of *C. Katuramu v. Matiya Kiiza and Others HCCVA No. DR/89 JUSTICE Mukanza*, was able to save the affidavit by implying that since it had been sworn by an Advocate, it was assumed that he knew, believed, and had information of what he deponed to, even if he had not complied with the rule to distinguish and reveal the matters in knowledge, information and belief.

However in his affidavit, the deponent **Mr. Mwanga Francis** states in paragraph 1 that he is the Managing Director of the applicant hotel, and deponed in that capacity. However he later depones to facts within the specialty of the Bank (paragraph 3, 4, 5, 6, 9, 16). He depones to matters within the specialty of law. (Paragraph 6, 9, 11, 12, 15, 17). These paragraphs cannot allow me to follow the **Hon. J. Mukanza** precedent and read in the affidavit that what he deponed to were all in his belief, knowledge and information.

I have therefore reached the conclusion that for the reasons stated above, the affidavit is incurably defective and cannot be allowed to stand.

Having found so, I will not go into the determination of the rest of the arguments which were raised because the defect in the affidavit has eaten up the entire taproot of the application and has totally terminated it. Without the affidavit, there is no motion. Without the motion there is no application, therefore this application must fail and is dismissed for violating the provisions of O.19 r.3.

Costs to respondents. I so order.

**Henry I. Kawesa**

**JUDGE**

**19.12.2013**

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**5. OCHWO JOHN**

**T/a ROCKLAND GENERAL AUCTIONEERS**

**6. STEEL & TUBE INDUSTRIES.....RESPONDENTS**

18.09.2013

Mutembuli for Applicant.

Parties absent.

Adjourned to 2:30p.m.

**Henry I. Kawesa**

**JUDGE**

18.09.2013

Mr. Mutembuli for the Applicant present.

Applicant's representative absent.

3<sup>rd</sup> Respondent's representative present.

1<sup>st</sup> and 2<sup>nd</sup> Respondents' representatives absent.

Martin Asingwire for the 1<sup>st</sup> Respondent present.

Asodio Jordan for the 3<sup>rd</sup> respondent present.

Court Clerk Kanagwa Grace.

Mutembuli: The matter is for hearing but the Judge is not sitting. I pray for an adjournment.

Court: Matter put to the 04.10.2013 for hearing at 2:30p.m.

**Musimbi Muse S.L.**  
**ASSISTANT REGISTRAR**

04.10.2013

Mutembuli for Applicant.

Applicant's Directors present.

No Representative from 1<sup>st</sup> Respondent (DFCU).

2<sup>nd</sup> Respondent (absent).

3<sup>rd</sup> Respondent (Seruwoza Represented).

Mr. Asingwire Martin for 1<sup>st</sup> Respondent.

Mr. Jordan Asyodyo for 3<sup>rd</sup> Respondent.

Mutembuli: It is for hearing and am ready to proceed.

Mutembuli:

This is an application for temporary injunction pending determination of Civil Suit 1/2013.

It is by Chamber summons under O.41 r.1 and 2, O.52 r.1-3 of the Civil Procedure Rules. It's supported by affidavit of **Mwanga F.K** (Managing Director). There are affidavits in reply filed by **Mayanja** (for 1<sup>st</sup> Respondent) and by **Nilax Bhat** (for 3<sup>rd</sup> Respondent).

The order sought is to restrain the Respondents or any of their agents from transferring the suit property comprised in Vol. 3455/Fol 18 Bugwere Road Mbale, until disposal of the main suit; and an order of Temporary Injunction restraining the respondents from evicting the respondents till disposal of main suit.

We pray for costs of the application

In an application for temporary injunction there are 3 conditions to satisfy;

1. Applicant has a pending case with probability of success.
2. That applicant will suffer irreparable damage not compensatable by damages.
3. That if court is doubtful will decide on a balance of convenience.

***Robert Kavuma v. Hotel International SCCA 8/1990, Justice Mukasa Kikonyogo DCJ*** referred to in ***Godfrey Kikonyo v. Mutabazi CA 65/2001.***

In that case- the court has to confine itself strictly to the immediate object sought and that the court is enjoined as far as possible to desist from prejudging the matter in issue in the main suit.

a) **PRIMA FACIE CASE:**

Refer to paragraph 9 of affidavit (states that the sale is illegal).

Paragraph 15 the suit has substantial questions of law to be determined. He has filed a suit pending before the court seeking permanent injunction and a declaration that the sale was unlawful and wrongful and for the recovery of the land.

**b) IRREPARABLE DAMAGE**

Paragraph 12 of affidavit in support that **Mr. Mwanga's** family stays on the suit property and have paid till 2014. If evicted shall suffer irreparable damage as it is not easy to get accommodation in Mbale.

Paragraph 14- Nuggatory.

Paragraph 8- There is a note requiring them to vacate the premises. If they are evicted they will suffer irreparable damage.

**c) BALANCE**

It is not in dispute that applicant is in possession of suit property. Respondents are threatening to evict applicant and tenants. Balance of convenience is in favour of applicant who is in possession unlike the Respondent who just intend to take possession. They should be protected.

As cautioned I will not go into the merits of the main suit. It is my humble submission that court maintains the status quo as the main purpose.

***Kiyimba Kagwa v. Katende 1985 HC***:- the grant of temporary injunction is an exercise of Judicial discretion. We submit and invite court to find that the

applicant has satisfied all conditions necessary for grant of temporary injunction and do grant for purposes of maintaining the status quo. The affidavits in reply, they have not attacked the merits of the application they only deny generally. We pray that the application be granted with costs.

**Henry I. Kawesa**

**JUDGE**

**Martin for 1<sup>st</sup> Respondent:**

I have a point to raise. The application itself doesn't state the grounds and only relies on the affidavit in support.

The affidavit in support has falsehoods especially paragraph 5 and 9.

Paragraph 5(reads): The annex 'E' and 'A' indicate that applicant was given notice when property was first advertised in response to which he wrote annex 'E'. (See annex E, fourth paragraph).

"then you can proceed if I fail." The advert annexed was the 2<sup>nd</sup> after applicant had requested for 3 months, failure of which he agreed to the sale. The same is reflected in annex 'F' in which second Respondent indicated that the request had been worked on and he still failed to make good his default. Therefore paragraph 5 and 9 are falsehoods.

The second point is on paragraph 20 of the affidavit (reads). This offends O.19 r.3 of the Civil Procedure Rules. ***Uganda Journalists Safety Committee and 2 Ors v. AG Const Petition 7/97*** averments that are based on information, the information must be stated and if it is belief the belief must be stated. If it is not done the affidavits falls on the way side.

Falsehoods I refer to *Makerere University v. St. Mark Education Institute Ors 1994 KLR 681* an affidavit that contains lies and untruth cannot be relied upon for being defective and unreliable. The affidavit in support falls short of the requirements of an affidavit making it incurably defective and ought to be struck off. Since the application does not contain any ground, I pray it suffers the same fate.

I agree on the requirements for a temporary injunction but submit that he has failed to prove any of them.

On proof of *prima facie*, I refer to annex 'E' and contend that applicant in the head suit acknowledges default. He waived his equitable right of redemption when he defaulted repeatedly and when he wrote 'E' giving (respondents) a right to sale if he defaulted which he habitually committed.

**IRREPARABALE DAMAGE-** I refer to the case of *Fredrick Zabwe v. Mars Trading Co. & OR 1998 KLR*. Irreparable damage is not atonable in damage. If the applicant has not shown special circumstances that the injury was not atonable in damages he cannot succeed. Loss of property is compensatable in damages.

An applicant who earlier on mortgaged his property for money could as well be compensated for money as a result of that mortgage. The application is incompetent and has not shown any ground for the grant of a temporary injunction and should be struck off/dismissed with costs.

**Henry I. Kawesa**

## JUDGE

### **3<sup>rd</sup> Respondent's Counsel (Jordan):**

I greatly associate myself with my colleague for 1<sup>st</sup> Respondent. I make a small addition. In this matter the 3<sup>rd</sup> Respondent is a bonafide purchaser. He reacted to an advert, the same was advertised, bidden and paid consideration for the same. By the time this was being done the mortgagor had taken cognisance of the ramifications which would have befallen him if he defaulted. By then his equity of redemption had been waived.

3<sup>rd</sup> Respondent executed the sale with 1<sup>st</sup> and 2<sup>nd</sup> Respondent when applicant had waived off his right of redemption in his annex 'E' and 'F', he cannot be protected in the course of the law. See **HALISBURY'S LAW REPORTS par 722-25 Vol 32 4<sup>th</sup> Edn.**: where a right of sale has arisen then the mortgagee cannot be restrained from selling. Where the mortgagee has sold to a purchaser like the 3<sup>rd</sup> Respondent, the mortgagor's right of redemption is extinguished. This is a valid sale. I take that position from **EDWARD F COOSINS LAW OF MORGAGES pg. 226-228.**

A purchaser is protected.

There has not been any *prima facie* case elaborated whatsoever by applicant. By law if applicant fails to at least create a *prima facie* case then the application should be denied.

Regarding irreparable loss/convenience. I wish to add that by the time a party like mortgagor takes money and places property as security he does so well knowing in the event that he defaults the property shall be sold.

See the case of ***MAITHA V. HOUSING F. CO. OF KENYA & OR 2003 VOL1 EAR 133.***

Held:Securities are valued before lending and loss of property by a sale is contemplated by the parties even before the sale is completed therefore damages would be an adequate remedy.

Relied on in ***D. LUYIGA V. STANBIC BANK (U) LTD (Unreported) MSC 2002/12.***

As 1<sup>st</sup> Respondent counsel demonstrated where damages can atone, then temporary injunction should not issue.

**Balance of convenience:**

Clearly with a valid sale concluded between parties the applicant is illegally in those premises. He has deprived the 3<sup>rd</sup> Respondent of enjoyment of the same. It has been held by courts that courts of law should not aid illegality. Hence convenience is against them.

Finally, I invite court to Refer to ***SAVOURS INT. U LTD V. DFCU BANK LTD MSC 283/2002 ARISING FROM 239/2002***, where,

**J. Okumu Wengi** found that court should not grant an injunction restraining a mortgagor from exercising his statutory powers.

The applicant seems to have been indebted at all times. He failed to pay. He should face the ramifications. The application should be dismissed.

**Reply: Mutembuli:**

My friends are attacking what should be for the main suit. A *prima facie* case is not a case on a balance of probability. All you need to show is that there are issues. The issue here is, was the sale lawful or not? The rest is for evidence in court. We cannot do so now.

I refer court to O.41 r.1, of the Civil Procedure Rules which provides that,

*“where in any suit proof by affidavit or otherwise.”*

The application is by chamber summons- where grounds are contained in affidavit not in a Notice of Motion where they are in the motion.

The evidence is that in the affidavit.

- My friend **Asingwire** submitted at the bar that the affidavit contains falsehoods. Affidavit of 1<sup>st</sup> respondent does not attack applicant on falsehoods. Counsel refers to the annexures so where is the falsehood? He was not clear but concessions were not to amount to falsehoods. He was truthful.
- The affidavit does not offend O.9 r.3. The grounds are stated in the affidavit, “what I have stated herein above.....the grounds are the ones stated above.
- Irreparable damage: if the applicant and tenants are evicted now they have no alternative accommodation opposed to Respondents who can be compensated if they are there illegally.
- As for the issue of bonafide purchaser that is for the main suit. I will not submit on it.

Balance of convenience- status quo means that leaving the things as they are. If the respondents are allowed in then the status will change.

The affidavit points out all that is necessary- it is pre-emptive to go into the sale. I maintain my earlier prayers.

**Henry I. Kawesa**  
**JUDGE**

Court: Adjourned for Ruling on 29/Nov/2013.

**Henry I. Kawesa**  
**JUDGE**

19/12/2013

Applicant present.

Respondent absent.

Mutembuli for Applicants present.

Respondents' counsel absent.

Court: Matter for Ruling.

Ruling communicated to the parties above in presence of their lawyer.

**Henry I. Kawesa**  
**JUDGE**

**Mutembuli:**

We seek leave to appeal to get directions on the affidavits that are deponed as to knowledge, belief and information.

Court: Leave granted.

**Henry I. Kawesa**

**JUDGE**

**19.12.2013**

