

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
MISCELLANEOUS APPLICATION NO. 83 OF 2017

(Arising from civil suit No. 61 of 2017)

NAMAGANDA ALLEN:.....APPLICANT

VERSUS

- 1. KISULE ASTOCIO**
- 2. CENTENARY RURAL DEVELOPMENT BANK:.....RESPONDENTS**
- 3. MULIJU GENERAL AGENCIES & COURT BAILIFFS**

BEFORE: HON. JUSTICE WILSON MASALU MUSENE

RULING

The Applicant, **Namaganda Allen**, filed this application by Notice of Motion under O. 41 rules 1,2 & 3 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act against the Respondents Kisule Astocio, Centenary Rural Development bank and Muliju General Agencies and court bailiffs. The Applicant was seeking for orders that:-

- a) A temporary injunction doth issue restraining the Respondents, their agents/servants or employees and any one rightfully claiming under them from selling the mortgaged property at **Nakabotongo on Block 212 Plot 122** until Civil suit number 61 of 2017 is determined
- b) Costs of the application be provided for.

The applicant was represented by M/s Lubega Matovu & Co. Advocates, while the 2nd and 3rd Respondents were represented by M/s Kalenge, Bwanika Sawa & Co. Advocates.

The grounds in support of the application are detailed in the affidavit of the applicant, **Allen Namaganda**, but briefly are:-

- i) That the applicant made major contributions at acquiring of both the matrimonial home and the mortgaged property at Nakabotongo to which the first Defendant mortgaged with out her knowledge and consent.
- ii) That the applicant proceeded to make contributions to construct a house at Sseguku on the said property which was mortgaged by the first respondent to the second Respondent without informing the applicant and subsequently losing their matrimonial home.
- iii) That the applicant filed civil suit No. 61 of 2017 against the Respondents in this honourable court seeking among others a permanent injunction and the suit had high chances of success.
- iv) That unless the temporary injunction order is granted, the Applicant is likely to suffer irreparable damage and loss which cannot be atoned by way of award of damages because the Respondents are dispossessing her of the property where she has an interest hence civil suit No. 61 of 2017 will be rendered nugatory.

The 2nd and 3rd respondents filed an affidavit in reply sworn by Ronald Sekidde the Senior legal manager. Emphasis was on paragraphs 3,4,5,6,7 and 9. They are reproduced herein in below:-

- 3) That the applicant is a stranger to the suit property and she has no cause of action against the 2nd and 3rd Respondents as she holds no interest at all in the suit property

- 4) That the 1st Respondent willfully pledged the suit property for a loan to the 2nd Respondent on the 13th day of May, 2013 and he presented his spouse by the names of Nakato Sarah who duly consented to the loan transaction and to the pledge and ultimate sale of the mortgage property in the event of default. (A copy of the loan offer letter and the Banking facility agreement is attached and marked "A" and "B" respectively.
- 5) That the 1st Respondent was given opportunities on several occasions to redeem the mortgaged property to the extent of executing a consent judgment with the 2nd Respondent whose terms he still failed to honour. .
- 6) That in specific reply to paragraph 2,3, and 4 of the affidavit in support, the averments therein are false and the Applicant is not a wife of the 1st Respondent but merely an imposter stationed to frustrate the bank from exercising its right to fore close the mortgage and liquidate the property to recover the loan monies.
- 7) That in reply to paragraph 5 of the affidavit in support, the Respondent advertised the suit property in fulfillment of the consent judgment entered in civil suit No. 807 of 2015 after the plaintiff breached the terms of payment agreed between the parties.
- 9) That in reply to paragraph 10 of the affidavit in support, it is in the interest of justice that this application be dismissed and the 2nd respondent be allowed to continue with foreclosure considering the fact that the Respondent loaned colossal sums of money to the 1st Respondent in 2013, which sums have not been paid to the present day.

Counsel for the applicants submitted that the 1st, 2nd and 3rd Respondents are about to sell the property on Block 212 Plot 122 with all developments thereon in

accordance with the consent Judgment in Civil Suit No. 807 of 2015 . The applicant's contention is that as a wife and contributor to the capital used to buy the matrimonial property and business premises, that the 1st Respondent tricked her to move out of the matrimonial home so that she supervises coffee business in Gomba. Reference was made to the advert in the Saturday Monitor where the property in question has been Advertised for sale which will result into irreparable damage to applicant. It was further submitted that: Further, that the first Respondent called upon the applicant to contribute on the purchase of machinery and sold her land in Bukulula. She gave him the money to add to the business and also the family house in Katale. That for the last three years the applicant has been giving money to the 1st Respondent or on his account. The Applicant has also been looking over the building, contributing both financial material, not forgetting the intangible and unquantifiable contributions added as the lawful wife.

Counsel submitted that in view of the holding in American **Cynamid Company vs Ethicon Limited [1975] All E.R 504**, a serious question of law has been raised, hence the need to maintain the status quo.

Counsel for the Applicant concluded that the entire process of acquisition of the loan is questionable by the applicant, including mortgaging the family property in question.

In reply, counsel for 2nd and 3rd Respondents submitted that the facts to the application are that the 1st Respondent borrowed Ug shs **180,000,000/=(Uganda shillings one hundred eighty million)** from the 2nd Respondent (hereinafter called "the bank") on the 13th May, 2013 . The said loan was repayable within a period of 24 months at an interest rate of 23 % p.a which was payable in arrears on a monthly basis.

The 1st Respondent provided property comprised in private Mailo register, **Busiro Block 379, Plot 598 at Seguku Katale** and Block 212 Plot 122 Mengo, Gomba at Nakabotongo and also presented his spouse by the names of Nakato Sarah who duly consented to the loan transaction and to the pledge and ultimate sale of the mortgage property in the event of default.

Counsel added that the 1st Respondent defaulted on the servicing of his loan installments and the 2nd Respondent Bank sold the property comprised in Busiro Block 379, Plot 598 at Seguku Katale at Ug. Shs 80,000,000/= which proceeds were used to offset the 1st Defendant's indebtedness and to clear recovery costs leaving an outstanding amount of Ug. Shs 157,678,074/=.

Further submissions were that the 1st Respondent thereafter sued the 2nd Respondent vide **H.C.C.S NO. 807 of 2015, Kisule Astacio v Centenary Bank Ltd**, wherein he prayed for inter alia a permanent injunction restraining the Respondents from disposing off the suit property comprised in Block 212 Plot 122 at Nakabotongo Gomba (hereinafter called the suit property).

And that by the consent of the 1st and 2nd Respondents in the instant suit, on the 8th day of July 2016, judgment was entered in the bank's favour for a sum of **Ug. Shs 157,678,074/=**. By virtue of the same consent judgment (which is attached and marked "C" on the 2nd and 3rd Defendant's affidavit in reply to the instant application), the bank agreed to lift foreclosure on the suit property and it was further agreed that the 1st Respondent should pay the entire outstanding sum by the 31st day of December, 2016.

Counsel concluded that when the 1st Respondent still breached the terms of the consent judgment and in April, 2017, the bank decided to advertise the suit

property vide a warrant to attach and sale the said property (Annexure “A” of the Plaintiff’s affidavit in support of the application).

The issue before court is whether this application for temporary injunction should be granted to restrain the 2nd and 3rd Respondents from selling the mortgaged property at Nakabotongo on **Block 212 Plot 122**. The law on granting of temporary injunctions is settled. In **E.L.T Kiyimba Kagwa vs Haji Abdu Nasser Katende [1985] HCB 43, Odoki J** (as he then was) laid down conditions upon which a temporary injunction should be granted as follows:

- i) The applicant must show a prima facie case with a probability of success.
- ii) The injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
- iii) If Court is in doubt, it would decide an application on the balance of convenience.

As far as the matter of prima facie case is concerned, the applicant in the instant application claims that the suit property at **Nakabotongo on Block 212 Plot 122** is matrimonial property, and that the applicant as a wife of the 1st Respondent has an interest therein that merits the protection of this court.

Notwithstanding the validity of the marriage between applicant and 1st Respondent, which I shall not dwell on at this stage, the property in question is a subject of a mortgage. Counsel for the 2nd and 3rd Respondents has quoted Regulation 13 (10) of the mortgage regulations whereby if a spouse or agent of a mortgagor or any other interested party wishes to adjourn a sale by public auction, he/she has to pay a security deposit of 30% of the forced sale value of the mortgaged property.

In this case, the Applicant would have to pay the 30% of the outstanding sum of UGX 157,678,074, which is UgX 47,303,422/=. In that regard, the present application would be incompetent. Secondly, in **Commercial Division H.C.C.S NO. 80 of 2015, Kisule Astacio vs Centenary Bank LTD**, consent Judgment was entered in favour of Centenary Bank Ltd for the sum of UGX 157,678,074/=. Pursuant to that consent Judgment, the Bank agreed to list fore closure on the suit property on agreement that 1st Respondent now pays the outstanding sum by 31.12.2016. As counsel for 2nd Respondent submitted, it was upon the 1st Respondent's breach of the terms of the consent judgment that the Bank decided to advertise the suit property for sale. So whereas counsel for the Applicant has submitted in rejoinder that the applicant is not seeking to adjourn the sale of the mortgaged property but to stop it all together, the practical effect of granting the Temporary injunction being sought now would be to sabotage the consent Judgment entered into by the 1st Respondent, **Kisule Astacio**, (who is husband of Applicant **Namaganda Allen**) and Centenary Rural Development Bank. This court cannot be a party to such frivolous and vexatious proceedings where a husband has entered into a consent of judgment and the wife purportedly files another civil suit in this court which would amount to setting aside or varying the consent judgment in **Commercial Division HCCS NO. 807 of 2015**. That is not how the High Court anywhere in this country works. The best option for the applicant would have been to file an application for review in **H.C.C.S NO. 807 of 2015** or institute objector proceedings therein. The filing of **Mpigi H.C.C.S NO. 61 of 2017** out of which this application arose was in the circumstances misconceived, frivolous and vexatious.

I accordingly find and hold that there is no prima facie case made out, warranting the grant of a temporary injunction.

This Court , which is not only a Court of law but also a Court of Justice cannot allow a husband and wife to play hide and seek games after borrowing money from the Bank, entering a Consent Judgment and then rushing from one Court to another to delay or postpone payment.

The application is accordingly hereby dismissed with costs.

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W. Masalu Musene

Judge

01/11/2017