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The Republic of Uganda

In The High Court of Uganda Holden at Soroti

Holden at Soroti

Miscellaneous Application No.185 of 2021

(Arising from Civil Suit No.044 of 2021)

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Sammy J Company and 2 Ors ::: Applicants

Versus

Opportunity Bank (U) Limited and Anor ::: Respondents

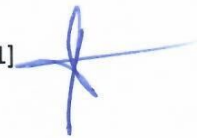
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Before: Hon Justice Dr. Henry Peter Adonyo

Ruling

1. Background.

The applicant filed Civil Suit No. 44 of 2021 before this court against the Respondents jointly and severally for a declaration that the mortgage purportedly created out of the matrimonial suit property by the first respondent was illegal, null and *void ab initio* for want of spousal consent, an order for an audit or reconciliation of the 1st applicant’s loan account held with the 1st respondent by a court appointed auditor, an order of refund to the 1st applicant by the 1st respondent of monies paid in excess of the legitimately deserved and repaid principle sum and interest if any amongst others.

[1] 

5 The applicants in their plaint contended that the 1st applicant applied for and was offered by the 1st respondent a loan facility worth Ugx. 153,000,000 and the 1st applicant secured the loan using his matrimonial property comprised in plot 1 Volume 4460 Folio 12 land at Okille Road Soroti belonging to the 2nd and 3rd applicants.

10 That the 3rd applicant did not consent to the mortgaging of the matrimonial property.

That after a loan reschedule the 1st applicant finalized the payment of the loan and interest to a tune of Ugx. 309,000,000/=, however were surprised when an advert was run in the Monitor Newspaper notifying the public of the
15 respondents' intention to dispose of the property.

The 1st respondent in its written statement of defence denied the contentions of the applicants and averred that after a rescheduling of the loan the 2nd applicant mortgaged land registered in his name with the approval of the 2nd and 3rd applicants in their capacity as directors.

20 And that the 1st applicant defaulted in its loan obligations prompting the 1st respondent to exercise its legal remedy of selling the mortgaged property.

The applicants subsequently filed this application for a temporary injunction.

2. Issues.

25 Whether the applicant is entitled to grant of a temporary injunction?

5 3. Resolution.

The applicant brought this application for a temporary injunction by way of chamber summons under section 98 of the CPA and Order 41 rules 1, 2 and 9 of the Civil Procedure Rules seeking orders that;

- 10 - A temporary injunction doth issue restraining respondents, its employees, servants, agents and workmen from selling, dealing in and or interfering with the Applicant's property comprised in Plot 1 Volume 4460 Folio 12 land situated at Okille Road Soroti until final disposal of the main suit.
- Costs of the application.

15 Order 41 rule 1 Civil Procedure Rules provides that where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

20 (b) that the defendant threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the
25 court thinks fit until the disposal of the suit or until further orders.

Order 41 rule 2 provides thus;

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the

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5 suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

10 (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court thinks fit.

(3) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of the
15 disobedience or breach to be attached, and may also order the person to be detained in a civil prison for a period not exceeding six months unless in the meantime the court directs his or her release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the
20 property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled to it.

Order 41 rule 9 requires the applications under rule 1 be by summons in chambers.

25 Section 98 of the Civil Procedure Act provides thus;

Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Section 33 of the Judicature Act provides thus;

5 The High Court shall, in the exercise of the jurisdiction vested in it by the
Constitution, this Act or any written law, grant absolutely or on such terms
and conditions as it thinks just, all such remedies as any of the parties to a
cause or matter is entitled to in respect of any legal or equitable claim
properly brought before it, so that as far as possible all matters in controversy
10 between the parties may be completely and finally determined and all
multiplicities of legal proceedings concerning any of those matters avoided.

Whether the applicant is entitled to grant of a temporary injunction?

In *Noor Mohammed V Jamma Husein (1953) 29 EACA* a temporary
injunction was defined a remedy which aims at protecting the status quo
15 until the matter to be determined by court is disposed of.

Section 64(c) of the Civil Procedure Act permits the High Court to
grant a temporary injunction and it provides a temporary injunction may be
issued by the High Court in a matter before it orders to prevent the ends of
justice from being defeated, the court may, if it is so prescribed.

20 The law on granting of temporary injunctions in Uganda is well settled in the
classic case of *E.L.T Kiyimba Kaggwa V Haji Abdu Nasser Katende*
[1985] HCB 43 where Odoki J (as he then was) laid down the rules for
granting a temporary injunction that the granting of a temporary injunction
is an exercise of judicial discretion and the purpose of granting it is to
25 preserve the matters in the status quo until the question to be investigated in
the main suit is finally disposed of.

The conditions for the grant of the interlocutory injunction were laid down
in *Kiyimba Kaggwa's* (above) case as follows;

- 5 a. Firstly, that, the applicant must show a prima facie case with a probability of success.
- b. Secondly, such 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.
- 10 c. Thirdly if the Court is in doubt, it would decide an application on the balance of convenience.

Therefore, first and foremost, it is necessary to identify the status quo. "Status quo" as defined as in Black's Law dictionary at page 4418 means the existing state of things existing before the particular point in time; and in
15 determining whether or not to maintain the status quo other surrounding circumstances have to be taken into account. In ***Jakisa & 2 Ors v Kyambogo university HCMA No. 549 of 2013) [2013] UGHCCD 156***, Hon. Lady Justice Elizabeth Ibanda Nahamya stated that "*status quo*" is purely a question of fact and simply denotes the existing state of affairs
20 existing before a given particular point in time and the relevant consideration is the point in time at which the acts complained of as affecting or likely to affect or threatening to affect the existing state of things occurred. Depending on the facts of the case, a party may apply for an injunction in order to preserve the Status Quo.

25 The Court of Appeal in ***Godfrey Sekitoleko & Ors Vs Seezi Mutabaazi & Ors [2001 – 2005] HCB 80*** as cited ***Jakisa & 2 Ors v Kyambogo University*** (above) made the position clear by stating when it held that "***the court has a duty to protect the interests of parties pending the disposal of the substantive suit. The subject matter of a***

5 ***temporary injunction is the protection of legal rights pending litigation.***”

From the above, it can be seen that it is now settled law that when court is considering the application for a temporary injunction, it must bear in mind that its purpose is to preserve the status quo in respect of the matter in
10 dispute until determination of the whole dispute.

The *status quo* in the instant case is that the 2nd applicant is the registered owner of the suit property and he is living with his wife the 3rd applicant on the suit property.

The respondents are not in possession of the property but have started the
15 process of selling by advertising the same and have also issued eviction notices to the applicants.

The conditions for grant of a temporary injunction include that there exists a prima facie case with a probability of success. A prima facie case with a probability of success was defined in the case of ***Kigongo Edward Nakabale Vs Kakeeto and Anor MA 144 of 2017 [2017] UGHCCD 146*** as no more than that the court must be satisfied that the claim is not
20 frivolous or vexatious.

In other words, that there is a serious question to be tried.

In ***Robert Kavuma Vs M/S Hotel International SCCA NO. 8 of 1990***, as cited in ***Kigongo Edward (supra)***, Wambuzi CJ (as he then
25 was) was emphatic and stated that an applicant for a temporary injunction is required at this state in trial to show that a *prima facie* case with and a probability of success was available but not success itself.

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- 5 Relating the above position of the law to the instant matter, it is the contention of counsel for the applicants that the applicants have filed a suit which is pending hearing and determination by this Court and that the respondent created a mortgage on matrimonial property without spousal consent of the applicant.
- 10 Counsel for the 1st respondent in reply submitted that the Mortgage Act 2009 and the Regulations thereunder take precedence over the normal considerations for the grant of a temporary injunction. Counsel relied on ***Mutegeki John Versus Mutabazi Joseph and others MA. No. 109 of 2016.***, in making this contention.
- 15 Counsel referred court to **Regulation 13 of the Mortgage Regulations 2012** which require a deposit of 30% of the forced sale value or outstanding amount before court can adjourn or stop a sale.

It was counsel's submission that the Applicants must deposit 30% of the outstanding loan before this application is granted.

- 20 On the existence of a *prima facie* case Counsel submitted that the civil suit does not disclose triable issues as the applicants have not adduced evidence that spousal consent was not obtained or proof of marriage.

Counsel further submitted that the loan was given to the 1st applicant which is a company and the issue of spousal consent does not arise as the 2nd and 25 3rd applicants consented to the loan as Directors.

Counsel further submitted that the allegations by the applicants that they fully serviced their loan were disproved by the affidavit in reply of the 1st respondent.



5 From the above, I can see that there are triable issues between the parties herein in the main suit, especially since the parties are not in agreement on whether the loan was fully repaid, whether the 2nd and 3rd applicants were married and indeed the suit property was matrimonial property and the existence of a valid mortgage.

10 The submissions by counsel for the Respondent that the Mortgage Act and its Regulations take precedence over the normal considerations for a temporary injunction cannot stand because in this instance the parties are not in agreement over whether there is an outstanding balance.

15 It would be unjust to direct the applicants to deposit 30% of the value of the forced sale or outstanding amount before court determines whether indeed the loan was serviced or not. The first condition has been met.

The second condition is whether an irreparable injury may be caused to party incapable of being atoned by damages. For such a situation, Spry VP in *Giella v Cassman Brown & Co Ltd [1973] 1 EA 358 (CAK)* had this
20 to say “***an interlocutory 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. Irreparable injury is therefore that which cannot be compensated by damages.***”

25 Counsel for the applicant submitted relying on the 3rd and 11th paragraph of the affidavit in support that the 2nd and 3rd applicants stand to lose their matrimonial home as the respondents are threatening to sale the suit property and if the temporary injunction is not granted the applicants would be rendered homeless.

5 Counsel for the respondent submitted in reply that the applicants will not suffer irreparable damage as they derived the loan with full knowledge and consent and knew they were obligated to pay the outstanding loan and it was contemplated by them that upon failure to do so their property would be liable to sale as was held in ***Willis International Engineering and***
10 ***Contractors Ltd and another Versus DFCU Bank Limited MA No. 1000 of 2015.***

Having already established that there are triable issues that need to be resolved in the main suit regarding the legality of the mortgage and the outstanding sum of the loan, I would find that the applicants would suffer
15 irreparable injury if this temporary injunction was denied.

The applicants specifically the 2nd and 3rd are in possession and occupation of the suit property as their home and if they are evicted and the property sold they would be left homeless and have to start afresh which cannot be adequately compensated in damages. The 2nd condition has been met.

20 The third condition is balance of Convenience. In ***Jover Byarugaba Vs Ali Muhoozi and Anor (Misc. Application 215 of 2014) [2014] UGHCCD 173***, Hon. Lady Justice Elizabeth Ibanda Nahamya stated that
25 ***“it is trite law that when Court is in doubt on any of the above principles, it will decide the application on the balance of convenience. The term balance of convenience literally means the if the risk of doing injustice is going to make the applicant suffer then probably the balance of convenience is favorable to him /her and court would most likely be inclined to grant to him or her the application for a temporary injunction.”***

5 Counsel for the applicants submitted that the current *status quo* is that the
applicants are in possession of the same and the balance of convenience
favour them. Counsel further submitted that the position of the law as seen
in ***Kiyimba Kaggwa Vs. Hajji Nasser Katende [1985] HCB 43*** at
page 44 is that the person in possession of land is said to have the balance of
10 convenience.

Counsel for the respondent submitted in reply that the 1st Respondent is a
regulated financial institution and to meet its regulatory compliance
requirements it is obligated to recover from defaulting borrowers. Therefore,
the balance of convenience would be in its favour since it will continue to
15 suffer bad debts in its records if the application is allowed.

In the instant matter, I would consider that the *status quo* of the suit
property and the triable issues would tilt the balance of convenience in
favour of the applicants for were this application to be denied the main suit
would become nugatory as the property for which the parties have come to
20 court would have been sold and the issues of legality of the mortgage would
be determined in respect of a disposed property. This application thus
satisfies all the ingredients necessary for the grant of a temporary injunction.

It thus allowed accordingly.

4. Orders:

- 25 a) The application is allowed.
- b) A temporary injunction is granted restraining respondents, its
employees, servants, agents and workmen from selling, dealing in and
or interfering with the Applicant's property comprised in Plot 1 Volume
4460 Folio 12 land situated at Okille Road Soroti until final disposal of
30 the main suit.

5 c) Costs to abide the outcome of the main suit.

I so order.



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Hon Justice Dr Henry Peter Adonyo

Judge

8th June 2022