THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISC. APPLICATION NO.109 OF 2016
(OUT OF CIVIL SUIT NO. 075 OF 2016)

MUTEGEKI JOHN …… APPLICANT

VERSUS

1. **MUTABAZI JOSEPH**
2. **KIRENGA FRED**
3. **TROPICAL BANK LTD…….. …… RESPONDENTS**

RULING
BEFORE HON. LADY JUSTICE EVA K. LUSWATA

This application is presented by chamber summons under Order 41 rules 1, 2 and 3 of the Civil Procedure Rules (CPR) and Section 98 to seek an order for a temporary injunction, against the respondents to restrain them, or their agents or successors in title from entering upon and evicting the applicant from, wasting, damaging, alienating, selling and transferring land and developments comprised in Kyadondo Block 243 Plot 1811 at Luzira (hereinafter referred to as the suit land) until disposal of HCCS. No. 075 of 2016 (the main suit) and for costs of the application.

The grounds of the application were set forth in the summons and in his affidavit in support of the summons, the applicant stated that as the registered proprietor,he holds a title and is in possession of the suit land. He deems the transfer of the suit land from the 1st to the 2nd respondent as being fraudulent and is strongly opposed to the mortgage on the suit land which was obtained by the 2nd respondent from the 3rd respondent and seeks the temporary injunction to protect the suit land from any action by the respondents until disposal of the main suit.

In reply, the 2nd respondent argued that he obtained ownership of the suit land from the 1st respondent *bonafide* and subsequently obtained a loan against it from the 3rd respondent. He doubted of the merits the main suit claiming that the title held by the applicant is questionable.

At the hearing of the application, the applicant's counsel choose to withdraw the application against the 1st applicant who had in fact not filed any affidavitin reply. Both counsel for the 2nd and 3rd respondents submitted in effect that they did not oppose the application on condition that the applicant paid to the 3rd respondent, the equivalent of 30% of the outstanding debt at the time of filing the application. This, counsel argued was in line with Regulation 13(1) of the Mortgage Regulations No. 2 of 2012. Counsel for the applicant opposed that submission with reasons.

I allowed both counsel to make brief oral submissions. Those, and the parties' pleadings shall be the basis of this ruling. It follows therefore that although the application seeks the interim relief of an injunction, there is need to determine whether the applicant would qualify so to apply in line with the current law of mortgages and the traditional provisions of temporary injunctions.

The brief submissions of counsel for the respondent appear to suggest that notwithstanding that the application is presented under Order 41 CPR over which there is no contest, the provisions of the mortgage law that require that a security deposit be made before adjournment or stoppage of a sale are paramount, or at least, applicable to the circumstances of this case.

The relevant provision under scrutiny is Regulation 13, and excerpts of it are reproduced for ease of reference.

Regulation 13(1)

> *"The court **may** on the application 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 mortgaged property or outstanding amount".*

Regulation 13(4)

> *"Where a sale is stopped or adjourned at the request of the mortgagor… **or any other interested party,** the mortgagor …..or that interested party **shall** at the time of stopping or adjourning the sale payto the person conducting the sale a security deposit of 30% of the forced sale value of the mortgaged property or the outstanding amount, whichever is higher. "(Emphasis mine)*

Counsel for the applicant had knowledge of the above rules but strongly contested their application to his client. He argued that the main suit is pivoted on fraud in that, the 1st respondent without the knowledge and consent of the applicant, obtained registration of the suit land which he transferred to the 2nd respondent. That the latter in turn, mortgaged the property to the 3rd respondent yet the applicant remains in possession (with paying tenants therein) and has his duplicate certificate. That the applicant who had no hand in those transactions is neither an agent of the 2nd respondent, nor a spouse to any of the first two respondents. That he cannot even be deemed to be an interested party in a transaction that he is challenging before this court. In his view, the regulation is merely discretionary and not mandatory and thus its interpretation should be subject to the peculiar facts of each case as presented to court. He argued further that the rule is unconstitutional in that it has the effect of depriving a deserving owner of his property merely due to his being impecunious.

Counsel argued that there was no connivance between his client and the 1st respondent, since at the time he filed the suit, the applicant was not aware that it was his son, the 1st applicant, who had defrauded him. That the decision to withdraw the application against him was based on the fact that the 1st respondent had by then divested himself of the suit land and thus ceased to have any interest in it.

In reply, counsel for the 2nd respondent argued that the applicant admitted knowledge of the 1strespondent his son, to whom he previously gave the suit land which the latter was free to transact in with the 2nd respondent. He argued that the decision to withdraw the application against the 1st respondent was a ploy to defeat the other respondents' interests in the suit land. He argued thus that the applicant would qualify to be an interested party who should comply with the provisions of the Mortgage Regulations.

On his part, counsel for the 3rd respondent submitted that there is a clear and legally defined relationship of a credit facility agreement between the 2nd and 3rd respondents and for that reason, his client holds a charge over the suit property. That the process of a sale was initiated because the 2nd respondent failed to comply with the repayment terms and for anyone to challenge that foreclosure, they were bound to abide by Regulation 13(1).

I have in a previous ruling found that that the Mortgage Act 2009 and Regulations which were both promulgated after the Civil Procedure Act and Rules, make provision for the formation and management of mortgages generally, and adjournment or stoppage of a sale of mortgaged properties specifically. I did find then and still hold the same view that, although the traditional grounds for granting an injunction have their foundation in the Judicature Act, CPR and common law, where they are being considered in respect to the sale of mortgaged property, they would have limited application or at least, they should be applied in accordance with and not in conflict with the Mortgage Act and Regulations. See **Agnes Katushabe Vs. the Housing Finance Bank Ltd & Anor Misc. Appl. No. 134/2015.**

Justice Madrama had a similar view in***Willis International*** **Engineering and Contractors Ltd & Anor Vs DFCU Bank Ltd Misc. Appl. No 1000/15,** when he held that the statutory requirements under the Mortgage Regulations currently overide traditional considerations for the grant of a temporary injunction. This is because, a temporary injunction if granted will in most cases have the effect of stopping a sale until the matters in controversy in the main suit are dealt with.

With respect, I am not prepared to buy into the arguments put forward for the applicant that the above provisions are not mandatory. Indeed, Regulation 13(1) is coined to give discretion to the Court to decide whether a party should be granted the relief of stoppage of a sale. Once that is done, the obligation to make the 30% payment is mandatory and must be fulfilled for the order of stoppage to have effect depending on the time given for the payment to be made. Again, it appears that the term "…*any other interested party*" would include all other persons other than the mortgagor, their agent or legal spouse. In fact, an exemption 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.

That said, the Regulations should not be read in isolation, especially of the parent Act and the rules of equity under which the law of temporary injunctions generally operates. The legal position is that the Mortgage Regulations 2012 were prescribed by the Minister of Lands under section 41 (1) of the Mortgage Act generally for the better carrying into effect of the purposes

and provisions of the Act. Upon default on the loan, a mortgagee generally has recourse to any of the remedies provided for under Sections 20 to 26 of the Mortgage Act.

On the other hand, under Section 33, a mortgagor, mortgagors (if it was a joint mortgage), spouse of a mortgagor or trustee in bankruptcy of a mortgagor may apply to court for relief against the exercise by the mortgagee of any of the remedies under Section 20, including the powers of sale. It is reasonable to believe that the provisions of Regulation 13 were born out of Section 33 of the Act so that the term "…..*any other interested person*" would allude to those listed in Section 33 and others in the same position who are not necessarily privy to the mortgage agreement but who for legal reasons can bring an action based on their interest in the mortgaged property e.g. a spouse for lack of consent, indemnity in the mortgaged property etc. This of course would be an issue of fact to be considered on a case by case basis.
It is appreciated that the provisions of Rule 13 were designed to protect commercial institutions like banks in their quest to execute remedies open to them and previously agreed upon with the borrowers following defaults of mortgages. However, I am not prepared to believe that it was meant to be a catchment provision to cover every possible applicant against such sales. It is my considered view that a party who comes to court with a claim that without his knowledge and consent, his certificate of title, which is still in his possession, was used by another fraudulently, to procure a loan would fall under the ambit of Regulation 13.

It is my view that Reg.13 (1) is intended to forestall sales of mortgages where for some reason other persons interested in the mortgaged property challenge the sale on purely legal grounds. Fraud is not per se a legal but a distinctive cause of action which, if proved, would unravel all transactions including a registered mortgage. It is not in dispute that in the main suit, the applicant/ plaintiff alleges fraud against the three respondents. It is also undisputed that he was never party to the mortgage deed. To that extent, he is only an interested party for purposes of safeguarding the suit land against sale while he proves the alleged fraud. He is not deemed an interested party merely for legal reasons. Therefore, Reg.13 (1) does not apply to him because he was never party to the mortgage which is being challenged on grounds of fraud. Of course he is still expected to prove his claims in the main suit, but for now, he is *primafacie* entitled to be

considered for a remedy of a temporary injunction against the sale, without having to pay the statutory deposit envisaged in the Regulations; and I so hold.

There was not much contest against the application for a temporary injunction. It is settled law that for one to enjoy that equitable remedy the following conditions must be in place.

1. The applicant has to show that he has a prima facie case with a probability of success in the main suit.
2. The applicant has to show that he is likely to suffer irreparable damage if the injunction is denied.
3. If court is in doubt as to the above considerations, it will decide the application on the balance of convenience.

See for example **American Cyanamid Co. Vs Ethicon Ltd [1975] AC 396** and **E.L.T.Kiyimba Kaggwa Vs Hajji Katende (1985) HCB 43.**

A prima facie case with a probability of success is no more than that the court must be satisfied that there is a serious question to be tried. Both the applicant and 2nd respondent appear to be in agreement that two titles currently exist in respect of the suit land with each party claiming to hold the genuine copy. This therefore calls for an investigation to be made in the main suit on the *bonafides* of those titles and generally the entire transaction of the mortgage. Those are serious questions which would merit the status quo to be maintained until a decision is handed down in the main suit. I would also find merit in the arguments by the applicant that the suit land is his property and the imminent sale would occasion him substantial loss if it turns out that he was correct in his assertion that its transfer from his name and the entire mortgage process was a fraudulent venture by the respondents. For now, the balance of convenience lays in his favour to maintain his possession until final disposal of the main suit.

I would therefore allow the application and grant the temporary injunction in the terms that it is sought. I hold in addition that the costs of the application shall abide the outcome of the main suit

I so order.

EVA K. LUSWATA
JUDGE
14/07/2016