

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
LAND DIVISION  
MISC. APPLICATION NO.462 OF 2015  
CIVIL SUIT NO. 249 OF 2015**

**OTUBENY JOSEPH ..... APPLICANT**

**VERSUS**

**1. HOUSING FINANCE BANK LTD.  
2. KAMUGISHA AGENCIES LTD. .... RESPONDENTS**

**RULING  
BEFORE HON. LADY JUSTICE EVA K. LUSWATA**

This application is presented by chamber summons under Order 41 rules 1 and 9 of the Civil Procedure Rules (CPR) to seek an order for a temporary injunction against the respondents to restrain them, or their agents/workers from selling, or in any other way disposing off of land comprised in Kyaggwe Block 104 Plot 451 at Lumuli Mukono (hereinafter called the suit land) until disposal of HCCS. No. 249 of 2015 (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 deposed that as registered owner of the suit land, he secured a loan in the sum of Shs,360,000,000/- from the 1<sup>st</sup>respondent in order to carry out construction on the suit land. He contended that only Shs.306,000,000/- was actually disbursed by the 1<sup>st</sup> respondent which resulted into the construction stalling. He considered the unfulfilled disbursement as a breach of the loan agreement and contested the attempts of advertising the suit land for sale as unlawful and made in bad faith. He has for that reason filed the main suit to contest the sale through a permanent injunction and in addition sought general damages and interest.

Ms Joanita Ethel Aber, the 1<sup>st</sup> respondent's legal manager swore an affidavit in reply to the application. She agreed to the facts of the credit facility and advised that the suit land was offered and taken as security save that it was extended to both the applicant and a one Mr. Oematum Lawrence Kenneth. She argued that the mortgagors breached the mortgage agreement when they failed to carry out the works as periodically approved, the loan disbursements were not used for the intended purpose and, they failed to pay the loan and interest as agreed which

prompted the 1<sup>st</sup> respondent to exercise its remedy of sale. She argued that this application is an abuse of court process as being designed to suspend the applicant's obligations under the mortgage. She further argued that the applicant was mandated to deposit a 30% security before the sale could be stayed. The applicant did not file an affidavit in rejoinder to Ms Aber's depositions.

Temporary injunctions are provided for under Order 41 Rule 1(a) of the Civil Procedure Rules which provides that;

*“Where in any suit it is proved by affidavit or otherwise -*

- 1. That any property in dispute in a suit is in danger of being wasted, damaged or alternated by any party to the suit or wrongfully sold in execution of a decree; or*
- 2. The court may be 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 disposing of the property as the court thinks fit until the disposal of the suit or until further orders.*

The grounds for securing a temporary injunction that were laid down by Lord Diplock in **American Cynamid Co. Vs Ethicon Ltd [1975] AC 396** are now well settled in our jurisdiction. In particular;

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 **Robert Kavuma Vs M/s Hotel international 9SCCA No. 9 of (1999)** followed in **Suleiman Muwonge Lubega Vs The AG (Constitutional Appl. No. 7/2012)**.

The submissions made for the applicant centered on his right to a temporary injunction against the sale of the suit land until the matters in the main suit were decided. The fact of a subsisting suit was not contested and his counsel argued that a *prima facie* case was presented in that, the 1<sup>st</sup>respondent failed to advance the full loan sum as agreed upon which a fundamental breach of the mortgage agreement was, and that, the imminent sale would result into irreparable damage. Counsel for the 1<sup>st</sup> respondent conversely argued with authority that the applicant did not satisfy

the requirements for a temporary injunction. He argued strongly that the prayer in the main suit is for a permanent injunction and therefore, if a temporary injunction was allowed, it would serve to dispose of the main suit and render it as nugatory because in both cases, an order for stoppage of the sale of the suit land is sought.

The principle rationale of a temporary injunction is for the court to maintain the *status quo* pertaining until the main suit is disposed of. Thus, the prayer if granted, will only serve to stay the sale until the main suit is disposed of. On the other hand, the sale of the suit property is contested in the main suit on the ground that the mortgage agreement was discharged by breach of the 1<sup>st</sup> respondent. Thus, the prayer for a permanent injunction will serve to stay the sale entirely and revert the property to the applicant, its owner. If he were to succeed, the applicant would in that event, be entitled to other remedies as well. I would thus respectfully disagree with the arguments of counsel for the 1<sup>st</sup> respondent that the prayers in this application would dispose of the suit altogether. Their objection would thus fail.

I will now turn to the merits of the application.

In addition to their opposition of the orders sought, counsel for the 1<sup>st</sup> respondent argued that this being a mortgage, no stoppage could be allowed before the applicant had paid to the respondent a deposit of 30% of the forced sale value of the suit land. They argued in addition that the respondent was by law required to pay to the Bank of Uganda as a specific provision on account of the outstanding loan which is now classified as non-performing. There was no response to those arguments and I take it that counsel for the applicant preferred to concentrate his submissions upon his client's entitlement to temporary injunction.

The arguments of counsel for the respondent appear to raise a notion that notwithstanding the provisions of Order 41 CPR on temporary injunctions, 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.

It is without doubt that the above objection is one that many of our courts are bound to grapple with especially now that a relatively new law in the form of the Mortgage Regulations 2012 (hereinafter referred to as the Regulations) were passed. . I was faced with a similar challenge in the case of **Agnes Katushabe Vs The Housing Finance Bank Ltd & Anor Misc. Appl. No. 134/15** in which a spouse sought to delay the sale of family property as security of a loan, until her rights to lit had been determined in the main suit. I did find then and still hold the same view 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 consider then and agree with the findings of my brother Judge Christopher Madrama in the case of **Paunocks Enterprises Ltd & Ors Vs Stanbic Bank (U) Ltd HCMA No.1113/14** that the original jurisdiction of the High Court must be exercised in conformity with the written law, which in this case is the Mortgage Act and the Regulations. 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. In essence, it is the Mortgage Act and Regulations and not the 0.41 CPR which would apply in this case.

Having made the above decision, I will for ease of reference, reproduce the relevant sections of those Regulations.

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 payment to 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)*

Stemming from the above provisions, it appears that the party who wishes to stop or adjourn a sale has the option of approaching the court for such order, or making such request to the mortgagee or their agent. Invariably, in both cases, he/she is expected to make a security deposit of 30% of the forced sale value of the mortgaged property or outstanding sum. It appears also that the court can only adjourn or postpone the sale to a definite future date and time, obviously as way of giving the applicant a grace period to re-negotiate the loan terms or to repay it as demanded.

In his affidavit, the applicant did not deny the fact of the mortgage and deposed that Shs.305,000,000/- out of the loan was disbursed to him. His contention is only that he expected a larger sum as agreed in the mortgage agreement and deemed less payment as breach of the mortgage agreement. He has not denied the fact that the loan (or at least the part disbursed to him) is now non performing on account of his nonpayment. He has not denied the fact that the imminent sale is the result of the respondent making an attempt to recover the loan sum as agreed in the loan agreement or at least, as one of the remedies open to them in the mortgage law. In that event, he is entitled to the statutory remedy of stopping or delaying the sale but can only do so after paying the security deposit, and the court's hands are tied in that aspect. It was presented and not contested that the outstanding loan amount is Shs.351,718,340.93 (as at 21/5/15), 30% of that would be Shs.105,515,502,279/-.

There has been no deposition that the applicant is willing to pay the deposit or furnishing security in that regard. I would under such circumstances have no mandate to consider his application for a temporary injunction. That notwithstanding, the merits of the main suit still subsist and the applicant can still argue the merits of the mortgage or the contended breach of that mortgage by the 1<sup>st</sup> respondent. However, before then, he must first satisfy the requirements under the Regulations by paying the above stated sum. It is in his interest to do so, in order to guard against the main suit being rendered nugatory.

Therefore the application fails. However since there is a head suit still pending in this court, I order that the costs of this application abide the outcome of the main suit.

I so order.

*Signed*

**EVA K. LUSWATA  
JUDGE  
27/1/2016**