

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
MISC. APPLICATION NO.134 OF 2015  
(ARISING FROM CS. NO. 81 OF 2015)**

**AGNES KATUSHABE..... APPLICANT**

**VERSUS**

**1. HOUSING FINANCE BANK LTD  
2. KATUSHABE APOLLO.....RESPONDENTS**

**RULING**

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

The applicant is proceeding 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 1<sup>st</sup> respondent to restrain her and her agents from selling, evicting the applicant or dealing with property comprised in Kyadondo Block 229 Plot 2378 at Ntebetebe (hereinafter called the suit property) until disposal of HCCS No.81 of 2015 (the main suit) and for costs of the application.

The grounds of the application are enumerated in the motion and expounded upon in the applicant's affidavit. She deposed that she is the plaintiff in the main suit and married by custom to the 2<sup>nd</sup> respondent with whom she resides in the suit property with their four children. She further deposed to have contributed to its development. She states further that in 2014, she was served with a notice of the 1<sup>st</sup> respondent of their intention to sale the suit property on account of the 2<sup>nd</sup> respondent's default on a loan that he had taken out from the 1<sup>st</sup> respondent. She subsequently learnt of a notice of intended sale of the suit property by public auction advertised in the Daily Monitor Newspaper. She asserted that she had not consented to the mortgage transaction and as the spouse of the 2<sup>nd</sup> respondent, had filed the main suit to protect her rights in the suit property, which is family property and prevent its sale.

The 1<sup>st</sup> respondent opposed the application and in an affidavit deposed by Fred Byamukama, her legal and compliance officer, gave the background of the mortgage the result of which the suit property was up for sale. He deposed specifically that M/s New Calvary General Hardware is the principle debtor and the 2<sup>nd</sup> respondent furnished a statutory declaration in which he attested on oath that he was not married and that the suit property is not family land. That the 3<sup>rd</sup> respondent is in default and in neglect of the loan repayment and as such, the 1<sup>st</sup> respondent's

action of foreclosing against the suit property is a lawful exercise of their right as a mortgagee. That the actions of the applicant would have the effect of staying a lawful sale yet the 1<sup>st</sup> respondent has an obligation at law to make provision for all defaults for non-performing loans such as the one in issue here.

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 alienated by any party to the suit, or wrongfully sold to execution of a decree.*
- 2. 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 disposing of the property as the court thinks fit until the disposal of the suit or until further orders.”*

The principle rationale of a temporary injunction is for the court to maintain the status quo pertaining until the main suit is disposed of. I note that counsel for the applicant has extensively submitted on that principle and on the grounds that the applicant is required to satisfy before a temporary injunction order can be granted. These grounds which were laid down by Lord Diplock in **American Cyanamid Co. Vs Ethicon Ltd. [1975] AC 396** are now well settled in our jurisdiction. That is to say;

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/she 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 SCA No.8 of 1990.**

1<sup>st</sup> respondent’s counsel did not raise strong objections to the submissions on the above grounds. Instead, he carried forward his earlier oral submissions in court that his client was willing to concede to the application on condition that the applicant fulfilled the conditions laid down in

Regulation 13 of the Mortgage Regulations 2012 (hereinafter referred to as the Regulations). I find it practical to address that submission first before delving into the actual merits of the application and for ease of reference, I will reproduce Regulation 13 (4).

*“Where a sale is stopped or adjourned at the request of the mortgagor, an agent of the mortgagor the spouse of the mortgagor or any other interested party, the ...spouse of the mortgagor shall, at the time of stopping or adjourning the sale, pay 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.”*

Counsel argued that Byamukama had by his affidavit shown that the 2<sup>nd</sup> respondent was in default of the loan which by 17/10/15 stood at Shs.113,364,217/- and that by law, the 1<sup>st</sup> respondent is required to make equivalent financial provisions for that default on the non-performing loan. He argued that by this application, the applicant sought to stop the sale of the suit property and accordingly, the provisions of the above section should apply for her with full force and with no exception, even if it were to be believed that she is the spouse of the debtor.

In response, counsel for the applicant argued that the 1<sup>st</sup> respondent need not make any provision for the non-performing loan since there is evidence in Annexure HF3 to Byamukama’s affidavit, that the loan is insured against the unfortunate eventuality of nonpayment. They further argued that under Regulation 13 (6), a spouse is given some latitude against payment of security in that, the decision to order such payment is in the discretion of court. They prayed that such discretion be judiciously executed in their client’s favor because if the payment of security is made a pre-condition to stay the sale, and if the applicant were to fail to meet that condition, which is the likely situation, then she would be precluded from enforcing her spousal right to matrimonial property which would be an order that is tantamount to discriminating against her on grounds of her economic status.

It is clear that the request to stop or delay the sale is being made by the applicant (through an application for a temporary injunction), not to the party conducting the sale (or their agent) but to the Court. For that reason, I would opine that Regulation 13(1) as much as Regulation 13(4)

would apply in the circumstances. For reasons of clarity Regulation 13(1) is also reproduced here below:

*“The court may on the application of the...spouse 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.”*

Both parties agree that there is an exception to the above rule in Regulation 13(6) which is likewise reproduced below:

*“Notwithstanding regulation (1) where the application is by the spouse of a mortgagor, the court shall determine whether that spouse shall pay the thirty percent deposit.”*

My understanding of the provisions of Regulation 13(1) and (6) when read together, is that an application meant to stay a sale by a spouse is made an exception in that on request, the court may exercise her judicial discretion to stop or delay the sale of a mortgaged property. By all means, if the injunction is granted it will not result into the sale being permanently stopped but only delayed until the issues in controversy in the main suit are settled. Even then, before that can be considered, the applicant should present facts to persuade the court that hers is a case for which judicial discretion ought to be employed to allow delay of the sale but, at the same time exempt her from paying the statutory deposit.

That said, counsel for the applicant raised issues with Regulation 13, arguing that it would negate the preconditions for the grant of an order of temporary injunction against the sale. That submission is viable and I would therefore still be taxed to decide whether an application for a temporary injunction to delay the sale of mortgaged property would be an application envisaged by Regulation 13 of the Regulations or, whether the provisions of the Regulations have now overtaken and override the equitable protection traditionally offered by temporary injunctions.

Temporary injunctions are specific equitable remedies whose genesis is Section 14 and Section of the Judicature Act and operationalized by Order 41 CPR. They are ordinarily awarded to preserve the subject in issue until the rights of parties are fully determined. They rely heavily on judicial discretion and can only be entertained when subsisting within an ordinary suit filed under provisions of both the Civil Procedure Act and Rules. The preconditions for granting the order have already been given and will not be repeated here. Suffice to say, the payment of

security in monetary terms is not a precondition for granting a temporary injunction although the court may, in its varied discretion order such payment if the facts justify it. On the other hand, the Mortgage Act 2009 and succeeding Regulations were promulgated (inter alia) to consolidate the law relating to mortgages, and for their discharge, including, matrimonial homes and remedies of mortgagors. The provisions of Regulation 13 specifically address the issue of adjournment or stoppage of a sale of a mortgaged property.

My brother Judge Madrama had an opportunity to consider a dispute with similar facts in the case of **Paunocks Enterprises Ltd & Ors Vs Stanbic Bank (U) Ltd H.C.MA.A 1113/14**. He did previously agree with my views about the genesis of the equitable remedy of injunctions and added that the original jurisdiction of the High Court must be exercised in conformity with the written law and where there is none, in conformity with common law, doctrines of equity or established custom. In his view, and I do agree, such written law is the Mortgage Act and the Regulations. It would follow therefore, 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. This is because the Mortgage Act and Regulations is the law that made specific provision in relation to the way mortgagor properties are to be applied, repayment achieved and the rights of debtors/mortgagors protected. In particular, Regulation 13 created a statutory right for the debtor, their spouse or other interested persons, to stop or adjourn the sale of mortgaged property upon a mandatory payment of a statutory deposit. Therefore, any *prima facie* spouse who wishes to enjoy the protection of the exemption, should at least put forward sound reasons why the court should exempt them from that payment. In my view, since the debt is not necessarily denied, such reasons would include or at least allude to their inability to pay the deposit or such related matters. Those facts can of course be juxtaposed with the other reasons that one would ordinarily present before a temporary injunction is granted, but the applicant's inability to pay should at least be expressly shown.

The applicant has deposed that she is legally married to the 2<sup>nd</sup> respondent and that the suit property which is under threat of sale is their family home in which she, the 2<sup>nd</sup> respondent and their children reside. She has stated that she did not authorize and was not aware of the mortgage transaction which has caused her trauma and inconvenience. She is strongly opposed to the sale and has as a result, filed the main suit to challenge it and will therein be expected to prove all those facts. Her fear is that the property will be sold before the issues in controversy are determined in the main suit. On the other hand, the respondent has presented quite economically justifiable arguments that they continue to incur considerable loss as a result of nonpayment by the 2<sup>nd</sup> respondent, and in payments to BOU for a loan that is not denied.

The issue of the deposit was first raised by the 1<sup>st</sup> respondent in paragraph 6 of Fred Byamukama's affidavit thereby putting the applicant on notice that the 1<sup>st</sup> respondent expected payment of the deposit before a stay of the sale could be achieved. There was no specific reply to that deposition save for submissions of the applicant's counsel that Shs.34million (which is the expected sum) is too large a sum for an average Ugandan to raise. It was also submitted but not shown that a sale would impinge on the applicant's rights and discriminate against her on grounds of her economic status. I would consider those submissions as arguments made from the bar and in my estimation, nothing was put forward to show the applicant's financial circumstances or capacity to throw light on her inability to pay the security deposit. The result is that, this court would thus have no basis upon which to exercise its discretion. Judicial discretion must be exercised judicially and on a case by case basis. She for example, **Monica K. Bakenzana Vs Nile Bank Ltd & Anor, HCMA 224/05.**

In conclusion, the applicant has not satisfied this court that she is entitled to the statutory exemption against paying of the 30% statutory deposit. Under such circumstances, a temporary injunction cannot be granted to stay the sale until the main suit is heard and determined. However, under Regulation 13 (4), delay of the sale can be achieved even without recourse to Court. It is still open to the applicant to approach the 1<sup>st</sup> respondent or their agent to negotiate payment of the deposit in order to delay the sale.

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

I so order.

*Signed*

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