

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MISC. APPLICATION NO. 1536 OF 2017
(ARISING FROM CIVIL SUIT NO. 772 OF 2017)

MUTUMBA ZAITUNI (*Suing through her*

Lawful Attorney (ABUBAKER MOHAMMEDI) ::::::::::::::: APPLICANT

V E R S U S

- 1. CRANE BANK LIMITED** (*In Receivership*)
- 2. DFCU BANK LIMITED** ::::::::::::::: **RESPONDENTS**
- 3. JAMES MUTUMBA**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

This is an application brought under **Section 98** of the **Civil Procedure Act** and **O.41, R1 1& 9** of the **Civil Procedure Rules** for a temporary injunction to restrain the 2nd Respondent; its servants, agents, workmen, proxies and or persons claiming under it from selling, evicting the Applicant or otherwise interfering with the Applicant's use and occupation of the property comprised in Kyadondo Block 265 plot 4909 at Bunamwaya, until the final disposal of Civil Suit No. 772 of 2017.

The application is supported by the affidavit of Mr. Abubakari Mohammed the lawful Attorney of the Applicant – Mutumba Zaitun.

The 2nd Respondent swore an affidavit by Muhammad S. Kiwanuka in opposition of the application. The 1st Respondent also opposed the application vide an affidavit sworn by Mukiibi Semakula. The 3rd Respondent swore an affidavit in reply in his own names. The Applicant filed an affidavit in rejoinder through Abubakari Mohammed in which he controverted the said replies.

From the Chamber summons, the grounds for this application are not given. However from the Applicant's affidavit, Abubakari Muhammed stated that the 3rd Respondent (Defendant) James Mutumba had procured the Applicant's consent for the mortgage transaction executed, pursuant to a loan facility for shs. 260,000,000/- (*two hundred sixty million*) only and US\$ 150,000 (*one hundred and fifty thousand*) by way of a bank draft, secured by land comprising in Kyadondo Block 265 Plot 4909 at Bunamwaya.

However the Applicant discovered that in 2016, the 3rd Defendant (Respondent) had received further overdrafts from the 1st Respondent and mortgaged the suit property without her consent. All transactions alluded to have happened between 2014 and 2016, while she was outside Uganda, pursuing further education.

That on 22nd March 2017, the 2nd Defendant/Respondent served a notice of default and put out the property for an intended sale. The suit property was later advertised for sale on 26th September 2017. The Applicant then filed Civil Suit No. 22 of 2017 for a permanent injunction from the sale and eviction or interference with Kyadondo Block 265 Plot 4909 at Bunamwaya; being a matrimonial home; and hence this application.

It is from the above affidavit that the grounds seem to arise. The Applicant's Counsel in submissions though has intimated that;

'the purposes of the application for all intents and purposes seeks to restrain the Respondents from the suit premises and or taking any further steps which in turn trigger events leading to loss of her property until the determination of the head suit and the Applicant is not disposed of the suit property. 'What the Applicant seeks is a protective order, against the Respondent barring them from dispossessing him of the suit property. It is this status quo, the Applicant remaining in possession of the suitland that the Applicant seeks to preserve and no other, until the main suit is heard and determined on its merits'

Counsel for the Applicant recited the law applicable as stated under **O.41 RI** of the **Civil Procedure Rules** and *Kiyimba Kagwa versus Haji Abdu Katende (1985) HCB 43;* wherefore he argued that;

The status quo be maintained by preserving the home as it is since it is the Applicant's matrimonial home (per paragraphs 14 and 15 of the affidavit in support of Mr. Abubakari Mohammed.

He also argued that the Applicant has a prima facie case with a probability of success as shown in paragraphs 2, 4, 6 and 7 of Abubakari Mohammed's affidavit, and paragraphs 5(d), 5(e), 5(f) and 7 of the plaint.

Counsel argued that the Applicant is likely to suffer irreparable injury which damages cannot be adequately atoned for because there is:

- a) Threat of loss of a matrimonial home.
- b) Applicant is under effective occupation, hence the Applicant would be rendered homeless, yet no amount of damages will and or can atone for the loss of goodwill, reputation that will result from the eviction.

It was further argued that the balance of convenience lies in favour of the Applicant because;

- a) The suit property is the Applicant's family and matrimonial home.
- b) The state of things was not challenged or contradicted by the 2nd Respondent which is currently in possession of the title deed for the suit premises.

Counsel also addressed himself to the other legal matters regarding the 2nd Respondent's written statement of defence and affidavit in opposition. He concluded that the issue of continuing security be handled as a triable issue in the main suit. He concluded further that the requirement for depositing 30% (*thirty*) of the outstanding amount was not applicable to the current matter.

On their side, Counsel for the 2nd Respondent relied on the affidavit deposed by Mohammed S. Kiwanuka. Counsel reviewed the requirement for grant of a temporary injunction as stipulated in *Kiyimba Kagwa* (*supra*) and noted that the Applicant had failed to prove any of them. Counsel argued that as *status quo*, the Court must maintain the advertisement of the property in the terms as provided; and nothing less.

On irreparable injury, Counsel argued that the Applicant's affidavit does not demonstrate the same; as the affidavit of Mohammed alludes to matters not within his knowledge.

On balance of convenience, Counsel argued that it favours the Respondent who lent depositors' money and its repayment is now at stake.

On the other considerations, under **Section 13(1) of the Mortgage Regulations 2012**, they relied on the decision in **Ganafa Peter Kisawuzi versus DFCU Bank Ltd Civil Appeal No. 16/2006** which held that;

'Grant of an order of an injunction is not available to an Applicant who is in breach of Regulation 13(1) of the Mortgage Regulations 2012.

Referring to the decision in **Miao Huaxian versus Crane Bank and Anor; Misc. Application No. 935 of 2015**, they argued that;

the Applicant must as a matter of law, deposit 30% (thirty) of the current outstanding amount which translates into shs. 495, 570, 855.9/- (four hundred ninety five millions, five hundred seventy, eight hundred fifty five point nine) only.

The Respondents argued further that the Applicant cannot injunct the process of the Law. They also accused the Applicant of being guilty on the principle of approbation and reprobation.

Having reviewed all the evidence and pleadings/submission above, I now make findings as herebelow;

This application was brought under the provisions of **Section 98 of the Civil Procedure Act and O41 R1 & 9**. This puts it under the law governing grant of temporary injunctions.

Under O.41 Rule 1 (a) of the Civil Procedure Rules. It is provided that where in any suit, it is proved by an affidavit or otherwise that;

- a) any property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, or wrongly sold in execution of a decree or
- b) the Respondent 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 order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.

The conditions governing this discretion were laid down in the case of **Kiyimba Kagwa versus Hajji Abdu Katende (1985) HCB 43.** These conditions are that;

- 1) The aim is to preserve the *status quo*; until the question to be investigated in the main suit is finally disposed of. (see **Irene Mutumba versus Crane Bank Ltd; Misc. Application No. 18/2013**)
- 2) The Applicant must show that there is a *prima facie* case with a probability of success.
- 3) The Applicant must prove that he will suffer irreparable injury which damages cannot be adequately atoned for.
- 4) The balance of convenience must tilt in favour of the Applicant.

In the case before me and having regard to all arguments, I find that the Applicant's case is premised on facts which bring into play the law of Mortgages. The property for which the Applicant seeks relief is already a subject of a mortgage, therefore an issue arises regarding the Application of the **Mortgage Regulations 2012**. The Applicant did not ground his application on any specific grounds in the chamber summons, but Counsel in submissions referred to the affidavit drawn in support to conclude that the applicant seeks a '*protective order*' (paragraph 3 of his submissions).

I will consider this application bearing in mind that it is governed both by **O.41** of the **Civil Procedure Ruled** and the **Mortgage Regulations**.

Under O.41 of the **Civil Procedure Rules**, the Applicant must prove that there is a *status quo* to protect.

The 2nd Respondent has argued that the *status quo* currently is the one subsisting by way of the mortgage relationship in that the property has been advertised by the Bank to recover its money.

On the other hand, the Applicant claims the *status quo* to preserve is the fact that the suit property is in the effective occupation of the Applicant (*as per paragraph 24 of the affidavit in support*); and *paragraph 14 of the affidavit in rejoinder*.

I am of the view that in considering a '*status quo*', Court aims at preserving the subject matter as at the time the matter is drawn to the attention of Court. The state of affairs prior to the filing of the suit is what is to be preserved. Therefore by the time the Applicant came to Court, the property was already advertised and the 2nd Respondent had taken steps under the Mortgage Regulations to deal with it as per the law.

What Court can preserve is therefore that state of affairs. This position of the law was well articulated in the cases of *Commodity Trading Industries versus Uganda Maize Industries and Another (2001 – 2005) HCB 118* and *Sekitoleko versus Mutabaazi & Others (2001 – 2005) HCB 79*; which state *inter alia* that ;

'status quo does not refer to who owns the suit property, but refers to the actual state of affairs that pertain on the suit premises prior to filing of the main suit. The subject matter of a temporary injunction is the preservation/protection of legal rights pending litigation. It is not concerned with the determination of who has the legal title'.

In this case therefore, we cannot divulge into the question of *status quo* without inquiring into the question of whether there is a *prima facie* case.

What amounts to a *prima facie* case was explained in the case of *Godfrey Sekitoleko versus Peter Mutabazi* (*supra*) that;

what is required is for the Court to be satisfied that the claim is not frivolous or vexatious, and that there are serious questions to be tried.

In the present case, judging from the submissions of both Counsel and the pleadings, there are serious issues revolving on the questions;

- 1) Whether the facilities obtained by the 3rd Respondent from the 1st Respondent were on a continuous basis.
- 2) Whether the same security having been used for the different loan facilities required separate spousal consent for each transaction.
- 3) Whether the Applicant is guilty of approbation and reprobation.

These and other issues show that the suit is not *frivolous* or *vexatious*. Looking at the plaint, under paragraphs 2, 15 – 2.21, it shows that there are serious questions to be tried to determine whether land in Kyadondo Block 265 plot 4909 Bunamwaya is a matrimonial home, and cannot be subjected to a mortgage without the consent of the Applicant, rendering the intended sale pursuant to the mortgage illegal, *null* and *void*.

I do find therefore that there is a *prima facie* case.

The next question to determine is whether the Applicant will suffer irreparable damage if the injunction does not issue.

Irreparable damage has been defined by Black's Law Dictionary 9th Edition page 447 to mean;

'damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurements'

Furthermore, according to the case of Kiyimba Kagwa versus Haji Abdu Katende; (*supra*), this damage was meant to be injury that is substantial or material and cannot be adequately compensated in damages.

The Applicant claims that losing a matrimonial home, a residence for herself and family for which she has sentimental attachment is not compensatable for by damages. The 2nd Respondent however argues that the suit property was subjected to a charge and is therefore capable of being sold.

The 2nd Respondent attacked the affidavit in support for not demonstrating the alleged injury; as the affidavit by Mohammed depones to matters not in his knowledge.

I have considered the facts and the evidence. I am inclined to believe that by the Applicant consenting to the first loan transaction as a spouse, removes any doubt that the ‘*spouse element*’ goes along with the subsequent transactions to which this property was later subjected. If it is sold, she loses it as ‘*a spouse*’ and no amount of damages can replace the lost enjoyment, spouse/family emotions and sentiments attached therein.

I am further persuaded by the fact that the said transactions allegedly happened in her absence, hence the element of shock at the altered *status quo*, evokes emotions.

I therefore find that this test has been proved.

Having found that the above two elements (*prima facie case*) and irreparable injury are found to exist, there is no need to divulge into an examination of the balance of convenience.

The Court however, needs to be guided further by the provisions of the **Mortgage Regulations 2012; Regulation 13(1)** thereof which provides;

‘the Court may on the application of the mortgagor, spouse, agent 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% (thirty percent) of the forced sale value of the mortgaged property or outstanding amount’.

The above provision was referred to in the submissions by the 2nd Respondent’s Counsel, citing the decision by the **Court of Appeal** in **Ganafa Peter Kisawuzi versus DFCU Bank Ltd Civil Appeal No. 16/2006** which held that;

‘Grant of an order of an injunction is not available to an Applicant who is in breach of Regulation 13(1) of the Mortgage Regulations 2012.

Counsel argued that the discretion to injunct the process of sale can only be exercised upon deposit of 30% (*thirty percent*) of the amount outstanding or the forced sale value of the mortgaged property.

The 2nd Respondent argued that the process of law cannot be injuncted, as it is a process governed under the **Mortgage Act**.

In response, counsel for the Applicant referred to other decided High Court decisions particularly *Nakayaga versus Fina Bank HCMA NO. 390 of 2014* and *Parul Ben Barot versus Victoria Co. Ltd; HC MA NO. 319 of 2017*. These cases in my view, though persuasive, are subject to the superior decision by the Court of Appeal in this matter.

I also take special note that each of the quoted High Court cases dealt with a different case scenario whose facts led the presiding Judges to invoke rules of equity to balance justice with the law.

Applying the same test to the case before, I find that the Applicant is caught up by the provisions of **Regulation 13(1)** of the **Mortgage Regulations**. The Court of Appeal, having stated with finality that;

*‘Grant of an order of an injunction is not available to an Applicant who is in breach of **Regulation 13(1)** of the **Mortgage Regulations**.*

This Court is bound by that interpretation of the rule. No amount of Legal Ping Pong can help the Applicant out of this requirement unless exceptions to the same are shown, which is not the case here.

In view of the above findings therefore, though the Applicant has proved the requirement for grant of a temporary injunction in the ordinary spine under **O.4 R1 & 9** of the **Civil Procedure Rules**, she still has to satisfy the requirements of the **Mortgage Regulations - Regulation 13(1)** of the said Regulation as per the decision in *Ganafa Peter Kisawuzi versus DFCU Bank Ltd.* (*supra*), by depositing 30% (*thirty percent*) of the outstanding amount OR the forced sale value.

Having found as above, I do find that the Applicant is entitled to a stay of the anticipated sale by auction if she can deposit the 30% (*thirty percent*) of the forced sale value or outstanding amount.

This 30% (*thirty percent*) is supposed to have been paid before the sale is stopped upon the application by the Mortgagor or Spouse under the Mortgage Act.

However, since the applicant has moved to Court under **Section 98 of the Civil Procedure Act** and **O.41** of the **Civil Procedure Rules**, but the provisions of the **Mortgage Act** have also been brought into play and in the interest of justice, the injunction order will be given, subject to the following directions;

1. The Applicant is given a grace period of 120 (*one hundred twenty*) days from today's date within which to deposit the 30 (*thirty*) percent of the forcible sale value OR outstanding amount.
2. The 2nd Respondent shall not advertise or sale the said property during the stated period of 120 (*one hundred twenty*) days within which the Applicant must provide and show proof of such deposit.
3. The order will automatically lapse if no deposit is provided at the end of the said 120 (*one hundred twenty*) days.
4. The 2nd Respondent should provide to this Court within 15 (*fifteen*) days from today the calculated 30 (*thirty*) percent forcible value OR outstanding value as approved by the Chief Government Valuer.
5. Costs to abide in the main cause.

I so order.

.....

Henry I. Kawesa

J U D G E

12/2/2018

12/2/2018:

Denis Sembuya for Applicant.

Abukari Applicant's representative.

2nd Respondent: Philbert Mpiirwe on brief for Michaela Mafabi.

Matter for Ruling.

Court: Ruling delivered to parties.

.....

Henry I. Kawesa

J U D G E

12/2/2018