

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

MISC. APPLICATION NO. 240 OF 2018

DFCU BANK LIMITED ::APPLICANT

V E R S U S

GEOFREY MUWANGA::RESPONDENT

BEFORE HON. MR. JUSTICE HENRY I. KAWESA

RULING

The Applicant moved this Court by way of Notice of Motion for orders that the temporary injunction order granted in Misc. Application No. 1470/2018 be vacated; and in the alternative that the Respondent be ordered to pay 30% as security deposit of the mortgaged property or outstanding amount to the Applicant. They prayed for costs of this Application. The application is brought under O.52 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act.

Briefly, the grounds are that when granting the orders under Misc. Application No. 1470/2018, Court did not take into account the affidavit in reply and submissions of the Applicant. According to Isaac Mpanga's affidavit in support under paragraphs 6, 7, 8, 9, 10, 11, 12, 13 14, 15, 16, 17 and 18 thereof, the background to this is given. The application was not opposed by the Respondents. No affidavit in reply, nor submissions were filed.

Given the above, it is trite that parties proceed on the basis of their pleadings. Parties are to that extent bound by their pleadings as observed in ***Interfreight Forwarders versus East***

African Development Bank (1990 – 1994) EA 117 page 125, where the Supreme Court held that;

“a party will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of pleadings”

An affidavit in support or in reply is therefore part of pleadings. The effect of not filing an affidavit where the law requires one was held to be a fatal omission in *Agro Supplier Ltd versus Uganda Development Bank HC CS NO. 379/2005*. Therefore in this case, the absence of an affidavit in reply implies that there is no rebuttal to this application.

I will then turn to consider if the Applicant is entitled to the reliefs sought. Firstly, I noted that the Applicant claims that he was denied a hearing during the progress of Misc. Application No. 1470/2017. The facts as pleaded when checked out, are found to be a little disturbing. The Court file for Misc. No. 1470/17 does not have any affidavit in reply and submissions for the Applicant as claimed in paragraph 8 and 13 of Isaac Mpanga’s affidavit. What is true however is that upon cross checking the Court record, it is a fact that the said reply and submissions were filed on the Misc. Application file No. HCT-00-LD-MA-1471-2017; Godfrey Muwanga versus Ssembatya John Patrick – Application for interim order. The said papers were therefore not part of the said Misc. Application No. 1470/2017.

That be as it is, there is truth in the fact that the Applicant owns the attached annex ‘A1’ and ‘A2’ which in essence were aimed at addressing issues raised in Misc. Application No. 1470/2017. The contents when examined are pertinent and lend credence to the issues the Applicant raises in this current application.

I do find for a fact therefore that though the Respondent obtained injunctive relief vide Misc. Application No. 1476/2017, the Applicant is right to raise the alternative prayer under paragraph (f) of his application to wit the fact that the Applicant is entitled to a deposit of 30% of the outstanding amount. This is because by law, it is a requirement under Regulation

13(1) of the Mortgage Regulations 2012 that every such Applicant pays a security deposit of 30% of the forced sale value or of the outstanding amount.

In *Ganafa Peter Kisawuzi versus DFCU Bank Civil Appeal No. 0064/2016*, it was held by the Court of Appeal that;

“The Applicant who is in breach of the above provision of the law, has no right to a grant of an order of a temporary injunction stopping the intended sale.”

For the above reasons, this application is granted with orders that the injunction order granted in Misc. Application No. 1470/2017 against the Applicant in favour of the Respondent is hereby amended under Section 98 of the Civil Procedure Act, to include an order that the injunction is conditioned upon the Applicant satisfying the provisions of Regulation 13(1) of the Mortgage Regulations by depositing 30% of the outstanding amount.

Costs granted to the Applicant.

I so order.

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Henry I. Kawesa

JUDGE

12/04/2018

12/04/2018:

Mr. Aisu Isaak for Applicant.

Respondent present

Court: Ruling delivered to the parties above.

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Henry I. Kawesa

JUDGE

12/04/2018