

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

(CORAM: S.T. MANYINDO, D.C.J; A. MPAGI-BAHIGEINE, J.A; S.G.
ENGWAU, J.A)

CIVIL APPLICATION NO.32 OF 1997

BETWEEN

SAMUEL FROBISHER OWORI..... APPLICANT

AND

NON-PERFORMING ASSETS RECOVERY..... RESPONDENT
TRUST

(Arising from Court of Appeal Civil Appeal No. 33/97)

RULING OF THE COURT

This is an application by Notice of Motion under Rule 5(2)(b) of the Rules of this Court, for an injunction restraining the respondents from selling the applicant's property situate at Plots Nos 6 and 4 Martyrs Garden, Ntinda in Kampala (hereinafter referred to as the property) pending disposal of his appeal in this court.

The applicant borrowed a huge sum of money from the Uganda Commercial Bank ten years ago. The loan was not repaid and was eventually treated as a non-performing one by the Bank. Accordingly, it was transferred to the respondents as a non-performing loan.

In 1996, he filed a suit with the Non-performing Assets Recovery Tribunal (NPART) seeking, inter alia, a declaration that his loan was a performing loan and for an order that he be allowed to redeem the mortgage on the property mentioned above. On the 30th of July 1997, the tribunal dismissed the applicant's suit with costs to the respondents. The respondents counterclaim for Shs.357, 945, 008/ as the outstanding balance of the said loan was allowed as it was not disputed 'by the applicant. The applicant was ordered to pay the respondents' costs of that counter-claim.

On the 1st of August 1997, the respondents advertised the property for sale. The sale was scheduled for 1st September, 1997. The applicant then applied to the tribunal for an order of stay of execution or a temporary injunction against sale of the property. The application was refused on the 25th August, 1997, on the ground that since taking out the loan, the applicant had not made any effort to comply with the terms of servicing it.. Hence this application.

By 29th August 1997, when this application was lodged in this court the property was intact. But on 1st September 1997, it was sold by private treaty for Shs.185, 000,000/—. A down payment of Shs. 40, 000, 000/ was deposited and the balance of Shs. 145, 000, 000/ was to be paid within 6 months on terms to be mutually agreed by the parties.

Learned Counsel for the applicant contended before us that the sale was incomplete in which case this court could stop it by injunction. He argued that the contract of sale was conditional because: -

- (a) the buyer had to procure and present by 10th October 1997, a guarantee either by a Bank or Insurance Institution for the outstanding balance;

- (b) interest was imposed on the outstanding balance and;
- (c) transfer was not to be effected until after presentation of the Bank or Insurance guarantee.

According to Counsel there was only a process of sale and not a sale in that the certificate of title, possession and full purchase price have not yet changed hands. He cited section 50 of the Civil Procedure Act under which an order for a sale becomes absolute only on payment of the full purchase price.

Further, learned Counsel for applicant cited the authority of: **Erinford Propertied Ltd. V Cheshire County Council [1974] 412 All ER 448** whose reasoning was adopted by the Supreme Court in **Lawrence Musitwa Kyazze v. Eunice Busingye civil Application No. 18 of 1990 (unreported)** for the proposition that there may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid and that when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not rendered nugatory.

According to Counsel the memorandum of appeal raises substantial questions of fact and law rendering the appeal not frivolous and greater hardship would not be caused to the respondent¹ especially as negotiations relating to the payment of the balance of the full purchase price was still in process within the next 6 months. He, therefore, prayed for the grant of the injunction.

For the respondents; it was contended by their Counsel, that this application is misconceived, frivolous, and a waste of Court's time because:-

- (a) the applicant does not deny his indebtedness to the respondents
- (b) the applicant has never made any effort to pay any money to the respondents as part settlement of the loan;
- (c) before the commencement of the hearing of the suit the tribunal had, at the

applicants instance, granted him a temporary injunction restraining the respondents from selling the property in question provided he paid the expenses of postponing the sale but the applicant failed or neglected to do so, and

(d) that in any case as the property has since been sold off the application has been overtaken by events. There is no impending sale to be stopped by an injunction.

It was also argued that the sale by private treaty was done pursuant to the provisions of the mortgage between the parties so that section 50 of the Civil Procedure Act is inapplicable as it relates to a sale in execution of a decree which is not the case here.

We do not see any merit in this application. The sale of the two houses was advertised by the respondents pursuant to the powers conferred to them by the respective mortgages.

The advertisement clearly showed that the respondents were proceeding under the Registration of Titles Act, the Mortgage Decree, 1974 and the Non-Performing Assets Recovery Statute, 1994. Regulation 7 of the NPART Regulations 1995 empowers the respondents to determine among others the value and price for the disposition of the assets. In this case the respondents sold the property to the H/s J.Z. Holdings Ltd. who partly paid the contract price. In our opinion the contract was complete when part of the purchase price was deposited. It is immaterial that the price was not paid in full or that the purchaser did not take possession of the property. The moment the contract was entered into the purchaser acquired an equitable interest in that property.

We are satisfied that the applicant's property was sold off on 1st September 1997. So in the circumstances it would be futile to order a stay of sale. Such an order would not be enforced.

In the result; the application is dismissed with costs to the respondents.

Dated at Kampala this 19th day of November 1997.

S.T. MANYINDO,

DEPUTY CHIEF JUSTICE.

A. MPAGI-BAHIGEINE ,
JUSTICE OF APPEAL.

S.G. ENGWAU,

JUSTICE OF APPEAL.