

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**COMMERCIAL COURT DIVISION**

**HCT-00-CC-MA-0436-2007**

(Arising from HCT-00-CC-CS-0517-2007)

FLORAH RWAMARUNGU

APPLICANT

VERSUS

DCFU LEASING CO. LTD

RESPONDENT

**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE**

**RULING**

1. Florah Rwamarungu is the plaintiff in the head suit and the applicant here. She is seeking a temporary injunction to restrain the defendant from selling the suit property which was mortgaged to the respondent by her husband, without her consent, as a spouse and yet, the suit property, she contends, is the matrimonial home with her husband, Mr. Yusuf Rwamarungu.

2. I shall set out the relevant portions of the affidavit sworn by the applicant for ease of reference.

‘2. That I have been married for over 25 years to Yusuf Rwamarungu and have established a matrimonial home in Kiruhura in land comprised in Plot 2 Block 52 Folio 49 Vol 1113 Nyabushozi- Mbarara. (A copy of the certificate of title is annexed hereto and marked ‘A’).

3. That the above property is our matrimonial home and family land which we all derive sustenance especially farming and cattle keeping. 4. That sometime in August 2002 my husband obtained a loan in DFCU and mortgaged our commercial property comprised in leasehold register volume 2481 Folio 3 Plot 15 Ndibalema Road. (A copy of the mortgage agreement is annexed and marked ‘B’) 5. That I gave consent for the mortgage of the above property (see annexure ‘C’). 6. That later in 2004 my husband together with the respondent substituted the mortgaged title of the commercial property in Mbarara with that of the matrimonial home, land and farm comprised in Plot 2 Block 52 Folio 49 volume 1113 Nyabushozi Mbarara, without my knowledge, approval or consent. 7. That my husband and respondent Bank entered into a mortgage agreement on the 16<sup>th</sup> of September 2004 in respect of the matrimonial land and home which mortgage was not consented to by me and as such is nul and void as it contravenes the law. (A copy of the variation deeds is attached hereto and marked ‘D1’ and ‘D2’).

3. The respondent opposes this application and filed an affidavit in reply in support of the respondent's position. The affidavit asserts that the claim that the suit property is the matrimonial home of the applicant is false in so far as the applicant's matrimonial home is Plot 15 Ndibarema Road, and reliance is placed on her own consent for the mortgage of that property.

4. Secondly the respondents stated that the suit property had already been sold to a third party following a warrant of attachment issued by this court in HCT-00-CC-CS-0613-2005, Yusuf Rwamarungu v DFCU Leasing Ltd.

5. It is now settled that that where a party seeks a temporary injunction before determination of the main suit, that party must, firstly, show that it has a prima facie case. Secondly that it stands to suffer irreparable loss should the injunction not be granted. And in case of doubt, the matter can be resolved on a balance of convenience.

6. In order to succeed on this application the applicant must demonstrate that she has a prima facie case, or at least an arguable one. At this stage, as no trial has taken place the court is not required to evaluate the case in detail or assess at great length the probability of success of the same. However, the court must be able to be satisfied that there is some serious question to be investigated.

7. Section 39 of the Land Act (Chapter 227) as amended by the Land (Amendment Act) 2004 bars, inter alia, mortgaging 'family land' without consent of a spouse. Family land was substituted for the original phrase in the Chapter 227 which referred to 'any land' or 'land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance'. The import of this change is yet to be clear. And can only be addressed I suppose after a full trial of the matter, to determine if the suit land is indeed the nature of land protected under the provisions of the law.

8. Nevertheless the applicant describes this suit land variously as the matrimonial home and land. But in the annexure 'C' to her own affidavit she describes another property, Plot 15 Ndibareema Road, other than the suit land, as the matrimonial home/residential home. It is possible that a person or a family may have two matrimonial homes but if that is the case, those homes must be described as such to be understood as such.

9. In her affidavit in paragraph 6 she describes Plot 15 Ndibarema Rod, as the commercial property in Mbarara, and not as the matrimonial home/residence as described in annexure 'C' to her affidavit. This is a serious contradiction. It may point to a deliberate lie, leaving her credibility in question. But I suppose since the law now protects family land, which may be more expansive, rather than a matrimonial home, this may not be material. Even if it is not actually a matrimonial home/residence, it may still be family land, and thus protected. On the basis of that it is possible to find that a prima facie case is made out.

10. However, what has not been shown is whether the applicant would suffer any irreparable loss should the temporary injunction not be granted. The applicant has alleged, '12. That if the suit land is sold before the hearing of the main application for injunction, I will suffer irreparable loss and damage as I have no where else to go or take my family and no other source of income apart from farming and cattle keeping.'

11. Loss of a source income does not in itself constitute irreparable loss. By the nature of an income source, the stream of income following from that source is quantifiable in monetary terms, and cannot be 'irreparable' in the sense that it cannot be atoned for by damages, since it is capable of quantification, without more. The applicant alleges that she has no where to go but I am not sure why. This in itself is not sufficient to prove irreparable loss in any case. At the same time it appears to be false, given the contents of Annexure C to the affidavit she swore that

indicates that she has a matrimonial home/residence at Plot 15 Ndibarema Road, Mbarara.

12. I would find that this application has no merit for failure to prove irreparable loss.

13. There is another matter that merits attention. During the hearing of this application learned counsel appearing for the applicant conceded that the sale had occurred but challenged the legality of the sale, asserting that it was not in accordance with the court order in that suit. I presume challenges to that sale will proceed in the proper forum as in fact no challenge of that sale is raised before this court in this proceeding. Nor could this court be able to deal with such challenge on an application such as this application.

14. What is important to note is that this application seeks to restrain a sale of the suit property but the sale has occurred. The purpose of a temporary injunction is to maintain the status quo and not to alter it. As the sale has occurred already, even though its legality may be disputed, this application is coming too late. It cannot succeed in the circumstances.

15. The applicant is of course free to pursue the main suit and obtain such relief against the respondent or such other parties as she may add to this action, as the law allows her.

16. This application is dismissed with costs.

Signed, dated and delivered this 20<sup>th</sup> day of September 2007

FMS Egonda-Ntende  
Judge

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