

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 872 OF 2015
ARISING FROM CIVIL SUIT NO 662 OF 2015**

- 1. HABIB OIL LIMITED}**
- 2. HABIB PROPERTIES LIMITED}**
- 3. HABIB BROTHERS LIMITED}**
- 4. BLACK EAGLE INVESTMENTS LIMITED}**
- 5. HABIB KAGIMU}.....APPLICANTS**

VERSUS

STANDARD CHARTERED BANK UGANDA LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This is an application for a temporary injunction to restrain the Respondent, its servants and agents from selling or enforcing the mortgage in respect of the Applicant's mortgaged properties comprised in FRV 345, Folio 20 Plot 18 Wampewo Avenue, Kololo, Busiro Block 401 Plot 483 and Plot 489 Busiro, Bwebajja, Kyaggwe Block 116 Plot 140 Kyaggwe Kitega, FRV 419, Folio 14 and 13, Plots 6A – 8A and Plot 10A – 12A Amberley road Jinja, LRV 3618 Folio 12 Plot 1094 Sir Apollo, Makerere, LRV 3253, Folio 2 Block 1 Plot 100 Kashari, Mbarara, LRV 3906 Folio 9 Plots 1-9 Bridge Street Jinja, LRV 50, Folio 17 Plot 19 Martin Road, Old Kampala and LRV 3135 Folio 9 Plot 114 – 116 Bunyoyi Drive, Kiswa, Kampala pending the hearing and final determination of HCCS No. 662 of 2016 and for costs of the application to be provided for.

The grounds of the application in the Chamber Summons are as follows:

1. The Applicants filed HCCS No. 662 of 2016 against the Respondents seeking orders inter alia that;
 - a. A declaration that the banking transactions contract between the Applicant and the first Respondent is frustrated. In the alternative but without prejudice;
 - b. A declaration that the Respondents recall of the first Applicant's loan is irregular, premature and illegal.
 - c. A declaration that the Respondent's notice of sale of the Applicants mortgaged properties is irregular and illegal.

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- d. A declaration that the loan amounts demanded by the Respondent are inflated and did not due.
 - e. A declaration that the interest charged by the Respondent under the loan is excessive, speculative and uncertain, making it void and unenforceable.
 - f. An order that an account and reconciliation of the first Applicants loan account to determine the correct loan amount due to the Respondent.
 - g. A permanent injunction restraining the Respondent, its agents or servants from selling the Applicants mortgaged properties comprised in;
 - FRV 345, Folio 20 Plot 18 Wampewo Avenue, Kololo,
 - Busiro Block 401 Plot 483 and Plot 489 Busiro, Bwebajja,
 - Kyaggwe Block 116 Plot 140 Kyaggwe Kitega,
 - FRV 419, Folio 14 and 13, Plots 6A – 8A and Plot 10A – 12A Amberley Road Jinja,
 - LRV 3618 Folio 12 Plot 1094 Sir Apollo, Makerere,
 - LRV 3253, Folio 2 Block 1 Plot 100 Kashari, Mbarara,
 - LRV 3906 Folio 9 Plots 1-9 Bridge Street Jinja,
 - LRV 50, Folio 17 Plot 19 Martin Road, Old Kampala,
 - LRV 3135 Folio 9 Plot 114 – 116 Bunyoyi Drive, Kiswa, Kampala
 - h. A permanent injunction restraining the Respondent, its agents or servants from taking any loan recovery measures against the Applicants or enforcing the debenture.
 - i. General damages for mental anguish and inconvenience.
 - j. Exemplary damages.
 - k. Costs of the suit.
2. The main suit pending before this honourable court discloses substantial issues for determination with a very high likelihood of success.
 3. However, the Respondent bank through its servants or agents is threatening to unlawfully sell the Applicants mortgaged properties.
 4. If not restrained and the Respondent goes ahead to sell the mortgaged properties, the Applicants are likely to suffer irreparable damage for which no amount of monetary compensation shall sufficiently atone.
 5. The balance of convenience is in favour of the Applicants for the orders sought in this application.
 6. It is fair, urgent and in the interest of justice that the injunctive order sought in the application is granted.

The Applicant's application is supported by the affidavit of Ahmed Noor Osman, the chief executive officer of the first Applicant and it repeats the grounds of the application as set out in the chamber summons. The facts in support of the application disclosed by the affidavit in support are that sometime in 2010, the first Applicant entered into a fuel supply agreement with

Messieurs Electro-Maxx (U) Ltd for its thermal power plant which was to supply power to the national grid under a power purchase agreement with Uganda Electricity Transmission Company Ltd. On the basis of the business transaction, the first Applicant approached its bankers, the Respondent, to finance the importation of fuel to be supplied under the agreement. After careful evaluation of the liability of the business, the Respondent granted import loan facilities which included short-term loans; import invoice financing facilities, overdrafts and bonds to the first Applicant on 3rd January, 2013 and subsequently on 24th July, 2014 all in the aggregate amount of US\$9 million. It was a condition precedent before granting the facility that the first Applicant would submit its fuel supply agreement with Electro - Maxx to the Respondent and also assign all receivables from the said entity to the Respondent. It was also a condition precedent before grant of the facility that the first Applicant would obtain a payment guarantee from Electro - Maxx and assign it to the Respondent. The first Applicant complied with this condition as well. Additionally, the first Applicant complied with other conditions demanded by the Respondent which were:

Firstly, to issue to the Respondent a bank guarantee in the sum of US\$2 million. Secondly, to obtain and present personal guarantees of the fifth Applicant and Ahmed Noor Osman, a director of the first Applicant to the Respondent for the sum of US\$9,100,000. Thirdly, to create a debenture over the fixed and floating assets of the first Applicant. Fourthly, the creation of a legal mortgage of the Applicant's properties described above.

Under the facility granted to the first Applicant, the interest chargeable by the Respondent was stated to be at or about 10% per annum but it was the scale indeterminate since it was subject to change at the sole discretion of the Respondent.

The Respondent granted the facilities to the first Applicant on the strength of its aforesaid business and it was understood that the source of loan repayment were the payments from Electro - Maxx. The first Applicant undertook supply of fuel to Electro - Maxx but started experiencing delayed payments which were in turn caused by delayed payments from Uganda Electricity Transmission Company Ltd. The Respondent was at all material times aware of the delayed payments which frustrated the first Applicant's ability to service its loan and by way of mitigation; the first Applicant sold some of the mortgaged properties with the consent of the Respondent in order to service the loan. Notwithstanding the first Applicant's efforts to pay in the face of frustration and without recourse to the Electro - Maxx guarantee assigned to it, the Respondent kept on issuing demands, a notice of default and because of the loan to the fifth Applicant and recently on 25 August 2016, and it issued a notice of sale of the Applicant's mortgaged properties. In the last notice of sale, the Respondent demanded US\$2,539,476 which does not take into account payments made on the loan account by the first Applicant. As a result of the Respondents action the fifth Applicant has suffered severe mental anguish and inconvenience. He further deposes that if it is not restrained, the Respondents who attended sale and disposal of the Applicant's property shall occasion the Applicants irreparable loss and

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damage for which no amount of monetary compensation shall atone. Secondly, it will render the main suit nugatory since the very essence of the suit is to challenge the threatened sale of mortgaged properties. Thirdly, the balance of convenience is in favour of the Applicants because the Respondent can still recover any money that may be due to it after the termination of the main suit by the Applicants who would have lost property, business and the good will.

In a supplementary affidavit in support of the application Ahmed Noor Osman, the Chief Executive Officer of the first Applicant, further deposed that as follows:

On 2nd September, 2016 he filed before this court HCCS No. 662 of 2016 and Miscellaneous Application Number 872 and 873 of 2016 arising from the same suit. The basis of the suit against the Respondent was pursuant to frustration occasioned to the first Applicant that made it difficult to clear the loan and the resultant notices of sale of the Applicant's properties. After filing the matter in court, he got to know on 5th September, 2016 after reading the new vision newspaper at page 17 that the Respondent had advertised the first Applicant's property for sale. The advertisement of the first Applicant's property was done in bad faith and clearly demonstrates the Respondent's high-handed intention towards selling off the Applicants properties without due regard to the prevailing circumstances.

In reply Jacqueline Barlow, the Accounts Manager - GSAM of the Respondent deposed an affidavit which discloses the following:

On 3rd January, 2013 and 24th July, 2014, the 1st Applicant applied for and obtained facilities that included; term loans, an overdraft, short term loans, import invoice financing facility, Bonds, Guarantees and Facility letters from the Respondent amounting to a total of USD 9,000,000. The facilities were secured by the following; A Debenture over fixed and floating assets of the Company for USD 10,100,000; Directors personal guarantee from the 5th Applicant for USD. 9,100,000; a legal Mortgage for USD. 2,500,000 over land comprised in LRV 3135 Folio 9, Plot 114-116, Bunyonyi Drive-Kiswa; Supplementary mortgage of USD. 9,100,000 over the following properties owned by the Applicants; FRV 345, Folio 20, Plot 18 Wampewo Avenue, Kololo ("the Kololo Property"); Busiro Block 401 Plot 483 and Plot 489 Busiro, Bwebajja; Kyaggwe Block 116 Plot 140 Kyaggwe Kitega; FRV 419 Folio 14, Plot 10A-12A, Amberley Road, Jinja; FRV 419 Folio 13 Plot 6A-8A Amberley Road Jinja; LRV 3253, Folio 2 Block 1 Plot 100 Kashari, Mbarara; LRV 3906, Folio 9 Plots 1-9 Bridge Street, Jinja; LRV 50, Folio 17 Plot 41 (Formerly Plot 19) Martin Road, Old Kampala; LRV 173 Folio Allidina Visram Street, Kampala; LRV 3618 Folio 12 Plot 1094, Sir Apollo Kagga Road, Kampala; Busiro Block 401 Plot 483, Bwebajja, Mengo.

In accordance with the Mortgage Deed, the loan amount together with the interest thereon were payable by equal monthly instalments from the date of disbursement of the loan

without the requirement for a reminder to make payment. The 1st Applicant began defaulting on his loan obligations in early 2014 and following the default, the 1st Applicant made various repayment proposals and offered to normalize its repayment obligations. The mortgage deeds provided that in the event of default the Respondent may recall the loan and realise the security pledged and exercise its statutory power of sale among other remedies. The first Applicant defaulted on its repayment obligations and despite several reminders it failed or refused or neglected to pay the amount due under the loan agreement. The Respondent indulged the first Applicant on proposals it made to repay the loan amount but the first Applicant failed to honour the proposals. Following the continued default, on 15th February, 2016, the Respondent issued a notice of default against the first Applicant. The notice informed the Applicant that if it continued to default on its loan obligation the Respondent would exercise its powers under the mortgage which included the right to sell part of the secured properties. Sale on 29th February, 2016, Electro – Maxx wrote to the Respondent and committed to the payment of the first Applicant debt obligation. It also wrote that it was expecting money from the government that would be used to pay the first Applicant debt obligations. On 11th April, 2016, the first Applicant wrote to the Respondent and informed it that it wanted to sell some of its secured properties. The first Applicant wrote that it was going to sell property comprised in plot 1 – 9 Bridge Street Jinja Municipality and plot 6A – 8A Amberley Rd, Jinja Municipality. The first Applicant promised to pay US\$975,000 into the Respondent’s account. Following the continued default of the first Applicant, the Respondent on 13th April, 2016 notified the Applicants of the default in the loan repayment obligations and recalled the loan in accordance with the law and the mortgage deed, demanding repayment of the loan monies due to it under the mortgage. The Respondent further noted that failure to comply with the terms of the demand notices would cause the Respondent to begin to exercise its rights under the mortgage which included the option of either placing the first Applicant under receivership; leasing/sub leasing the secured properties; entering into possession of the mortgage land; or sale of mortgaged properties.

On 13th of April, 2016, the Respondent notified the fifth Applicant of its guarantee obligations to the Respondent, pursuant to which the fifth Applicant undertook to pay to the Respondent a loan amounts due from the first Applicant in the event of default of the first Applicant under the facility. The fifth Applicant refused, failed or neglected to meet his obligations whether in whole or in part with regard to his guarantee within the time indicated in the notice of enforcement of guarantee. On 23rd June, 2016 the first Applicant wrote to the Respondent and made a commitment to pay US\$300,000 by 10th July, 2016. The first Applicant failed to honour its commitment. On 11th of July, 2016, the first Applicant acknowledged that it had failed to honour its commitment and made a promise to pay US\$300,000 by 30th of July 2016. On 28th July, 2016, the first Applicant wrote to

the Respondent that there had been a delayed payment of US\$800,000 and promise to make payment by 15th of August, 2015. On 22nd August, 2016, Electro - Maxx wrote to the Respondent attached a copy of a cheque and an electronic transfer form of money showing that it would pay US\$500,000 towards the liability of the first Applicant. The cheque and the transfer form had not been banked nor filed with the bank and US\$500,000 had not been received after the date of the affidavit in reply. On 25th August, 2016, the Respondent further issued the notice of sale of the fifth Applicant's mortgaged property in the realisation of the loan amounts and in accordance with the Mortgage Act but the first Applicant neglected to pay the loan amounts within the time stipulated in the notice. On 5th September, 2016, following the Applicant's failure to pay off the loan amounts, the Respondents advertised the Kololo property for sale. The amounts due under the mortgage are rightfully due and owing and had been calculated in accordance with the mortgage deed and the two instalment payments made by the first Applicant have been included therein. The first Applicant acknowledged its indebtedness to the Respondent.

On the basis of advice of her lawyers Messieurs Kampala associated advocates; Jacqueline Barlow deposed that the Applicants suit HCCS No. 662 of 2016 is incompetent and bad in law. Secondly, the sale of the suit properties can only be stopped or adjourned if the Applicant makes payment of the outstanding amount. Thirdly, the Applicants are seeking an equitable remedy which requires them to come to court with clean hands. However they have not made any mention of an intention to make payment of the outstanding amount but only seek orders of court to assist it in continuing to default on its loan obligations. (Paragraphs 25 – 29 are missing from the affidavit in reply).

The Applicant will not suffer any irreparable injury. The Applicant is pledged as security is well aware that in the event of default, the properties would be foreclosed to recover the Respondent's monies. Moreover, all the properties listed in the application, aside from one, are not in any danger of being sold off by the Respondent. The first Applicant has at all times been at liberty to redeem its properties from foreclosure by paying the full outstanding amount which by 25th August, 2016 amounted to US\$2,539,476 and continues to attract interest at the contractual rate. The Applicant has however demonstrated great laxity and unwillingness to redeem the suit property. Accordingly, the application ought not to be granted because the Applicant can be adequately compensated by way of damages. The Respondent is a reputable financial institution with the ability to refund any amounts due to the Applicant if the court so ordered. The value of the suit property is known and the Respondent is capable of compensating the Applicants in the event that they are successful in the main suit.

The balance of convenience tilts in favour of the Respondent. The Respondent stands to lose more than the Applicant in the event that the application is not granted since the Respondent will hold onto security to which it cannot have recourse and be deprived of

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collecting money rightfully due and owing to it and vital to its day to day business as a licensed financial institution. Lastly she deposed that it will be no abuse of the court process if the orders sought by the Applicant are not granted as the Applicants claim against the Respondent is frivolous and vexatious.

In rejoinder Charles Muhumuza the Chief Executive Officer of Electro- Maxx Ltd, a company which owns and operates a thermal power plant in Tororo under a concession power purchase agreement from Uganda Electricity Transmission Company Ltd, deposed as follows:

On 24th of April 2012, Electro – Maxx Ltd (referred to as ‘the company’) entered into a fuel supply agreement with the first Applicant for the supply of Furnace Oil to the said thermal power plant. The first Applicant applied for and obtained a credit facility from the Respondent to finance the supply of the fuel to the company. During the due diligence and credit appraisal of the first Applicant business, the Respondent’s bank officials visited the thermal plant and reviewed the power purchase agreement to satisfy themselves about the liability of the business to receive credit. As a condition for the grant of the credit facilities, the first Applicant was required to sign receivables under the fuel supply agreement towards loan repayments to the Respondent, a condition the first Applicant duly complied with. It was understood by the Respondent that the source of funding for the repayment of the loan by the first Applicant would be the payment from the company and that the fuel supply agreement. From the onset, when the company received payment from Uganda electricity transmission company Ltd, it remitted to the first Applicant, what was due to it and the first Applicant in due time made payments towards the loan repayment instalments due to the Respondent. Sometime in 2013, Uganda Electricity Transmission Company Ltd started to delay payments to the company for power supply which resulted in delayed payments to the first Applicant and the Respondent by extension. At the present, Uganda Electricity Transmission Company owes the company over US\$12 million and a considerable amount of that sum is due to the first Applicant which if paid would go a long way in settling the first Applicant is loan obligation to the Respondent. Uganda electricity transmission company Ltd made several promises and commitments to the company to settle its indebtedness and acting on the said commitments, the company in terms wrote to the Respondent undertaking to make payments to it on behalf of the first Applicant in a bid to settle the first Applicant's liabilities. As a result of the delayed/late payments, the company has also and intentionally delayed or failed to honour its undertakings made to both the first Applicant and the Respondent.

He further deposed that his company has done everything possible to demand for and follow up payments from UETCL and it is optimistic that payments will be made as soon as the correspondences attached show. The Respondent would not lose its money lent to

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the first Applicant or at all because the source of money for repayment is well known and it will materialise soon. The first Applicant is still supplying fuel to the company and if its activities are disrupted by the foreclosure action of the Respondent, it will force the first Applicant to breach its contractual obligations to the company and if it is done will cause termination of the very source for the loan repayments. In the circumstances it would be just and fair and in the public interest that the Respondents' intended action of foreclosure/sale of the first Applicant securities should be restrained.

The Applicant was represented in these proceedings by Counsel Fred Muwema of Messrs Muwema and Co. Advocates and Solicitors while the Respondent was represented in these proceedings by Bruce Musinguzi of Messrs Kampala Associated Advocates.

Submissions in support of preliminary objections

The court was first addressed on a preliminary point and subsequently on the merits of the application in written submissions. The Respondent objected to the application on the grounds that the 2nd to 5th Applicants have neither sworn nor filed affidavits in support of their Application for a temporary injunction and their failure to do so leave the Court with no choice but to strike them off the Application. The Respondent's Counsel submitted that the said Affidavit in support of this Application is deposed by a one Ahmed Noor Osman who describes himself as Chief Executive Officer of the 1st Applicant which implies that Mr. Osman is only competent to adduce evidence for and on behalf of the 1st Applicant. He cannot adduce evidence for and on behalf of the 2nd to 5th Applicants because he does not have, neither does he claim to possess, the capacity and/ or authority to do so. Counsel relied on **Nakalema & 3 Ors v Mucunguzi Myers (MISC. APPLIC. No. 0460 of 2013)**, where Justice Bashaija held on a similar issue that 'Whether it be a representative action under Order 1 rule 10 (2) and 13 CPR or suit by a recognized agent under Order 3 rule 2 (a) of the CPR or by order of court, the person swearing on behalf of the others ought to have their authority in writing which must be attached as evidence and filed on the court record. Otherwise there would be no proof that the person purporting to swear on behalf of the others has their express authority.'

He submitted that under Order 7 rule 4 of the Civil Procedure Rules it is provided that where a party sues in a representative capacity, they must demonstrate to the Court that they have taken essential steps to represent the other Plaintiffs/Applicants. More so, under Order 3 rule 1 and 2 of the Civil Procedure Rules, an Application in Court can only be made by a person himself, recognized agent or advocate and Order 3 rule 2 clearly states that a recognized agent is one with a power of attorney. As such Mr. Osman, having not shown in what capacity he deposed on behalf of the 2nd to 5th Applicant, cannot associate his Affidavit with the other Applicants. Counsel prayed that the 2nd to 5th Applicants having not deposed affidavits

in support of the Application, this court has no basis upon which to grant the orders they seek and accordingly their applications should be dismissed with costs.

The second point of law raised by the Respondent was the failure to comply with the mandatory pre-condition of payment of 30% to which Counsel submitted that under Regulation 13 (1) of the Mortgage Regulations of 2012, it is mandatory that a person before making an application for a temporary injunction must pay 30% of either the forced sale value of the mortgaged property or the outstanding amounts. He submitted that the courts have had an opportunity to review and interpret this rule and have reached the accurate conclusion that the requirement for the payment of the said 30% is mandatory where the Applicant is, inter alia, a mortgagor seeking to adjourn a sale of mortgaged property.

Counsel further submitted that the payment of 30% is a condition precedent to the application of a temporary injunction and suffice it to say if the 30% of the outstanding amount is not paid the Court should not hear the other grounds of the application. Counsel relied on the case of **Miao Huaxian v Crane Bank Ltd & Fit Auctioneers & Court Bailiffs H.C.M.A No. 935 of 2015**, where it was held that:

"That discretion is exercised only upon deposit of 30% of the outstanding amount or forced sale value of the property."

In the circumstances Counsel prayed that court should dismiss this application for non-payment of the 30% mandatory amounts.

Reply to preliminary objections

In reply to the first preliminary objection the Applicant's Counsel submitted that Order 41 rules 1, 2 and 9 of the Civil Procedure Rules under which the application was filed provides that any party to a suit can seek an Injunction in that suit to stop any property in that suit from being alienated and/or sold. Counsel further submitted that there is an affidavit in rejoinder sworn by Charles Muhumuza the Chief Executive officer of Electro - Maxx which affidavit is in support of all the Applicants in the matter as such the Respondent cannot aver that the rest of the Applicants' applications are not supported by any affidavit. He submitted that the true position is that the application is fully supported by two affidavits of Ahmed Noor Osman and Charles Muhumuza and that the application before this Court has got Five Applicants whose property is in danger of being alienated and any party out of the five can apply for an injunction within the meaning of Order 41 rule 1, 2 and 9 of the CPR. He submitted that court disregards the Respondent's submission on this point of law as raised since it is based on wrong law. He cited the case of *Kaingana vs. Dabo Boubou* (J 986) HCB 59, as quoted by the Respondent and submitted that it is actually supportive of the Applicants' application because it asserts the position that where an Application is grounded on
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evidence by Affidavit, a copy of that Affidavit intended to be used must be served with an action. In such a case the Affidavit becomes a part of the Application. He submitted that the Respondent has totally failed to prove its case on the first Preliminary point of law and the same should be dismissed.

In reply to the 2nd preliminary objection raised by the Respondent's Counsel he submitted that payment of 30% would mean the Applicants are seeking for time within which to pay which is not the case in this particular matter. He made reference to the case of *Ganafa Peter Kisawuzi vs. DFCU Bank CACA 64 of 2016*, which was referred to by the Respondent and submitted that it is distinguishable since in that case the intention was to adjourn the sale which is not the same case in this matter and submitted that this point be disregarded as well since it lacks merit and prayed that the preliminary points of law be dismissed with costs to the Applicants.

Rejoinder to preliminary objections

In rejoinder to the preliminary objections, the Respondent's Counsel submitted that the Applicants have attached and referred to an affidavit in rejoinder deposed by Mr. Charles Muhumuza; however, the said individual did not depose an affidavit in support and therefore cannot depose an affidavit in rejoinder. More so, Electro-Maxx is not a party to the suit and as such Mr. Muhumuza does not have the legal capacity to depose the said affidavit. He submitted that there is no nexus between Osman and the 2nd to 5th Applicants as he neither has capacity to speak on their behalf nor did he show his relation to them and in what capacity he deposes on their behalf or speaks for them. He submitted that the absence of affidavits in support of this application by the 2nd to 5th Applicants leaves their applications incomplete and according to the authority of *Kaingana v Dabo Boubou (Supra)* the effect of not having affidavit evidence is that the 2nd to 5th Applicants' ought to be struck off the Application. The authority of *Mukuye vs. Madhvani* was relied upon to emphasize the fact that an Applicant who deposes affidavit evidence on behalf of other Applicants must show in what capacity he does so and having failed to show his capacity and authority to depose evidence on behalf of the other Applicants. Counsel reiterated their prayer which is that the 2nd to 5th Applicants and their applications be struck off this Application as they are unsupported by evidence and court not grant any orders either for or against the Applicants in the circumstances.

In rejoinder to the second preliminary objection, the Respondent's Counsel submitted that the Applicants have filed this Application and are seeking to temporarily adjourn the sale of the suit properties until the hearing and determination of the main suit. The purpose of a temporary injunction is to preserve the status quo pending the disposal of the main suit and as such the Application before this Honourable Court is therefore by its nature aimed at adjourning a sale because a temporary injunction is deemed to be an

adjournment, then an Applicant who seeks to make such an adjournment should have first paid 30% before the filing of the application as stated in Regulation 13 (1). He submitted that the Court should not look into any other conditions for the grant of the temporary injunction before the payment of the 30%. Since the Applicants have admitted that they intended to stop the sale, they prayed that the Application be dismissed for non-payment of the 30% mandatory amounts and in the alternative prayed that the 1st Applicant, and or all Applicants, pay the 30% fee before proceedings to hear its application, failure of which the matter be dismissed with costs.

Applicant's written submissions

Counsel for the Applicant and the Respondent addressed the court in written submissions. The Applicants Counsel submitted that the law as to grant of injunctions is provided for under Order 41 Rules 1 and 2 of the Civil Procedure Rules S. I. 71- 1 which provides that;

"where in any Suit it is proved by Affidavit or otherwise that any property in dispute in a Suit is in danger of being wasted, damaged or alienated by any party to the Suit, the Court may by order grant a Temporary Injunction to restrain such act in deciding whether to grant an Application for an Interlocutory Injunction."

He further submitted that for court to grant a temporary injunction certain conditions for its grant must be fulfilled as was stated in the case of American Cyanamid vs. Ethicon Limited 1974 AC 396 and also enumerated in the Ugandan case of Kiyimba Kaggwa vs. Hajji A.N Katende 1985 HCB 43 to wit;

‘the basis of granting a Temporary Injunction is an exercise of judicial discretion and the purpose of granting it, is to preserve the status quo until the question to be investigated in the Suit, is finally disposed off and that the conditions of grant of a Temporary Injunction are that the Applicant must show a prima facie case with a likelihood of success, the Applicant is likely to suffer irreparable injury which would not be adequately compensated for or atoned for by an award of damages and if the Court is in doubt, then it will decide the application on the balance of convenience.’

In regard to prima facie case Counsel submitted that under paragraph 2 (a) of the affidavit in support, the Applicants contend that they filed HCCS No. 662 of 2016 against the Respondent which is pending hearing for declarations among others that the banking transactions contract between the First Applicant and the Respondent is frustrated. He further submitted that under paragraphs 3(a), (b), (c), (d), (e), (f) of the Affidavit in *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~ *&*\$\$# xtra+ *maximum735securityx 2017 style*

support their case has a likelihood of success as it discloses substantial issues that warrant Court's determination due to the high handed manner in which the Respondent is threatening to foreclose and dispose of the Applicant's mortgaged properties and debentures. He submitted that the delay by Electro - Maxx and Uganda Electricity Transmission Company Ltd to remit funds for the supply of fuel to the thermal power plant caused the Applicants not to honour their contractual obligations to the Respondent, a fact that is well known to the Respondent. This evidence discloses a *prima facie case* with a probability of success for the Applicants that warrants Court's investigation as was decided in the case of Kiyimba Kaggwa Vs. Hajji A.N. Katende (1985) HCB 43 where Court held that the conditions for grant of an Interlocutory Injunction among others are just that the Applicants must show a *prima facie case* with a probability of success. Counsel submitted that the issue of frustration must be investigated among others for which reason they prayed that court finds that the Applicant's main case raises pertinent issues that warrant court's investigation and irreparable loss for which no amount of monetary compensation shall atone. He further submitted that the Respondent is well aware of the monies due to the First Applicant from Electro - Maxx which were assigned to them and that Electro - Maxx is also owed money by UETCL. Both Electro - Maxx and UETCL have written to the Respondent acknowledging this and are promising to pay as soon as possible. Therefore the Applicants will suffer irreparable damage which cannot be atoned by damages if their properties are sold without giving due regard to these prevailing circumstances. He submitted that given the facts above and taking into consideration that it is not the intention of the Applicants to delay payment but it is because of factors beyond their control which factors are within the knowledge of the Respondent, this Court be pleased to find that the balance of convenience is in favour of the Applicants. He made reference to the case of made to the case of Gapco Uganda Limited vs. Kaweesa Badru and Sempala Obadia (HCMA No. 259 of 2013) where Court decided that;

"It is trite law if Court is in doubt of any of the above two principles, it will decide the Application on the balance of convenience. The term balance of convenience literally means that if the risk of doing an injustice is going to make the Applicants suffer then probably the balance of convenience is favourable to him/her and the court would most likely be inclined to grant to him/her the Application for a temporary injunction".

He prayed that court find that the Applicants have proved all the conditions necessary for grant of a Temporary Injunction and pray that this Application be allowed.

Submissions in reply

In reply the Respondent relied on the law regarding the grant of temporary injunction applications which was set out in the case of Kiyimba-Kaggwa vs. Katende (1985) H.C.B. 43 at pg. 44 thus;

"The conditions for the grant of an interlocutory injunction are first that, the Applicant must show a prima facie case with a probability of success. Secondly, such injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience. "

The Respondent's case is that the Applicants have no prima facie case with a probability of success and that in considering whether an Applicant in such applications has a prima facie case with a probability of success, courts actually consider whether there are serious questions to be tried. The issue of whether or not there are serious questions to be tried must be disclosed in the Applicant's pleadings in the main suit. Without a valid objection to the amounts stated by the Respondent as being due and owing or at least an estimated alternative loan amount due to the Respondent it cannot be argued that there is any serious question to be tried as to whether the Applicants are indeed indebted to the Respondent. The 1st Applicant has long been in perpetual breach of its repayment obligations under its loan facility as well as its self-initiated repayment proposals. He submitted that there is actually no partial or attempted partial fulfilment by the 1st Applicant of its loan repayment obligations in the instant case and on that basis alone, this court ought to find that there is no prima facie case. He also submitted that the Applicant will not suffer any irreparable injury that cannot be adequately atoned for by way of damages because as much as the Applicants are seeking a temporary injunction to stop the intended sale of the mortgaged property, they have also already undertaken to sale off the same properties in an attempt to pay off the loan amounts. In paragraph 3(j) of its Affidavit in support of the Application it was averred that;

"...The First Applicant sold some of the mortgaged properties with the consent of the Respondent in order to service the loan..."

Be that as it may, whereas the burden of proof lies on them, the Applicants have not illustrated in any way, that the sale of the mortgaged properties will result in suffering irreparable loss that cannot be atoned by way of damages. Further, the businesses and property referred to in paragraph 4.8 of the submissions as to what is at stake are classic examples of loss that can adequately be valued and compensated by damages as such an award of damages is clearly an adequate remedy in this case. That being the position, the law is that once they are an adequate remedy, no temporary injunction should be granted however strong the Applicant's case appears to be. This is premised on the leading case of American Cyanamid Co vs. Ethicon Ltd, (1975) 1 All ER 504, wherein it was held (refer to page 25 of the Respondent's authorities) that;

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"If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

The Respondent prays that the court finds that the Applicants have not made out a case for the grant of a temporary injunction and that therefore this application ought to be dismissed with costs to the Respondent.

Submissions in rejoinder

In rejoinder Counsel for the Applicant reiterated earlier submissions filed on the 14th day of August, 2016 and responds to the Respondent's submissions in reply as follows;

On the prima facie case, the Respondent in its submissions submits that it is not indicated anywhere in the Loan Facility Agreement that the purpose of the loan was to be for the supply of fuel to Electro-Maxx which is not true. In the Loan Agreement at page 5 condition number 9 which is annexure "B1" to the Affidavit in support of Chamber Summons, Electro-Maxx is mentioned as the party to acknowledge transport documents in case of financing transport invoices. It is therefore important to note that the Respondent cannot deny the existence of Electro-Maxx in the contract. It is not the intention of the First Applicant not to pay as submitted by the Respondent and therefore not a mere inconvenience it is more than that. They submit that their performance has been frustrated and/or prevented by Uganda Electricity Distribution Company Ltd, a fact that could not have been contemplated at the execution of the contract.

On the question of irreparable damage, the Applicants Counsel reiterated earlier submissions and submitted that the Applicants have shown that the Respondent intends to sell their property yet the contract has been frustrated. Their properties will never be regained if they are sold and yet non-payment is not out of their own will.

On the balance of convenience Counsel submits that the balance of convenience is in favour of the Applicants since they have a genuine case that needs court's investigation and if the Application is not granted the main suit will be rendered nugatory and prayed that court be pleased to grant the injunction.

Ruling

I have carefully considered the written submissions of Counsels as well as the application and authorities cited.

As far as the first preliminary objection to the application is concerned, it attacks the application brought by the second, third, fourth and fifth Applicants on the ground that their application is not supported by affidavit evidence.

I have carefully considered the question of parties and supporting affidavits and having considered that the credit facility was granted to the first Applicant, and the advertisement complained about for sale of property sought to be restrained in this application relates to the credit facility of the first Applicant, the preliminary objection does not and will not dispose of the first Applicant's application and if succeeds will only dispose of the applications of the rest of the Applicants. The first Applicant's application would survive and I do not find it necessary at this stage to dispose of this preliminary point since the affidavit in support and supplementary affidavit would remain intact.

Secondly, the property which is the subject matter of the application would still be the property to be considered for the injunction whether the rest of the Applicants are part of the application or not and the objection, if it succeeds, will not achieve any purpose other than on the issue of costs. The grounds of the application would remain the same supported by the same affidavits. Striking out the 2, 3rd, 4th, and 5th Applicants would not do away with the substance of the application and moreover the grounds to be argued would remain the same whether the Applicants are part of the application or not.

On the second preliminary objection as to whether the Applicant ought to have first deposited 30% of the outstanding amount before applying for a temporary injunction, the issue ought to be considered when dealing with the issue of whether the application should be granted conditionally and not as a preliminary point of law. This is because the stoppage of the sale already occurred albeit without deposit of security and the advertised sale attached to the supplementary Affidavit of the Ahmed Noor Osman which was slated to take place 30 days from the date of advertisement on 5th September 2016 has been overtaken by events. This should have been in October 2016. An interim Order stopping the intended sale was issued by the Registrar on the 8th of September 2016 and extended by court pending hearing of this application on the 5th of October 2016,

Where an intended sale is stopped or adjourned for more than 14 days it is provided by Regulation 13 (7) of the Mortgage Regulations that a fresh advertisement has to be issued in accordance with regulation 8. Regulation 13 (7) of the Mortgage Regulations 2012 provides as follows:

"(7) Where a sale is adjourned under this regulation for a period longer than 14 days, a fresh public notice shall be given in accordance with regulation 8 unless the mortgagor consents to waive it."

Regulation 8 of the Mortgage Regulations 2012 also provides that a mortgagee exercising a power of sale under the Act shall subject to the Act and Regulations, sell the mortgaged property by public auction and the sale shall not take place before the expiration of 21 working days from the date of service of the notice as specified in section 26 of the Act. Any person who contravenes Regulation 8 commits an offence. It is now necessary to re-advertise the property. In the premises the intended sale has been overtaken by events and the issue of deposit of 30% or 50% of the outstanding amount can be handled on the merits and not as a preliminary issue for as to whether the application is barred for want of deposit. It is the court which stopped the same rightly or wrongly.

Prima facie case

For that reason I will first deal with the first ground of the application as to whether the application discloses a prima facie case with a possibility of success in the suit.

The ground that an Applicant for a temporary injunction must disclose by the application that there are serious questions to be tried which merit judicial consideration and that the action of the Applicant is not frivolous or vexatious, is not in dispute.

I have further considered the submission that the Respondent agreed to receive payment from Electro-Maxx Ltd and that it was a precondition for the grant of the loan that the first Applicant would submit its fuel supply agreements with a letter copied to the Respondent and also assign all receivables from Electro-Maxx Ltd to the Respondent. Secondly, it was a precondition that the first Applicant obtains a payment guarantee from Electro - Maxx and assigns it to the Respondent. The first Applicant complied with the preconditions. Subsequently the first Applicant supplied the fuel to Electro - Maxx but started experiencing payment delays which in turn was caused by delay in payments from Uganda Electricity Transmission Company Ltd (UECTL) to Electro-Maxx Ltd. Despite the evidence of frustration, the Respondent went ahead to make demands, issue notice of default and recall of the loan to the first Applicant and the notice of sale of the first Applicant's mortgaged properties.

Alternatively but without prejudice to the above the Applicant submitted that the interest chargeable by the Respondent which was stated to be 10% per annum was basically indeterminable since it was subject to change at the sole discretion of the Respondent.

Finally on the same point the Applicants Counsel submitted that the Applicants have proved to the court that the issue of frustration must be investigated among other things for which reason the court ought to find that the Applicant's case raises pertinent issues which warranted investigation by the court.

The Respondent's Counsel on the other hand submitted that there was no prima facie case with a probability of success. He moved on the premises of whether there are serious questions to be

tried which have been disclosed. He submitted that the question of whether there are serious questions to be tried must be disclosed in the Applicant's pleadings and in this case there were none. He relied on the pleadings of the plaintiff and particularly paragraph 4 thereof for the matters before the court as being a prayer for declaration against the defendant that the contract is frustrated and that the recall of the first plaintiffs loan is irregular, premature and illegal and that the notice of sale is irregular and illegal and the loan amount demanded are irregular and inflated. Furthermore that the interest charged is excessive, speculative and uncertain and an order for determination of the correct loan amount due as well as a permanent injunction.

Counsel submitted on all of these items. In relation to the loan amounts, the Respondent demanded US\$2,539,476 without any objection from the Applicants. Instead the Applicants wrote letters to the Respondent requesting for more time within which to pay the demanded amounts. The Applicant's further admitted their indebtedness to the Respondent and gave the ground that the Respondent was at all material times aware of the delayed payments which frustrated the first Applicant's ability to service its loan. He contended that the Applicant failed to raise an arguable case which ought to be reserved for trial because the first Applicant had been in a perpetual breach of its repayment obligations.

Regarding frustration of contract, Counsel submitted that the purpose of the loan is clearly stipulated in the agreement and was for the purchase or importation of petroleum products. It was not indicated anywhere that the loan facility agreement was for the purpose of supply of fuel to Electro-Maxx Ltd. He further addressed the issue of frustration which has been summarised in the submissions immediately preceding this ruling. The conclusion is that the Applicants cannot argue that delay in payments to them from Electro-Maxx Ltd is an event that could not reasonably have been foreseen by any party in order to argue that the repayment of the loan has become impossible as opposed to merely onerous. He submitted that the duties between the Applicants and the Respondent have not become impossible to perform.

With regard to the payment of interest, interest rate was calculated by a stipulated formula preserving the right of the Respondent to change the rate of interest raised in line with market forces at its sole discretion. The Applicant signed the facility agreement without any coercion and therefore cannot dispute the terms.

Resolution of whether the application discloses a prima facie case.

The question is whether there is an arguable case that merits trial. Dealing with the first ground of the application which is whether the banking transaction contract between the Applicant and the first Respondent is frustrated, I find that it is a frivolous contention because in the supporting affidavit Charles Muhumuza, the Chief Executive Officer of Electro-Maxx Ltd, and paragraph 10 thereof, he deposes that a substantial amount out of what is owed to it by UETCL amounting to US\$12 million, is due to the first Applicant and would go a long way in settling the first

Applicant's loan obligations to the Respondent. The assertion contradicts ground 1 (a) of the Chamber Summons that the banking transaction has been frustrated. It instead proposes the opposite that the banking transaction would be fulfilled and on that basis this ground of frustration cannot be sustained in the suit.

Secondly, the question of frustration of contract should be considered on the basis of frustration of the loan facility. The Applicant's contention is that the loan repayment was frustrated because the Respondent knew the purpose for which the loan was going to be applied and that purpose was for the supply of petroleum products. It is in the Applicant's application that the Applicant actually supplied the petroleum products but has not yet got payment and that payment was in the offing. This depended on the contract between UETCL and Electro-Maxx Ltd. Electro – Maxx has undertaken to pay the Applicant. The Applicant has not demonstrated what legal steps it has taken to secure the payment.

Even if one proceeded on the premises that the Applicant's contract with Electro - Maxx Ltd was frustrated, which it is not according to the affidavits in support and in rejoinder, does it mean that the securities pledged by the Applicant in the event of default cannot be realised by the Respondent?

I considered such a matter in **Grofin East Africa Fund LLC and DFCU Bank Limited vs. Joan Traders and Hellen Kakyo High Court Civil Suit No 268 of 2008** involving a loan advanced to the defendants but the products imported expired and were condemned and destroyed by the authorities. Notwithstanding, the finding of the court that there was frustration of the contract in which the bank was involved, in that the defendant reported to the bank and was subjected to supervisory control, the loan remained enforceable under a basis principle to refund the loan amount and therefore the security was subject to the charge for the refund. The court relied on **Fibrosa Spolka Akeyjna vs. Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122**. The House of Lords considered the rule in **Chandler versus Webster [1904] 1 KB 493** described by Lord Russell as the rule "that in cases of frustration loss lies where it falls, or that where a contract is discharged by reason of some supervening impossibility of performance, payments previously made and legal rights previously accrued according to the terms of the contract, will not be disturbed, but the parties would be excused from further liability to perform the contract. However there are exceptions where the party who paid the money may be able to recover his money. At page 133 he said:

"There was a total failure of the consideration for which the money was paid.

In those circumstances, why should the appellants not be entitled to recover the money paid, as money had and received to their use, on the ground that it was paid for a consideration which has wholly failed? I can see no reason why the ordinary law, applicable in such a case, should not apply. In such a case the person who made the

payment is entitled to recover the money paid. This is the right which in no way depends upon the continued existence of the frustrated contract. It arises from the fact that the impossibility of performance has caused a total failure of the consideration for which the money was paid. ... Chandler versus Webster was accordingly, in my opinion, wrongly decided. The money paid was recoverable, as having been paid for a consideration which had failed. The rule that on frustration the loss lies where it falls cannot apply in respect of monies paid in advance when the consideration moving from the payee for the payment has wholly failed, so as to deprive the payer of his right to recover monies so paid as moneys received to his use;..."

Lord Wright at page 141 held that:

"But I think it is clear both in English and Scots law that the failure of consideration which justifies repayment is a failure in the contract performance. What is meant is not consideration in the sense in which the word is used when it is said that in executory contracts the promise of one party is consideration for the promise of the other. No doubt in some cases the recipient of the payment may be exposed to hardship if he has to return the money though before the frustration he has incurred the bulk of the expense and is then left with things on his hands which became valueless to him when the contract fails, so that he gets nothing and has to return the repayment. These and many other difficulties show that the English rule of recovering payment the consideration for which has failed works a rough justice. It was adopted in more primitive times and was based on the simple theory that a man who has paid in advance for something which he has never got ought to have his money back...."

Frustration is a common law doctrine and the common law applies to this case on the issue of frustration. The Applicants security pledged in case of default cannot be released for reason that the purpose for which the money was obtained was frustrated by failure to pay a third party Messrs Electro – Maxx by UETCL. In other words the alleged frustration does not discharge the security and it remains enforceable in the very minimum to get a refund of the loan. However, the evidence in support of the application do not show frustration of contract but delay in payment. The Applicant relied on an affidavit in rejoinder of one Muhumuza Charles a CEO of Electro – Maxx Ltd which gives contrary evidence to frustration. In fact he attached three letters showing delayed payments. The first letter is Annexure SA1 dated 19th November 2015 from UETCL addressed to Electro – Maxx Ltd on the subject of DELAYED PAYMENTS AND RESULTING ACTIONS. The letter ends with the following words:

“In the circumstances, this is to request you to hold onto any contractual enforcement measures to enable Government mobilise and remit the required funds. It is hoped that by mid December 2015, Government will have sorted this issue.”

The second letter is annexure SA2 written by the above cited Charles Muhumuza to the Permanent Secretary/Secretary to the Treasury, Ministry of Finance. They threatened to draw down a bank guarantee if payment is not received by 6th of April 2016. The letter was received by UETCL on the 31st of March 2016. It is presumably written the same day. Did they make a demand on the bank guarantee?

The third letter is dated 13th April 2016 from the PS/Secretary to the Treasury and addressed to the Permanent Secretary, Ministry of Energy and Mineral Development on the subject of DELAYED PAYMENT OF OUSTANDING OBLIGATIONS AND NOTICE TO CASH BANK GUARANTEE. The letter is about financial constraints of the Government but ends as follows:

“This is, therefore, to advise that the above obligations should take the first call on resources at the start of the execution of the Budget in Quarter One in July 2016”.

The evidence is therefore of delay and not frustration. The evidence is also that money owing to Electro – Maxx from UETCL is secured by a bank guarantee. Delay in payment is envisaged by the contract between the parties.

Moreover, the loans were secured against default by mortgages, the subject matter of this application. In specific terms one of the mortgage annexure B and clause 6 thereof provides that:

“IT IS HEREBY AGREED that if any of the moneys for the time being owing to the bank are not forthwith paid on demand, or having become payable without demand the statutory powers of sale conferred by the Registration of Titles Act and the Mortgage Act including powers to sell by private treaty without reference to the court shall immediately become exercisable.”

It is also agreed under clause 4 (i) that if the monies secured has been demanded in compliance with the terms of the mortgage and the Mortgagor has made a default in paying the bank, the bank may sell the property. They also agreed under clause 2 (c) that the conditions regulating the loan are contained in the facility letter dated 15th July, 2010 which terms were incorporated to the extent that they are not in conflict with the Mortgage deed.

A demand which is served on the borrower and not complied with constitutes a default and brings into operation provisions for realising money from the security. Sections 19 (1) (2) (3) and (4) of the Mortgage Act, Act 8 of 2009 give the remedies of a Mortgagee under the Mortgage Act 2009. Section 19 (1) provides that where money secured by a mortgage is made payable on demand, a demand in writing creates a default in payment. This means that the Mortgagee issues a demand for payment of any arrears. Upon failure by the Mortgagor to clear the arrears, the mortgagee issues a second notice of default requiring the Mortgagor to rectify the default. The second notice is issued under section 19 (2) and has to be in writing notifying the mortgagor of

the default and requiring the mortgagor to rectify the default within 45 working days. The notice has to be in the prescribed form as provided by section 19 (3) of the Mortgage Act. The Mortgagee upon default of the Mortgagor may require the Mortgagor to pay all monies owing on the mortgage; appoint a receiver of the income of the mortgaged land; lease the mortgaged land; enter into possession of the mortgaged land or sell the mortgaged land. The Mortgagee may also exercise the option to sell the property under section 26 of the Mortgage Act after expiry of the time provided for the rectification of the default stipulated in the notice served on him or her under section 19 of the Mortgage Act.

While a mortgage does not operate as a transfer, it secures the property until all the loan it secured is paid and section 121 of the Registration of Titles Act, Cap 230 Laws of Uganda which provides that:

“121. Certain qualities of the legal estate annexed to a first mortgage.

(1) In addition to and concurrently with the rights and powers conferred on a first Mortgagee and on a transferee of a first mortgage by this Act, every present and future first Mortgagee for the time being of land under this Act, and every transferee of a first mortgage for the time being upon any such land, shall, until a discharge from the whole of the money secured or until a transfer upon a sale or an order for foreclosure, as the case may be, has been registered, have the same rights and remedies as he or she would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him or her with a right in the Mortgagor of quiet enjoyment of the mortgaged land until default in payment of the principal and interest money secured or some part thereof respectively, or until a breach in the performance or observance of some covenant expressed in the mortgage or by law declared to be implied in the mortgage.

(2) Nothing in this section shall affect or prejudice the rights or liabilities of any such Mortgagee or transferee after an order for foreclosure has been entered in the Register Book; or shall, until the entry of such an order, render a first Mortgagee of land leased under this Act or the transferee of his or her mortgage liable to or for the payment of the rent reserved by the lease or for the performance or observance of the covenants expressed or to be implied in the lease.”

In **Maithya vs. Housing Finance Company of Kenya and another [2003] 1 EA 133** it was held that securities are valued before lending and loss of property by a sale is contemplated by the parties even before the security is formalised.

In the premises the issue of frustration is not a serious question for trial and default was contemplated by the parties before the lending transaction.

On the question of interest chargeable, the Applicant submission is that paragraph 3 (g) of the affidavit in support discloses that interest was stated to be 10% per annum and was indeterminable since it was subject to change at the sole discretion of the Respondent.

Again I agree with the submissions of the Respondents Counsel that the bank retained a discretionary power to change the rate of interest based on market conditions. There is no prima facie case for trial since the Applicant is not alleging that it was unjust to be charged a certain rate of interest and has demonstrated where the injustice is. Paragraph 3 (g) does not disclose any matter for trial in the assertion that:

"That under the facility granted to the first Applicant, the interest chargeable by the Respondent was stated to be at or about 10% p.a. but it was basically indeterminate since it was subject to change at the sole discretion of the Respondent."

The fact that the parties agreed that the Respondent shall be able to determine the rate of interest depending on market rates is a contractual matter and enforceable. Failure to understand the way interest is charged is not a triable issue since the formula is contractual and can be interpreted. The Applicant could have moved court by Originating Summons under Order 37 rule 6 for determination of any question of construction. It is not a case of saying that the Respondent has unjustly inflated the interest rate and there is no such an assertion of inflation of the rate of interest in the application. The question of whether the provision on interest is indeterminate is one of construction of a contractual clause. Clause 3 of the facility agreement provides as follows:

"Interest rate is at Standard Chartered Bank Uganda Limited's Base Lending Rate plus 2% (Effective rate 10.5% - 1% = 9.5% p.a.). Interest shall accrue on daily outstanding balances and is applied on the last working day each month in arrears. However interest is subject to change in line with market forces at the sole discretion of the Bank."

Notwithstanding the fact that I have not found grounds excusing the security pledged for the loan from the statutory rights of a mortgagee for purposes of preserving the issue for trial, the Applicants did not deny liability and even pegged payment to expected income from Electro Maxx Ltd. The Respondent has produced copious details of several undertakings by the Applicant and its contractual partner to pay the outstanding amounts notified by the Respondent.

To put the matter beyond argument, on 29th February, 2016 Mr Charles Muhumuza, the Chief Executive Secretary of Electro Maxx Ltd wrote to Kampala Associated Advocates, Counsel for the Respondent that UETCL owed Electro Maxx US\$7 million in contractual payments and they were making every effort possible to recover these payments. Additionally, the Applicant wrote on 11th April, 2016 promising to pay US\$975,000 upon disposal of certain securities. On 11th July, 2016 the Applicant wrote to the Respondent bank assuring it that they were committed to have the matter resolved by 30th of July, 2016.

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Various correspondences do not deny or contest liability to the Respondent and instead the Applicant has acknowledged indebtedness to the Respondent. None of the Applicant's correspondence raise any question as to whether the outstanding amounts notified in the demands of the Respondent are inflated or excessive.

These acknowledgements are found in annexure "D", "E" "H", "I", "I 2", "I 3", "J" to the affidavit in reply and they can form the basis of an application by the Respondent for judgment on admission and in any case cannot lead to any other conclusion other than that the Applicant acknowledged its indebtedness to the Respondent.

In paragraph 3 of the supplementary affidavit in support, Ahmed Noor Osman deposed as follows:

"That the basis of the suit against the Respondent was pursuant to the frustration occasioned to the first Applicant that has made it difficult to clear the loan and the resultant notices of the sale of the Applicant's properties. ..."

Which loan and which resultant notices issued by the Respondent? These are the default notices and notice to rectify default under Section 19 of the Mortgage Act.

The general rule is that sale of property which is pledged as security in a loan agreement or mortgage cannot lead to irreparable loss per se. In the case of **David Luyiga vs. Messrs Stanbic Bank (U) Ltd Miscellaneous Application Number 202 of 2012 (Arising from Civil Suit No. 152 of 2012)** the court agreed with the principles in two Kenyan cases of **Matex Commercial Supplies Ltd and another vs. Euro Bank Ltd (in liquidation) [2008] 1 EA at PP 216** and **Maithya vs. Housing Finance Company of Kenya and another [2003] 1 EA 133**. Any kind of property offered to a bank as security for a loan is made on the understanding that the property stands the risk of being sold by the lender if default is made on the payment of the debt secured. In **Maithya vs. Housing Finance Company of Kenya and another [2003] 1 EA 133**, it was held that securities are valued before lending and loss of property by a sale is contemplated by the parties even before signing the mortgage.

For the above reasons there is no prima facie case or a serious question to be tried that has the potential of avoiding liability for the outstanding loan amount. It follows that it is unnecessary to determine the preliminary issue of whether a deposit should first be made before an injunction is granted.

In the facts and circumstances of this application the Applicant has not offered the security of the prescribed deposit before adjournment of a sale or for stopping the same altogether and cannot get an injunction under Regulation 13 of the Mortgage Regulations 2012. Regulation 13 provides as follows:

“ ...

13. Adjournment or stoppage of sale.

1. 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% of the forced sale value of the mortgaged property or outstanding amount.
2. The person conducting the sale may, upon notifying the mortgagor, mortgagee and bidders in writing, adjourn the sale to a specified date and time.
3. The person conducting the sale shall specify the reason for adjourning the sale under sub regulation (2).
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 mortgagor, agent or spouse of the mortgagor or that interested party 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.
5. Where the sale is stopped or adjourned at the request of the mortgagor for the purposes of redemption, the mortgagor shall at the time of stopping or adjourning the sale pay a security deposit of 50% of the outstanding amount.
6. Notwithstanding sub-regulation (1) where the application is by the spouse of a mortgagor, the court shall determine whether that spouse shall pay the thirty percent security deposit.
7. Where a sale is adjourned under this regulation for a period longer than fourteen days, a fresh public notice shall be given in accordance with regulation 8 unless the mortgagor consents to waive it.”

The right of the court to stop a sale under regulation 13 (1) of the Mortgage Regulation is inapplicable as it requires deposit of 30% of the forced sale value of the mortgage property or outstanding amount. Under regulation 13 (5) where a sale is stopped or adjourned at the request of the mortgagor for purposes of redemption of the mortgaged property, the mortgagor is required at the time of stopping the sale to deposit 50% of the outstanding loan amount.

Because the Respondent is obliged to re-advertise the properties for sale, the option of the Mortgagor to have the sale adjourned under regulation 13 (1) to another date upon deposit of 30% of the forced sale value of the mortgaged property or to stop the sale for purposes of redemption of the mortgaged property upon payment of the aforementioned 50% remains.

In the premises there is no need for me to determine any other grounds of objection to the application. The Applicant's application lacks merit and stands dismissed with costs.

Ruling delivered in open court on the 20th of March 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Kagoro Friday Robert for the Applicant

Applicants not in court

Counsel Bruce Musinguzi for the Respondent

Dorothy Ochola Company Secretary of Respondent in court

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

10th March 2017