



The affidavit in reply was sworn by both the 1<sup>st</sup> and the 2<sup>nd</sup> respondents.

The first respondent was represented by Adarsh Kumar the Chief Manager at Kasanga branch and stated in his affidavit in reply that the 1<sup>st</sup> respondent in August 2011 granted a term loan facility of UGX 700,000,000/= to the 2<sup>nd</sup> respondent trading as M/S Moham Omar Complex for the purposes of construction of a Commercial Building on the land comprised LRV 3881 Folio 22 Plot No. 2 Bishop Campiling Road, Kiswa Kampala and that he knew the 2<sup>nd</sup> respondent or the registered proprietor of the said land which he pledged as security for repayment of the said term loan facility. That the 1<sup>st</sup> respondent's mortgage was duly and lawfully registered on the 2<sup>nd</sup> respondent's title deed as instrument No. 453802 on the 18<sup>th</sup> August, 2011 and that the land was vacant at the time of creation of the 1<sup>st</sup> respondent's mortgage. That their lawyer M/S Katera & Kagumire Advocates informed him that there was no requirement for spousal consent and the applicant has no interest in the mortgaged property, the application is frivolous, an abuse of court process and should be accordingly dismissed.

That the applicant and the 2<sup>nd</sup> respondent connived by bringing this application in order to frustrate the 1<sup>st</sup> respondent's effort to recover the outstanding debt due from the 2<sup>nd</sup> respondent.

That it is mandatory legal requirement that the applicant deposits security in this court equivalent to 30% of the forced sale value of the mortgaged property. The 2<sup>nd</sup> respondent's affidavit in reply challenges the application on grounds that the property in issue is registered in his names, the applicant made only a nominal contribution to the subject so he did not deem it necessary to obtain spousal consent.

The applicant further filed two affidavits in rejoinder to the 1<sup>st</sup> and 2<sup>nd</sup> respondent's affidavit in reply.

In rejoinder to the 1<sup>st</sup> respondent's reply that she was not aware of the loan advance to the 2<sup>nd</sup> respondent of UGX 700,000,000/= which she would have objected to had she known of it, she was not aware that the 2<sup>nd</sup> respondent had pledged the certificate of title for the land as security for the loan, she was not aware that the loan facility was registered on the suit land the fact that the land was undeveloped did not take away the fact that she contributed to its purchase. Spousal consent and disclosure of the mortgage facility were important before disbursing the money and

the 1<sup>st</sup> respondent should have done due diligence and his mistakes should not affect her interest in the suit land.

In rejoinder to 2<sup>nd</sup> respondent's affidavit in reply, that she contributed to the purchase of the land which contribution cannot be regarded as nominal as it contributed to the purchase of the land and the construction of the commercial structure thereon for the family's future sustenance and economic welfare and her share of proceeds of the sale of their business to wit Aura one FM contributed to the construction of the commercial structure thereon.

That she was not aware of the 2<sup>nd</sup> respondent's application for mortgage facility using the land of which she had to be informed about.

10 Counsel for the applicant submitted that the order of temporary injunction and costs of the application be granted to the applicant.

Counsel he relied on *Gapco Uganda Ltd Vs Kawese & Another M.A No. 259 of 2013* which cited *L.L.T Kiyimba Vs Haji Abdul Nasser Katende [1985] HCB 43* which laid out the grounds of the temporary injunction that include;

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- i. The applicant must show a prima facie case with a probability of success.
  - ii. If the injunction is not granted, the applicant shall suffer irreparable injury which would not be adequately compensated by an award of damages and
  - iii. If the court is in doubt, it should decide the matter and balance of convenience.

He also submitted that the grant of a temporary injunction is an exercise of judicial discretion for purposes of preserving the *status quo*.

He submitted that the grant of an injunction goes beyond the three conditions set down by the law and includes the courts duty to protect the interest of the parties pending disposal of the substantive suit (see *Godfrey Sekitoleko & Others Vs Seezi Mutabazi [2001] [2005] HCB 3* at 8.

His submission on the merits of the application.

25 **Ground One:** *Whether there is prima facie case with a probability of success.*

Counsel for the applicant submitted that there was a *prima facie* case based on the admission by the 2<sup>nd</sup> respondent that an applicant contributed to the purchase of the land and construction of the commercial structures.

Counsel relied on ***Julius Rwabinumi Vs Hope Bahimbisomwe SCCA No. 10 of 2009*** to state  
5 that contribution made by a spouse whether direct monetary contribution, or indirect non-monetary contribution enables the other spouse to acquire interest in the property.

Counsel also relied on **Section 4 and 5(1) and (2) of the Mortgage Act** to show that the 1<sup>st</sup> respondent owed a duty to make due diligence to ascertain the marital status of the mortgage and whether the property is matrimonial property or not.

10 ***Ground Two: Whether the applicant stands to suffer irreparable injury which cannot be compensated by an award of damages.***

Counsel for the applicant submitted that irreparable injury does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damages must be substantial or a material one, that is; one that can't be adequately atoned for in damages (see  
15 ***Jover Byarugaba Vs Ali Muhoozi & Another M.A No. 215 of 2014*** and ***Geilla Vs Cassman Brown & Co. [1973] EA 358***).

Counsel's submission was based on paragraphs 5,6, 8 and 9 of the affidavit in support and paragraphs 4 and 5 of the affidavit in rejoinder to the 2<sup>nd</sup> respondents affidavit in reply where the applicant stated that she had made a contribution to the property that was for future economic  
20 substance of which substance can't be qualified or calculated, the number of years for substance or benefit can't be satisfied. Failure to grant the injunction leading to the sale of the property will lead to the applicant suffering irreparable injury and the future economic sustenance can't be atoned for by way of damages.

***Ground Three: Court granting the injunction on a balance of convenience if it is in***  
25 ***doubt.***

Counsel submitted that a balance of convenience means if the risk of doing injustice is going to make the applicant suffer then probably the balance of convenience is favorable to him or her

and court would most likely be inclined to grant him/her the injunction order (see *Jover Byagaba Vs Ali Muhoozi & Another* supra).

He further added that the applicants investment proceeds lie in the suit property and the 2<sup>nd</sup> defendant has other property that he obtained without her input which can be attached as her  
5 suit will be rendered nugatory if the *status quo* is not maintained.

In reply Counsel for the 1<sup>st</sup> respondent submitted that the application is seeking a temporary injunction to restrain the 1<sup>st</sup> respondent from selling the said property pending the disposal of the main suit.

He submitted that the application lacks merit as the applicant has not proved any grounds for  
10 granting the same and that the application was brought in bad faith to frustrate the 1<sup>st</sup> respondent's effort to recover the outstanding debt.

Counsel further submitted that it is mandatory for the applicant to show and prove the grounds set out in *Kiyimba Kaggwa* (supra) of which the applicant failed to make a case for the grant of the temporary injunction.

15 With respect to the first ground, Counsel for the 1<sup>st</sup> respondent submitted that there is no evidence whatsoever by the applicant to demonstrate a *prima facie* case with any probability of success as the property in respect of which the applicant brought the main suit and in respect of which she seeks injunctive orders in the application is unknown to the 1<sup>st</sup> respondent.

He also submitted that there was no *prima facie* case as the applicant was claiming interest in the  
20 property comprised in FRV 487 Folio 1 Plot No. 2 Bishop Campiling Road, Kiswa, Kampala as per paragraphs 4 and 5, of the plaint whereas the 1<sup>st</sup> respondent mortgage was registered on land comprised in LRV 3881 Folio 22, Plot No. 2 Bishop Campiling Road, Kiswa Kampala (paragraphs 3 and 5 of the 1<sup>st</sup> respondent's affidavit in reply and annexure "BOB2).

He also submitted that there was no evidence whatsoever led by the applicant to show that the  
25 land in dispute was either family land or a matrimonial home as per **Sections 39 (1) a), 38A (4) Land Act, Cap 227 (as amended by the Land (Amendment) Act of 2004, Section 39 Land Act and Section 5(1) (a) & (b) of the Mortgage Act No. 8 of 2009**. The 1<sup>st</sup> respondent further submitted that for the applicants spousal consent to be a requisite requirement, she must show

that the mortgage property is either family land or a matrimonial home as defined by the said statutes for the applicant to required to give her consent as she had contributed to the land.

On the 2<sup>nd</sup> ground whether the applicant would suffer irreparable damage, Counsel for the 1<sup>st</sup> respondent submitted that it is mandatory for the applicant to show that she may suffer injury  
5 which must be irreparable in the sense that it would not be adequately compensated for by an award of damages. Counsel submitted that the applicant in paragraphs 8 and 9 of her affidavit in support of the application only made generalized statements that she will suffer irreparable damage and did not show any.

With respect to the 3<sup>rd</sup> ground-balance of convenience, Counsel for the 1<sup>st</sup> respondent submitted  
10 that the balance of convenience favors the 1<sup>st</sup> respondent on the grounds that he continues to suffer gross inconvenience and colossal financial loss by making provision for the outstanding debt under the disputed mortgage and that the 1<sup>st</sup> respondent may potentially permanently lose the security if the orders sought herein are granted.

Counsel for the 2<sup>nd</sup> respondent submitted that the 2<sup>nd</sup> respondent would have sought for the  
15 spousal consent had he known that it was important.

He further submitted that the applicant must show a *prima facie* case with probability of success, an injunction will not be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages and if the court is in doubt, it would decide an application on the balance of convenience.

20 Counsel for the 2<sup>nd</sup> respondent further submitted that the property comprised in LRV 3881 Folio 2 Bishop Campiling Road Kiswa, Nakawa is registered in his names only and the applicant made a nominal contribution towards the acquisition and development of the same in the interest of their family later earning a return on investment to support and sustain the family. The suit property is one of the sources of income to the applicant and 2<sup>nd</sup> respondent.

25 He submitted that the 1<sup>st</sup> respondent did not request for spousal consent as the land was only registered in the 2<sup>nd</sup> respondents name.

## **DECISION OF COURT**

I have considered the pleadings and submissions by both Counsel. I am alive of the decision in **Gapco Uganda Ltd Vs Kawesa & Another M.A No 259 of 2013** where **E.L.T Kiyimba Vs Haji Abdul Nasser Katende [1985] HCB 43** was relied on. I will therefore take into consideration the decision in both cases.

5 The 2<sup>nd</sup> respondent's admission of the applicant's contribution to the development of the said property under paragraphs 3 and 5 of the affidavit in support shows that she has an interest in the property.

Furthermore, **Section 4(1) and 5(2)** of the **Mortgage Act** provides for the mortgagor's duty to make due diligence to ascertain the marital status of the mortgagee and whether the property is  
10 matrimonial property or not. The 1<sup>st</sup> respondent had an obligation to find out if the 2<sup>nd</sup> respondent was married or if he wasn't then require declaration to that effect which they did not do. The spousal consent was to be obtained irrespective of the fact that it is subject to being matrimonial property or not. Thus showing that there is a *prima facie* case.

On whether the applicant stands to suffer irreparable injury, the injury or damages must be  
15 substantial or a material one, that is one that can't be adequately atoned for in damages (see **Jover Byarugaba Vs AG Muhoozi & Another M.A No. 21 of 2014**). The applicant's contribution to the property can in my view be ascertained and can be compensated by way of damages. This particular ground therefore fails.

With respect to a balance of convenience if court is in doubt I need to determine who would  
20 suffer more if the order is not granted.

In my view the applicant stands to suffer most if the order is not granted and it is my holding that the balance of convenience is in her favor.

The remedy of a temporary injunction is a discretionary one and its purpose is to preserve the *status quo* until the question to be investigated is finally disposed off. (see **Gapco Uganda Ltd**  
25 (supra))

The court does not have to prove all the three grounds in order to grant the injunction.

I therefore find merits in the application as there is a *prima facie* case and the balance of convenience is in favor of the applicant if the application is not granted. Accordingly I grant this application in the terms prayed for by the applicant.

Costs will be in the cause.

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**B. Kainamura**

**Judge**

**10.08.2018**

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