

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO 658 OF 1992

LIVINGSTONE KATENDE:.....PLAINTIFF

VERSUS

1 BARCLAYS BANK OF UGANDA:.....DEFENDANT

2. BEARING MACHINERY EQUIPMENT

BEFORE: HONORABLE JUSTICE I. MUKANZA

R U L I N G

This is an application by chamber summons brought under order 37 rules 1 and 9 of the civil d rules, order 48 rule 1 and section 101 of the CPR. The applicant is seeking for an order of a temporary injunction to restrain the first defendant, their agents Expo Associates their servants, and or workmen from selling by public auction or otherwise disposing of the plaintiffs land at Mulago Kampala comprised in mailo register Kibuga Block 5 plot 601 until hearing and final determination of the main suit.

The application is supported by the affidavits deponed to by the applicant and there is an affidavit in reply sworn by Mr. Buyondo the learned counsel appearing for the respondent. The grounds for this application are grounded in the affidavits by the applicant which showed:-

“That he is the registered proprietor of the land at Mulago Kampala comprised in Mailo Register Kibuga Block 5 plot 601. The second defendant secured credit facility from the first defendant/Respondent using the applicant’s certificate of title to the said facility but he was neither a director nor a share holder in the second defendant’s company and he was Ignorant of Its day to day operation when the second defendant defaulted in its payment of the principal and interest to the first defendant. The latter without prior notice to the applicant instructed M/S Expro Associates to publicly auction the said property and in pursuant to the said instructions Expro Associates advertised for sale the above mentioned property on 30th September 1992, and

5th September 1992 in Ngabo, The Star and New Vision Copies of which were attached and marked annexures A1, A2, and A3. The option taken by the bank to advertise his property for sale by public auction without first referring the matter to court deprived them of any right to be heard in defence of their property.

The affidavit further showed that guarantee he gave to the first defendant for the benefit of the second defendant had no express provision of sale by public auction without first referring to court and even if there were courts jurisdiction could not be ousted by a provision in a mortgage or guarantee. The property advertised for sale was valued at over 120,000,000/= shillings and it has many developments like buildings whose value for exceeds the amount demanded as an outstanding loan of 4,500,000/= shillings that before the sale could take place the value of the mortgaged property had to be as ascertained by the court due for payment established in a court of law and that was not done in instant case.

He continued that when he learnt of second defendants default he had already paid to the first defendant 35,000/= towards the reduction, and he undertakes to pay the defendant till the debt is finally extinguished.

That under clause 1 of the terms of the contract of guarantee with the first defendant the bank was under contractual obligation to demand in writing for payment of the sums of money directly owing from the second defendant. Where as under clause 1 B of the legal mortgage made between himself and the first defendant, the bank was obliged to demand in writing for payments of liabilities owed to the bank.

That he was never given the demand notes and because of that failure, neglect and or refusal of the first defendant to give him notice he was surprised to see his property advertised for sale.

That if the sale is allowed he will suffer irreparable damage.

Where as the affidavit deponed to by the counsel appearing for the respondent was to the effect:-

That the prior notice of the sale of the applicant's property was given to the applicant by sending a registered statutory notice to the Applicant on the 20th may 1992 at the address which he gave

to the Bank. A copy of the receipt issued by the General past office to that effect was attached to the affidavit and marked Annexure "A".

That under the terms of the legal mortgage executed by the Applicant on the 1st November 1990 it was not necessary to refer the matter of advertising the applicant's property for sale to court before doing so. A copy of the said legal notice was attached to the affidavit and marked as annexure.

That the sale by public auction of the applicant's property is authorized under the legal mortgage.

That property which was advertised for sale is just being managed by the plaintiff as there is no valuer's report to support the purported value of shillings 120,000,000/=.

That even if the purported value of the said property accepted that would not stop the respondent from selling the same to recover the money due to it sale of the mortgaged property value of the property was to be ascertained by the court.

That to stop the sale of the Applicant's property would be contrary to terms of the legal mortgage which binds the applicant and also to allow the applicant pay by installments would be in complete disregard of the terms of the legal mortgage.

That demand by the chief manager Barclays Bank of Uganda Ltd. A copy of the said demand note was attached as Annexure 'C'.

And finally that the first defendant did not at any stage act in breach of the legal mortgage or guarantee as alleged or at all."

Under Order 37 Rule 1 of the civil procedure rules a temporary injunction would be granted where it is proved that the property is in danger of being wasted, damaged or alienated. And it is also the law of this county that the grant of a temporary injunction is an exercise of judicial discretion See **Sergeant .V. Patel 1949 EACA P.63**

And its purpose is to preserve the status quo in the matter in dispute until the question under investigation in the main suit is finally disposed of See Jan Mohammed Vs Madhoni 1953 20 EACA P.40. Also See Halsbury's Laws of England 3rd Edition Vol 21 P.313 Para.716.

Before a temporary injunction is granted the plaintiff has to show a prima facie case with probability of success and if the court is in doubt it will decide the application on the balance of convenience. Also an interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury which would not adequately be compensated by an

a ward of damages. See E.A **Industries Ltd Truffoods Ltd (spray) [1972] EA 42. Quella V Casman Brown Ltd. [1973] EA 358, Nsubuga and Another Vs Mutawa [1974] EA 482**.

From what has transpired above the condition for the grant of a temporary injunction are in my humble opinion as outlined here below:-

(I) The applicant has to show prima facie case with the probability of success.

(II) That he would otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

(III) And finally that if the court was in doubt would decide the application on the balance of convenience.

As regards the first condition the legal mortgage stipulated that the first defendant would proceed to sale by public auction the property in question without resort to court. In a way the jurisdiction of this court would be ousted and the applicant would be condemned unheard. That would in my opinion violate the principle of natural justice. For this particular condition the applicant had shown a prima facie case with a probability of success.

With regard to the second condition, the subject matter is land. There are developments on that land which if sold might by far exceed the loan guaranteed by the applicant to the first defendant/Respondent when the latter advanced money to the second defendants. The absence of the valuer's report to that effect as submitted by Mr. Buyondo was of no consequence in my

humble opinion. Besides that there was evidence that the applicant had already made some part payment towards the reduction of the said loan

If the sale by public auction had to be permitted there would be no way of determining the monies already received by the respondent because the subject matter the suit property would have gone. Also if the interlocutory injunction was not granted, the applicant would otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, See Industries V Ryford Ltd Gualles case

And that in case of any doubt as per my explanation above the balance of convenience tilts in favour of the applicant. In the end the application succeeds. The applicant is granted a temporary injunction to restrain the first defendant/ respondent, their agents Expo Associates their Servants and or workmen from selling by public auction or otherwise disposing of the plaintiffs land at Mulago Kampala Comprised in Mailo register Kibuga Block 5 plot 601 until the hearing and final determination of the main suit. Costs for this application will be costs in the cause.

I. MUKANZA

JUDGE

4/6/1993