

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

**MISCELLANEOUS APPLICATION NO.78 OF 2003
(ARISING FROM CIVIL SUIT NO. 242 OF 2002)**

DFCU BANK LTDAPPLICANT

VERSUS

ANN PERSIS NAKATE LUSEJJERERESPONDENT

RULING

This ruling is in respect of an application to stay an order for the discharge of a mortgage and the return of title deeds in respect of property comprised in LRV 684 Folio 12 at Ntinda (i.e the suit premises). The applicant made the application by way of Notice of Motion under Order 48 rules 1 and 3 of the CPR and section 101 of the CPA. The application was accompanied by an affidavit that Mr. Joshua Ogwal swore and is dated 18th February 2003.

The respondent made a reply to the application under an affidavit that she swore on 4th March 2003.

The background that gave rise to this application was briefly as follows.

The respondent mortgaged the suit premises to Gold Trust Bank Ltd which was later sold to the applicant. Under that mortgage the respondent agreed that a third party (i.e A.V. Enterprises) would, among other things obtain a loan from Gold Trust Bank Ltd to the tune of shs. 80 million. After executing the mortgage and depositing her title for the suit premises with Gold Trust Bank Ltd the respondent did not find out whether any money was disbursed to A.V. Enterprises under the mortgage. Later on, the applicant bought Gold Trust Bank Ltd and sought to exercise the right of sale of the suit premises under the mortgage. Therefore, it advertised the suit premises and specified a day for the sale. The respondent at first tried to redeem the suit premises. However, because she could not fully understand whether A.V. Enterprises had truly taken a loan from Gold Trust Bank Ltd, she decided to file high Court Civil Suit No. 242 of 2002 against the

applicant in a bid to have the applicant release the title for the suit premises. She contended that the applicant had no evidence to show that it released any money to A.V. Enterprises under the mortgage. In its WSD the applicant denied the respondent's claim and counter-claimed a sum of shs. 35 million which it alleged was still owing under the mortgage. Eventually, Court heard the suit and decided it in favour of the respondent. The applicant who felt aggrieved by Court's decision decided to appeal. It lodged a Notice of Appeal in the Court of Appeal.

Following that event the applicant made the application which is the subject of this ruling.

At the time of hearing the application the applicant and the respondent were represented by Messrs Adriko and Nelima respectively. In his submission, Mr. Adriko insisted that the applicant who was dissatisfied with the decision of Court in High Court Civil Suit No. 242 of 2002 had appealed against that decision. Therefore, it needed an order for stay of execution so that it could ensure that the suit premises which (in its View) was still the subject of a debt in its favour that amounted to shs. 35 million remained in its hands until the appeal was disposed of. Mr. Adriko further pointed out that if an order of stay of execution was not granted the appeal would be rendered nugatory and the applicant would suffer substantial loss. He therefore prayed Court to grant the application.

On his part, Mr. Nelima opposed the application and submitted that the applicant did not show good cause why the stay of execution should be granted. It did not prove that it would suffer substantial loss if the application was not granted. It quantified what it thought remained owing under the mortgage (i.e shs. 35 million) and it did not show that the respondent would be unable to pay that amount if the intended appeal succeeded.

On the contrary, the respondent showed that as long as the title for the suit premises remained in the hands of the applicant the respondent would continue to lose tenants for the suit premises. Mr. Nelima therefore urged Court to dismiss the application with costs.

In the case of **Somali Democratic Republic v A.S. Treon Civil Application No. 11 of 1988**, the Supreme Court held that a stay of execution should be granted if a court is satisfied that there is good cause to do so and there are special circumstances to justify such course. The important question to answer is whether the applicant satisfied Court in the above respect? Court thinks

that it did not. The applicant merely showed that it appealed against the decision of Court in High Court Civil Suit No. 242 of 2002. It did not indicate even the chances it had for the success of that appeal. (See **N2an2a v Kimani [19591 E.A. 69 and Iddi Halfani v Hamisi Binti Althumani [19621 E.A. 761]**). That aside, the applicant did not prove that if Court refused to grant an order for stay of execution and later on the applicant succeeded with the appeal the respondent would be unable to pay shs. 35 million it alleged that A.V. Enterprises took under the mortgage. Above all, the applicant did not contradict the respondent's evidence that given the fact that at one time the applicant advertised the suit premises with a view to selling it if the respondent continued to hold on to her title that would adversely affect her chances of getting tenants for the suit premises. In the circumstances, Court has no choice but to dismiss the application with costs; and Court hereby orders so.

E.S. Lugayizi

(Judge)

24/3/2003

Read before: At 11.36

Mr. Adriko for Applicant

Mr. Sewanyana Court clerk

E.S. Lugayizi

(Judge)

24/3/2003