THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HIGH COURT MISCELLANEOUS APPLICATION 74 OF 2024

(ARISING FROM HIGH COURT CIVIL SUIT NO 22 OF 2024)

1. **FRANCIS ISHANGA ---------- APPLICANTS**
2. **NEW MUGISHA TRADING COMPANY (U) LTD**

VERSUS

1. **BANK OF BARODA (U) LTD**
2. **KELLEN KAREMERA ---------- RESPONDENTS**
3. **THE COMMISSIONER LAND REGISTRATION**

BEFORE: Hon. Justice Nshimye Allan Paul. M.

RULING

REPRESENTATION

1. Adv. Kevin Charles Nsubuga & Adv. Anthony Tomusange for the applicants.
2. Adv. Ambrose Naleba for the 1st respondent.
3. Adv. Paul Tusubira & Adv. Daudi Balinda for the 2nd respondent.

PREAMBLE

This application was filed on 23rd February 2024 and fixed for a hearing on 14th March 2024. Before it could be heard the applicants lodged a complaint that prompted the file to be transferred to Kampala for perusal. The file was then returned to the Mbarara High Court Circuit on 16th April 2024. It was then reallocated to me and fixed for a hearing on 30th April 2024.

BACKGROUND

The applicants filed an application against the respondents brought by way of **CHAMBER SUMMONS** under **SECTION 33 OF THE JUDICATURE ACT, SECTION 98 OF THE CIVIL PROCEDURE ACT, ORDER 41 RULE 1 (a) AND 2(i) OF THE CIVIL PROCEDURE RULES S.I 71-1 AS AMENDED BY S.I 18 OF 2018** seeking orders that;

1. A temporary injunction order doth issue restraining the 1st and 2nd respondents from alienating, encumbering, interfering with, damaging, wasting, taking possession of, or evicting the applicants from the suit property comprised in FRV 1072 FOLIO 15 PLOT 1 KITUNZI ROAD, KAMUKUZI in Mbarara city until final hearing and determination of the main suit.
2. A temporary injunction doth issue restraining the 1st respondent from committing further breach of the Debt settlement arrangement reached with the applicants on 28th March 2023 until final hearing and determination of the main suit.
3. A temporary injunction doth issue restraining the 3rd respondent from effecting any transfer, charge or dealing with the suit property in favor of any third party until hearing and final determination of the main suit.
4. The costs of the application.

The grounds of the application as stated in the Chamber Summons are that;

1. The applicants filed HCCS no 22 of 2024 challenging the inter alia the fraudulent, illegal sell, transfer of the suit property comprised in FRV 1072 Folio 15 Plot 1 Kitunzi Road, Kamukuzi, Mbarara city.
2. The applicant's above-mentioned suit has a high likelihood of success, and it raises serious questions relating to;
    a. The Propriety of the 1st respondents Mortgage interest in the applicant's freehold land.
    b. The Propriety of the 3rd respondent's removal of the government caveat.
    c. Alternatively, but without prejudice, the irregularity of the sale of the suit Property to the 2nd respondent without complying with the Mortgage Act 8
3. The applicants are in possession of the suit property, but they are being threatened with forceful eviction by the 1st and 2nd respondents.
4. That it is necessary to grant an injunction to preserve the status quo so that the serious questions of fraud and illegality raised in the main suit can be investigated and determined inter parties.
5. That the applicants will suffer irreparable harm and injury which cannot be adequately atoned for by way of damages if the orders sought herein are not granted.
6. That the balance of convenience favors the grant of the temporary injunction sought.

7. That it is fair and equitable that the application is granted.

EVIDENCE

The evidence to be considered in this application is contained in the affidavits filed on court record, which are;

- On 23/02/2024, the applicants filed an affidavit in support made by Mr. Francis Ishanga.
- On 23/02/2024 the applicants filed a further affidavit in support made by Mr. Francis Kyegarikye.
- On 07/03/2024 the 2nd respondent filed an affidavit in reply made by Ms. Kellen Karemera.
- On 11/03/2024 the 1st respondent filed an affidavit in reply made by Mr. Sauvik Pandey.
- On 11/03/2024 the 3rd respondent filed an affidavit in reply made by Mr. Kafureeka Victor Jagaine.
- On 13/03/2024 the 2nd respondent filed a supplementary affidavit made by Ms. Kellen Karemera.
- On 30/04/2024 the applicants filed 3 affidavits in rejoinder made by Mr. Francis Ishanga rejoining the respondent's affidavits in reply.

SUBMISSIONS

The parties made oral submissions when the application came up on 30th April 2024.

APPLICANT'S SUBMISSIONS

Counsel for the applicant submitted that the application is seeking a temporary injunction basing on the grounds stated in **KIYIMBA KAGGWA VS ABDUL KATENDE CIVIL SUIT NO. 2109 OF 1984** which are;

1. Prima facie case with possibility of success
2. Irreparable damage that cannot be atoned for by way of damages.
3. Balance of convenience

Counsel submitted for their client under each of the considerations listed above in the **KIYIMBA KAGGWA VS ABDUL KATENDE** case.

Prima facie case

Counsel submitted that the applicants have filed Civil suit 22 of 2024 attached as annexture NM1 to the affidavit in support challenging the fraudulent and illegal sale

of the suit property. He added that the suit raises triable issues, such as the debt Settlement arrangement with the 1st respondent, the failure to give notice and the caveat that was arbitrarily removed by the 3rd respondent. Counsel also contended that the transfer of the suit property into the names of the 2nd respondent was in breach of the Mortgage Act, insisting that he is not a bonafide purchaser for value. He concluded that all these warrant investigations and lay out a prima facie case.

Irreparable injury

Counsel submitted that the applicants have for the last 25 years built a business on the suit property where they derive their livelihood, which they now stand to lose in dubious transactions. Counsel contended that what is key is the nature of damage that will be suffered, which in this case, he stated extends to sentimental value that cannot be quantified in monetary terms. In support of this case, he cited the case of **SIMBA INVESTMENTS VS VANTAGE MEZAINE FUND HCMA 141 OF 2022** and **YEFUSA GOLOBA VS RL JAIN HCMA 334 OF 2013**. He stated that the applicants stand to lose property from which they have derived livelihood. Counsel also highlighted that the 255 plots that were subdivided from the land at Kashari do not have any mortgages and ought to also be preserved.

Balance of convenience

Counsel submitted that it is necessary to consider the harm to the applicant if the injunction is not granted, stating that court has a duty to weigh the scales of justice so that the suit is not rendered nugatory. Counsel contended that whereas this was a mortgage, there was also a debt settlement arrangement also referred to in paragraph 4 of the affidavit in rejoinder. He further submitted that the applicants are not obligated to pay 30% of the debt because of the existence of the debt settlement arrangement. Counsel concluded that eviction and taking of possession of the suit land was done without notice, which was illegal as it breached rule 5, 6,9 & 10 of **THE CONSTITUTION (LAND EVICTIONS) (PRACTICE) DIRECTIONS, 2021**. Counsel then prayed that the application be granted. Counsel also highlighted that the applicants were in possession of the suit land (**FRV 1072 FOLIO 15 PLOT 1 KITUNZI ROAD, KAMUKUZI)** by the time the land was transferred to the 2nd respondent on 12th February 2024 and when the application was filed in court on 23rd February 2024. Counsel prayed that the application be granted.

1ST RESPONDENT'S SUBMISSIONS

Prima facie case

Counsel submitted that the 2nd applicant obtained three facilitates from the 1st respondent, (i) an overdraft of 5 billion, (ii) a Term loan of 2 billion and (iii) a funded interest term loan of 3.5 billion. That the loans were secured by three properties namely (a) FRV 1072 Folio 15 Plot 1 Kitunzi Road, Mbarara, (b) Block 1 Plot 89 Kashari and (c) Block 1 Plot 148 Kashari. Counsel contended that the 2nd applicant defaulted on the three facilities and was given a notice dated 1st November 2022 annexed to the affidavit in reply as BOB1. That later the 2nd applicant was issued with a notice of sale. He also contended that the 255 plots were subdivided from property mortgaged to the 1st respondent, with the understanding within that arrangement that upon default the bank would proceed to sale without notice as stated in annexture BOB5. Counsel further stated that the primary requirement in applications of this nature as stated in regulation 13 (1) of the Mortgage regulations, 2012 is that the applicant ought to have deposited 30% of the outstanding amount. He concluded that the 1st respondent complied with all the notices in the Mortgage Act, 2009 and the suit property comprised in FRV 1072 Folio 15 Plot 1 Kitunzi Road, Mbarara was later sold, so he contended that no prima facie case was proved.

Irreparable injury

Counsel submitted that when property is mortgaged to a bank you cannot talk about irreparable injury because at the time of mortgaging, the sale of the property is contemplated. He cited the case of **CAIRO BANK & ANOR VS JOHN KANYAGO HCMA 1559 OF 2022** in support of his argument. He concluded that the applicant cannot make reference to irreparable loss when dealing with mortgaged property because sale is contemplated.

Balance of convenience

Counsel submitted that the applicants have outstanding facilities amounting to over UGX 5 billion, which has forced the 1st respondent to keep provisioning for the non-performing loans which affects the profitability of the 1st respondent. He concluded that since it is not in doubt that the loans were disbursed, the balance of convenience favors that the money is recovered. Counsel then prayed that the application be dismissed with costs.

2nd RESPONDENT'S SUBMISSIONS

Prima facie case

Counsel Daudi Balinda submitted that the 2nd respondent is the registered proprietor of the suit land which she acquired by sale during foreclosure. He drew court to annexure F of the supplementary affidavit. He contended that the 2nd respondent took possession of the land after following all the steps in the law and went on to demolish the old structure on the property.

Irreparable injury

Counsel submitted that at mortgaging, the purchase of the property when in default is contemplated. He also stated that there can be no irreparable injury since any loss can be ascertained in monetary terms.

Balance of convenience

Counsel Paul Tusubira submitted that the purpose of a temporary injunction is to preserve the status quo, he contended that the 2nd respondent transferred the suit land into her names and is now in possession so there is no status quo to preserve. Counsel then prayed that the application be dismissed with costs.

DETERMINATION

The Court of Appeal for East Africa in deciding the locus classicus case of **GIELLA VS CASMAN BROWN [1973] EA 358** laid down an approach to guide courts in applications for temporary injunctions, requiring;

1. That the Applicant must demonstrate a prima facie case with a probability of success in the main suit,
2. That the Applicant would suffer irreparable injury, which could not be compensated in damages.
3. That when the court is in doubt ,it will decide the application on the balance of convenience.

It is also important to note that when an application for an inunction is in regard to mortgaged property where the mortgagee **has already commenced steps of sale of the mortgaged property** to recovery of an outstanding loan amount then court ought to also consider the statutory requirements for **adjournment or stoppage of sale laid down in regulation 13 of The Mortgage Regulations, 2012,** which include the requirement for the mortgagor to make a deposit of the outstanding loan value if the injunction is to be granted.

In **FERDSULT ENGINEERING SERVICES LIMITED & ANOTHER VS AG & ABSA BANK UGANDA CONSTITUTIONAL PETITION 18 OF 2021,** the Constitutional Court of Uganda considered a petition in respect to the constitutionality of the statutory provisions in **REGULATION 13 of THE MORTGAGE REGULATIONS, 2012** holding that**;**

> "*A reading of Regulation 13(1) of the Mortgage Regulations requires all mortgagors who apply to adjourn or stop a sale to pay 30% of the outstanding amount or forced sale value of the mortgaged property. The provision demands formal compliance by all mortgagors seeking relief under the provision and the fact that the provision levies a requirement that might be burdensome to a person who may not be able to raise the deposit amount does not necessarily that it prefers persons who might have the deposit amount. The requirement to make a deposit under Regulation 13(1) is clearly devised to stop frivolous and vexatious mortgagors from frustrating mortgagees seeking recovery of monies rightfully owed. The Regulation is necessary to protect mortgagees from unnecessary adjournments or stoppage of sales that would result in satisfaction by defaulting mortgagors."*

I am of the opinion that the holding of the Constitutional Court of Uganda in **FERDSULT ENGINEERING SERVICES LIMITED & ANOTHER VS AG & ABSA BANK UGANDA CONSTITUTIONAL PETITION 18 OF 2021** imposes an obligation on a court considering an application for an injunction where a notice of default of loan has been served on the mortgagor, to comply with the statutory provisions in the Mortgage Act, 2009 and Mortgage regulations, 2012, when weighing the case of the Mortgagor and Mortgagee as opposing parties in a temporary injunction application.

I will now lay down the facts that are confirmed by both sides as can be deduced from the evidence of all the parties and then proceed to determine the application guided by the considerations laid down in **GIELLA VS CASMAN BROWN [1973] EA 358** and the holding in **FERDSULT ENGINEERING SERVICES LIMITED & ANOTHER VS AG & ABSA BANK UGANDA CONSTITUTIONAL PETITION 18 OF 2021.**

FACTS CONFIRMED BY EVIDENCE OF BOTH SIDES.

1. The 2nd applicant is a customer of the 1st respondent bank, from whom they obtained loan facilities secured by properties. ***(see paragraph 15 (a) of the***

Plaint annexed as NM1 to the affidavit in support for the applicant *and* ***also see paragraph 3 of the affidavit in reply for the 1st respondent bank***)

2. The applicants mortgaged the property comprised in FRV 1072 Folio 15 Plot 1 Kitunzi Road, Kamukuzi, kashari Block 1 Plot 89 and Kasahri Block 1 Plot 148 to the 1st respondent bank ***(see paragraph 15 (b) of the Plaint annexed as NM1 to the affidavit in support for the applicant*** *and* ***also see paragraph 4 of the affidavit in reply for the 1st respondent bank)***
3. The 1st respondent bank advertised in The Monitor Newspaper, the sale of the suit land ***(see paragraph 15 (y) of the Plaint annexed as NM1 to the affidavit in support for the applicant*** *and* ***also see paragraph 13 & 14 of the affidavit in reply for the 1st respondent bank)***
4. The land comprised in FRV 1072 FOLIO 15 PLOT 1 KITUNZI ROAD, KAMUKUZI is registered in the names of the 2nd respondent, who is also in possession of the same, with the structure thereon demolished ***(See submissions of both parties on 30th April 2024*** *and* ***pictures on court record taken at the suit land during the locus visit with the parties and lawyers)***
5. The certificates of title of 255 plots comprised in Block 1 Kashari are held by the 1st respondent bank ***(See submissions of both parties on 30th April 2024)***

ISSUE

- Whether a temporary injunction order may be granted to the applicants as prayed.

In order to address this issue, with regard to the orders sought in the Chamber Summons, I have to consider 5 questions under subheadings, which are;

1. What is the status quo of the properties?
2. Has the applicant made a deposit percentage stated in Regulation 13(1) of the Mortgage Regulations, 2012?
3. Has a prima facie case with a probability of success been made out by the evidence on record?
4. Will the applicant suffer irreparable injury if the injunction is not granted?
5. Who does the balance of convenience favor?

A. STATUS QUO

It is trite that an application for a temporary injunction primarily seeks to preserve the status quo. The application at hand is in respect to properties that the applicants mortgaged with the 1st respondent bank and whose status quo is as follows:

1. Land comprised in FRV 1072 FOLIO 15 PLOT 1 KITUNZI ROAD, KAMUKUZI is registered in the names of the 2nd respondent, who is also in possession of the same, with the structure thereon demolished and the land fenced off with iron sheets, guarded by staff of a security firm instructed by her. In summary, as of 30th April 2024 when the application was argued, the applicants were neither the registered proprietors nor the ones in possession.
2. Land comprised in the 255 certificates of title subdivided out of land that originally comprised in Kasahari Block 1 plots 98 and 148 are in possession of the bank, but the titles are still registered in the names of one or both applicants, and It is the applicants that are in physical possession of the land.

I find that some orders such as order 1 in the chamber summons seeking an injunction against damaging , wasting, taking possession or evicting the applicants have been overtaken by events in respect to Land comprised in FRV 1072 FOLIO 15 PLOT 1 KITUNZI ROAD, KAMUKUZI, because the 2nd respondent is in possession of the said land as was witnessed by court and all the parties with their lawyers during the locus visit on 30th April 2024. I therefore agree with Counsel for the 2nd respondent Senior Counsel Paul Tusubira's submission that there is no status quo for the applicants to preserve in respect to FRV 1072 FOLIO 15 PLOT 1 KITUNZI ROAD, KAMUKUZI.

I also find that the Land comprised in the 255 certificates of title subdivided out of land that originally comprised in Kasahari Block 1 plots 98 and 148 is still in the names of the applicants, and they are in physical possession. This means that the applicants have a status quo to preserve in these titles that are still in their names, especially considering that they are also still in possession of the same.

B. DEPOSIT UNDER REGULATION 13 MORTGAGE REGULATIONS.

It is trite law that a mortgagor, spouse, agent of the mortgagor or any other interested party seeking to adjourn or stop a sale of mortgaged land by public auction for reasonable cause pay a security deposit of 30% of the forced sale value of the mortgaged property or outstanding amount, as is provided in Regulation 13. (1) of the Mortgage Regulations, 2012. The intention of this provision is stated in **FERDSULT ENGINEERING SERVICES LIMITED & ANOTHER VS AG & ABSA BANK UGANDA CONSTITUTIONAL PETITION 18 OF 2021,** where the Constitutional Court of Uganda stated that;

"The requirement to make a deposit under Regulation 13(1) is clearly devised to stop frivolous and vexatious mortgagors from frustrating mortgagees seeking recovery of monies rightfully owed. The Regulation is necessary to protect mortgagees from unnecessary adjournments or stoppage of sales that would result in satisfaction by defaulting mortgagors."

The question that must be answered is whether the applicants have an obligation to pay the 30% deposit now. The evidence on court record in paragraph 24 and 25 of the 1st respondent's affidavit in reply is that the applicants ought to pay 30% of the forced sale value of the 255 plots amounting to UGX 4,397,775,000/=. In counter to the 1st respondents' evidence, the applicants avers in paragraph 4 (g) of the 1st applicant's affidavit in rejoinder to the 1st respondent's affidavit in reply that the applicants are not liable to pay the 30% of the forced sale value because of the Debt settlement Arrangement between the applicants and the 1st respondent bank.

In my analysis of the evidence above, I must make distinction between the properties that had been mortgaged and the applicability of Regulation 13. (1) of the Mortgage Regulations 2012 to them. I note that the provision in Regulation 13. (1) of the Mortgage Regulations 2012 is applicable in cases where an applicant is **seeking to adjourn or stop a sale** of mortgaged land by public auction. So how does this relate to the mortgaged properties at the time that this application was heard on 30th April 2024.

1. The Land comprised in FRV 1072 FOLIO 15 PLOT 1 KITUNZI ROAD, KAMUKUZI was already registered in the names of the 2nd respondent by the time this application was filed. It is therefore not subject to any adjournment or stoppage of a sale by public auction. The property had already been sold to the 2nd respondent. I therefore find that it is not necessary to deposit the 30% as stipulated in Regulation 13. (1) of the Mortgage Regulations 2012 in respect to the Land comprised in FRV 1072 FOLIO 15 PLOT 1 KITUNZI ROAD, KAMUKUZI since it was already sold.
2. Land comprised in the 255 certificates of title subdivided out of land that originally comprised in Kasahari Block 1 plots 98 and 148. There is no evidence that any advert has been put out by the 1st respondent to sale the property in the 255 titles. I therefore also find that the provision in the mortgage regulations requiring a deposit of 30% as stipulated in Regulation 13. (1) of the Mortgage Regulations 2012 does not apply to the 255 plots since there is no

evidence of an imminent sale by public auction, that the applicants seek to adjourn or stop.

C. PRIMA FACIE CASE.

It is trite that one of the considerations in an application for a temporary injunction is to determine whether a prima facie case has been made out. It is important that the applicant shows a strong case in their evidence on court record. In **RESTY NANTONGO V DAVID KAYONDO SCCA 1/1994** the Supreme court emphasized the need for a party seeking an injunction to show a strong case, holding that;

> *"The Plaintiff has not attempted to defeat the leasehold title, and consequently, no injunction could or should have been granted. The Plaintiff could not succeed in preventing the Defendant entering into possession, on the evidence before the Court."*

The analysis of the evidence to determine whether a prima facie case has been put forward by the applicants, requires us to first consider the grounds 4 (a) and (b) of the applicant's application since they shed light on the applicants claims against each of the respondents. I will reproduce the grounds in the Chamber Summons below;

4(a) *"The applicants filed HCCS no 22 of 2024 challenging the inter alia the fraudulent, illegal sell, transfer of the suit property comprised in FRV 1072 Folio 15 plot 1 Kitunzi Road, Kamukuzi, Mbarara city.*

(b)The applicant's above-mentioned suit has a high likelihood of success, and it raises serious questions relating to;

i. The Propriety of the 1st respondents Mortgage interest in the applicant's freehold land.

ii. The Propriety of the 3rd respondent's removal of the government caveat.

iii. Alternatively, but without prejudice, the irregularity of the sale of the suit Property to the 2nd respondent without complying with the Mortgage Act."

The case against the 1st respondent is in respect to the relationship with the applicants in light of the Debt settlement arrangement *(see paragraphs 7, 8 and 9 of the affidavits in support by the 1st applicant)*. The case against the 2nd respondent is that she is not a bonafide purchaser since the sale to her was allegedly tainted with fraud and illegality (*see paragraph 5 of the affidavit in support by the 1st applicant)* and the case against the 3rd respondent is in respect to the manner in which a caveat was removed on land FRV Lo72 Folio 15 plot 1 Kitunzi Road, Kamukuzi, Mbarara city.

I have perused the affidavit evidence and the plaint in HCCS 22 of 2024 and I find as I did above that there will be need to consider the details and implication of the debt settlement arrangement which both the applicants and the 1st respondent bank don't deny. So to that extent the evidence on court record makes out a prima facie case against the 1st respondent. I also note from the plaint that is annexed to the affidavit in support as annexture NM1, that the applicants attached thereto annexures O (a caveat) and annexture P (a search report) to confirm that the caveat had been lodged and it was removed, so to that extent, there are triable questions that would require answers from the 3rd respondent in a trial.

In regard to the 2nd respondent, I don't find the evidence on court record sufficient to create a prima facie case. The applicants' allegations against the 2nd respondent are that the sale to her was tainted with illegality and the property was undervalued. These averments in the plaint made by the applicants have to be looked at within the context of the fact that the 2nd respondent purchased mortgaged property, after the applicants defaulted on loan repayment and also after advertisement for sale was done in a newspaper *(**see paragraph 15 (q), (r) and (y) of the Plaint annexed as NM1 to the affidavit in support for the applicant and also see paragraph 5, 7, 13 and 14 of the affidavits in reply for the 1st respondent bank**).*

It is also important to note that a purchaser of Mortgaged property gets extra protection as stated in section 29 of The Mortgage Act, 2009. I further note that a sale by public auction also gets protection in regulation 16 (1) of the Mortgage Regulations which provides that:

> ***"16. Sale not to be vitiated by irregularity.***
> *(1) An irregularity in conducting a sale by public auction **shall not vitiate the sale,** but any person suffering loss or injury as a result of the irregularity may bring an action for damages or compensation against the mortgagee or the person who conducted the sale."*

The protection in the law in Section 29 of the Mortgage Act 2009 and Regulation 16(1) of the Mortgage regulation, 2012 is meant to protect the purchaser after a purchase by public auction, while at the same time enabling the financial sector players to recover outstanding loan monies, which the banks otherwise have to provision for, harming their profitability and eventually threatening the stability of the financial sector in the country. I therefore find that the evidence on the court

record in this application does not ably bring out a prima facie case against the 2nd respondent.

D. IRREPARABLE INJURY

It is trite that when dealing with mortgaged property, a mortgagee may exercise its power to sell the mortgaged land as stated in in section 20 and 24 of the Mortgage Act, 2009, as one of the remedies available to the mortgagee. The evidence on court record shows that:

1. The 2nd applicant is a customer of the 1st respondent bank, where it has loan facilities secured by properties. ***(see paragraph 15 (a) of the Plaint annexed as NM1 to the affidavit in support for the applicant and also see paragraph 3 of the affidavit in reply for the 1st respondent bank***)
2. The 2nd applicant mortgaged the property comprised in FRV 1072 Folio 15 Plot 1 Kitunzi Road, Kamukuzi, Kashari Block 1 plot 89 and Kasahri Block 1 plot 148 to the 1st respondent bank ***(see paragraph 15 (b) of the Plaint annexed as NM1 to the affidavit in support for the applicant and also see paragraph 4 of the affidavit in reply for the 1st respondent bank)***
3. The 1st respondent bank advertised in The Monitor Newspaper the sale of the suit land ***(see paragraph 15 (y) of the Plaint annexed as NM1 to the affidavit in support for the applicant and also see paragraph 13 & 14 of the affidavit in reply for the 1st respondent bank)***

In my opinion the evidence of both the applicants and the 1st respondents as stated above, shows that property was mortgaged , the mortgagor was in default, an advert for public auction was done, the argument of irreparable injury after the property is sold is thus weakened, because the mortgagor had a lot of time to seek court redress before the advert to sale was made in the newspapers but chose not to go to court. It is always prudent for a mortgagor to file a suit in court as soon as there is disagreement about the loan amount with the mortgagee or as soon as notice of default is served or as soon as a notice of sale is served or as soon as the advertisement is published if they have just cause to halt the public auction or seek court redress. Otherwise it is always contemplated that upon default the mortgaged property may be sold by public auction.

The applicants have also averred that they built a business over 25 years and acquired property that has a warehouse which if lost cannot be atoned by damages *(see paragraph 12 and 13 of the 1st applicant's affidavit in support, paragraph 3 and*

4 of the further affidavits in support). When court in the presence of the lawyers and parties visited locus at the land comprised in FRV 1072 Folio 15 plot 1 Kitunzi Road, Kamukuzi, Mbarara city, it was observed that the land was vacant, the warehouse that was thereon had been demolished, the land was fenced and guarded by guards put on the land by the 2nd respondent, who is the current registered proprietor.

I find that the developments that were on the land comprised in FRV 1072 Folio 15 plot 1 Kitunzi Road, Kamukuzi, Mbarara city no longer exist, so the developments that existed thereon but no longer exist before cannot be a basis for grant of an injunction. The only remedy left to the applicants in the main suit is for damages, assuming they can prove fault on any party. I therefore find that the evidence on court record does not prove irreparable injury will be suffered by the applicant in respect to land comprised in FRV 1072 Folio 15 plot 1 Kitunzi Road, Kamukuzi, Mbarara city, as it now stands, if an injunction is not granted, especially considering that the 2nd respondent in possession and registered on the title as the proprietor.

In respect to the 255 titles that were subdivided out of land formerly comprised in Kasahri Block 1, the evidence on court record in paragraph 9 of the affidavit in support states that the Debt settlement arrangement has an impact on the relationship of the applicants and the 1st respondent bank in respect to the outstanding loan. I therefore find that a sale of the 255 titles before considering in the main suit the impact of the Debt settlement arrangement between the parties on the mortgage will result in the applicants suffering irreparable injury. It is therefore worth preserving the status quo of the 255 plots pending the determination of the main suit where an interrogation of the debt settlement arrangement will most likely be done if the applicants adduce any evidence.

Lastly, I have considered the other arguments of the applicants in respect to irreparable injury, and I find that any claims that can be proved by either party can be atoned for by way of damages after the main suit is heard and determined.

D. BALANCE OF CONVENIENCE.

In principle the court will consider the balance of convenience if it is in doubt after considering whether a prima facie case is made out or irreparable injury is proved as was stated in **KIYIMBA KAGGWA VS HAJI ABUDUL NASSER KATENDE [1985] HCB 43**. I find that it is not necessary to discuss the subheading dealing with the balance of

Convenience, because the court has already made findings in respect to prima facie case and the irreparable injury claims by the applicants.

REMEDIES

Its trite law that costs follow the event, and the successful party is entitled to costs. Section 27 (1) of the Civil Procedure Act provides that ;

> *"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid."*

I find from the determination of the application above that the applicant has been successful as against the 1st respondent justifying the grant of an injunction in respect of property in the custody of the 1st respondent, but on the other hand the applicants have not been successful as against the 2nd respondent to justify grant of any injunction affecting the 2nd respondent. Following the guidance in section 27 of the Civil Procedure Act, costs will be due to the applicants and 1st respondent.

In conclusion the application is granted in part, and I order that;

1. The status quo in respect to the 255 certificates of title subdivided out of land formerly comprised in Kashari Block 1 plots 89 and 148 is maintained until HCCS 22 of 2024 is heard and determined.
2. The 1st respondent shall pay the applicant's costs of the application.
3. The application against the 2nd respondent is dismissed with costs.

NSHIMYE ALLAN PAUL M.
JUDGE
03.05.2024

This ruling has been delivered by email, as was agreed with the advocates of the parties on 30th April 2024, that the ruling will be sent to the email addresses provided by the Advocates of the parties.

NSHIMYE ALLAN PAUL M.
JUDGE
03.05.2024