

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(LAND DIVISION)**  
**MISCELLANEOUS CIVIL APPEAL NO 0140 OF 2023**  
**(ARISING FROM MISCELLANEOUS APPLICATION NO**  
**2812 OF 2023)**  
**(Arising from Civil Suit No. 1024)**

**ORIKIRIZA CHRISTINE ::::::::::: APPLICANT/APPELLANT**

**VERSUS**

**1. KCB BANK**

**2. MWESIGWA BERNARD**

**3. MIXED SCRAP METAL DEALERS LTD**

**4. COMMISSIONER FOR LAND**

**REGISTRATION :::::::::::RESPONDENTS**

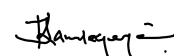
**BEFORE HON LADY JUSTICE NALUZZE AISHA BATALA**

**RULING.**

**Introduction;**

1. This ruling arises from an Appeal brought by the Appellant, Orikiriza Christine under section 98 of the Civil Procedure Act Cap 71, Order 50 rule 8 and Order 52 r 1 and 3, of the Civil Procedure Rules SI 71- for orders that;

- i) That the order which was issued by His Worship Kagoda Ntende Samuel M, Assistant Registrar on the



4<sup>th</sup> day of October, 2023 in Miscellaneous Application No.2812 of 2023 be reconsidered and set aside and the application for a temporary injunction be allowed unconditionally.

ii) Costs of this Appeal be provided for

**Background:**

2. The facts giving rise to this Application are that his Worship Kagoda Ntende Samuel M, the Assistant Registrar gave a ruling following an Application by the Appellant who had sought that the sale of the mortgaged property by the 1<sup>st</sup> Respondent be stayed/ stopped pending the determination of Civil Suit No.1024 of 2023 which was filed against the Mortgagee and the Mortgager for mortgaging property without the consent of the Appellant's spousal consent.

3. In Miscellaneous Application No.2812 of 2023, the Learned Ass. Registrar issued an order for temporary injunction lasting 6 months from the date of issue and subject to renewal upon proof of necessity and on condition that the Applicant pays a security deposit of 30%



of the outstanding balance of the Mortgaged property within one month from the date of the ruling.

**Grounds for the Application;**

4. The grounds in support of the Application are contained in the Notice of Motion and the Affidavit in support deposed by the Applicant dated the 1<sup>st</sup> day of December, 2023. The grounds are as follows;

i) That the learned Assistant Registrar erred in fact and law when he allowed Miscellaneous Application No. 2812 of 2023 on condition that the Applicant deposits 30% of the outstanding balance of the Mortgaged properties within one month from the date of the ruling without considering her capacity to pay the said sum.

ii) The learned Assistant Registrar erred in law and fact when he failed to evaluate all the evidence on record thereby subjecting the Applicant on a condition to deposit 30% of the outstanding balance of the Mortgaged Properties that she could not manage.

iii) That the Assistant Registrar erred in law and in fact when he limited the injunction order for 6 months



without considering the time the Civil suit will be determined.

iv) The learned Assistant Registrar erred in both law and fact when he failed to consider all the circumstances of the Application before making a ruling thereof.

5. On the other hand, the 1<sup>st</sup> Respondent opposed the application and filed an Affidavit in Reply deposed by Eric Eloket, an Advocate of the High Court of Uganda working with M/S Arcadia Advocates which has been handling the head suit and Applications therein of the 1<sup>st</sup> Respondent.

The grounds in opposition were;

i) That there is no appeal properly before court, on account of the Applicant not serving the summons, did not seek leave to extend time within which to serve summons and the suit abated in law.

ii) That there was no affidavit in rejoinder from the Applicant making the averments that she seeks to make an appeal.

iii) That the 30% deposit on the outstanding loan sums is a creature of the law.



iv) That the learned Assistant Registrar in restricting the injunction to 6 months was exercising his discretion.

v) That the learned Assistant Registrar's order provided for the renewal of the same upon proof of necessity.

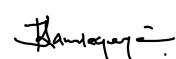
vi) That this Affidavit is in opposition to all sought orders and pray that this Appeal be dismissed with costs.

6. The Applicant filed an Affidavit in Rejoinder and averred that she was advised by her lawyers that;

i) That the Applicant was advised by her lawyers that the summons in form of the Appeal herein was served onto the 1<sup>st</sup> Respondent on the 10<sup>th</sup> day of January, 2024 which according to the law was within time in which to serve.

ii) That not filing an Affidavit in rejoinder is not breach of any legal provision and the same should not constitute a defence for an omission or error or irregularity/illegality by the judicial officers while reaching a decision.

iii) That the issue of 30% Deposit was raised in the 1<sup>st</sup> Respondent's Written submissions which were replied



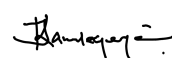
to in the Applicant's submissions in rejoinder where the Evidence of Hardship to be suffered by the Applicant was evidenced.

iv) That a 30% Deposit is not mandatory when the suit is filed by a spouse. That it is only mandatory where the suit is filed by the Mortgager him/herself.

v) That before subjecting conditions onto the spouse of paying a 30% Deposit before the injunction takes effect the Ass. Registrar ought to be guided by a number of circumstances such as the inconvenience to be caused to the Applicant after he or she fails to pay the said sum, whether the eviction there from will occasion the Applicant undue hardship, the number of dependants the Applicant has and many others which the Ass. Registrar didn't put into consideration.

vi) That the law leaves the discretion to court which ought to be exercised considering circumstances as mentioned.

vii) That the registrar's discretion does not extend to varying the provisions of the law on the purpose of an injunction. That the purpose of the temporary



injunction is to maintain the status quo until the main suit is fully determined.


viii) That the law makes the temporary injunction to expire automatically upon the completion of the main suit and does not extend to creating expiry dates for an injunction that ought to lapse upon completion of the main suit.

**Representation;**

7. The appellant/applicant was represented by Mr. Tumwesigye Everisto of Kabuusu Muhumuza & Co. Advocates whereas the 1<sup>st</sup> respondent was represented by Mr. Isaac Bakayana of M/S Arcadia Advocates for the 1<sup>st</sup> Respondent.

**Grounds of Appeal;**

The grounds for this Appeal are that;

- i. The learned Assistant Registrar erred in fact and law when he allowed Miscellaneous Application No.2812 of 2023 on condition that the Applicant deposits 30% of the outstanding balance of the Mortgaged properties within one month from the date of the ruling without considering her capacity to pay the said sum. 

- ii. The learned Assistant Registrar erred in law and fact when he failed to evaluate all the evidence on record thereby subjecting the Applicant on a condition to deposit 30% of the outstanding balance of the Mortgaged properties that she could not manage.
- iii. That the Assistant Registrar erred in law and fact when he limited the injunction order for 6 months without considering the time the civil suit will be determined.

**Submissions of Counsel for the Applicant;**

8. In his submissions, counsel for the Applicant raised four issues to be determined and these are;

***i) Whether the Assistant Registrar evaluated the evidence on record properly before holding that the Applicant Deposits 30% Security of the outstanding balance of the Mortgaged Property.***

***ii) Whether the Assistant Registrar erred in law and fact when he limited the Temporary injunction to 6 months without considering the main suit.***

***iii) Whether the Assistant Registrar considered all the circumstances available before making a ruling thereof.***





iv) ***What are the remedies available to the Parties?***

9. Counsel for the Applicant submitted on issue 1 and 3 together and stated that the Assistant Registrar did not evaluate the evidence on record properly before holding that the Applicant Deposits 30% Security of the outstanding balance of the Mortgaged property and that he did not consider all the circumstances available before making a ruling thereof.
10. It was further submitted that for mortgages, Regulation 13(6) of the Mortgage Regulation; 2012 guide on how temporary injunctions involving Mortgaged properties ought to be determined.
11. This Regulation does not make it mandatory for the spouse to pay the 30% security deposit but gives court discretion on whether it ought to be paid or not. Counsel relied on the case of **Nakato Margaret v Housing Finance Bank (U) Ltd Civil Appeal No. 0687 of 2021** where his Lordship Justice Mubiru stated that, “ ***the position now is that applications for temporary injunctions involving mortgaged property have to be dealt with in conformity with the statutory provisions for***

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***mortgages under the Mortgage Regulations therefore override traditional considerations for the grant of a temporary injunction.***” counsel further submitted that had the Trial Ass. Registrar considered every circumstance surrounding this case, he wouldn’t have granted this conditional order subject to payment of 30% security deposit.

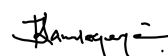
12. Counsel therefore submitted that the Ass. Registrar in making the order in Miscellaneous Application No.1812 of 2023 did not properly evaluate the Evidence on record for if he had done so, he would have been alive to the undue hardship that would be suffered by the Applicant if the condition for a security deposit of 30% of the outstanding balance before the order of injunction becomes effective.
13. On the issue of whether the Ass. Registrar erred in law and fact when he limited the Temporary injunction to 6 months without considering the main suit, counsel for the Applicant submitted that the main purpose of a temporary injunction as expounded under order 41 (2) of the Civil Procedure Rules is to preserve the status quo until the determination of the main suit.



14. That they wonder whether by fixing the injunction order for 6 months, the Ass. Registrar had pre-determined the period within which the main suit would have been determined.
15. That the Ass. Registrar added thereon a condition that the injunction order was subject to renewal upon proof of necessity and in that case, the Ass. Registrar erred in limiting the injunction to 6 months contrary to what the law provides for.
16. On the issue of any remedies available, Counsel for the Applicant prayed that the Ass. Registrar in Miscellaneous Application No 1812 of 2023 be set aside and the temporary injunction is freed to stand without any condition whether for payment of a security deposit of 30% of the outstanding balance or time limit of six months from the date of issue and prayed for the Appeal to Succeed.

**Decision and determination of court;**

**Ground 1; The learned Assistant Registrar erred in fact and law when he allowed Miscellaneous Application**



**No.2812 of 2023 on condition that the Applicant deposits 30% of the outstanding balance of the Mortgaged properties within one month from the date of the ruling without considering her capacity to pay the said sum.**

**Ground 2; The learned Assistant Registrar erred in law and fact when he failed to evaluate all the evidence on record thereby subjecting the Applicant on a condition to deposit 30% of the outstanding balance of the Mortgaged properties that she could not manage.**

17. The power to grant temporary injunctions is discretionary (*see; Robert Kavuma v. M/s Hotel International, S.C. Civil Appeal. No. 8 of 1990*).

18. In the case of **Nakato Margaret v Housing Finance Bank and Another, Civil Appeal No. 0687 of 2021**, Justice Stephen Mubiru stated that; **“Discretion is the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable. “Discretion” cases involve either the management of the trial and the pre-trial process; or where the principle of law governing the case makes many factors relevant, and requires the decision-**

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**maker to weigh and balance them. Just as the factors for consideration could never be absolute, there could never be a gauge to measure the accuracy of such decisions. Unless the exercise of discretion is obviously perverse, an appellate court should be slow to set aside discretionary orders of courts below.”**

19. In an appeal against exercise of discretion, the appellate court should not interfere with exercise of discretion unless satisfied that the lower court misdirected itself on some matter and thereby arrived at a wrong decision or it is manifest from the case as a whole that the lower court made a wrong decision as per the case of **Mbogo & Anor v Shah (1968) EA 93**.

20. The appellate court will intervene where the court below acted un-judicially or on wrong principles; where there has been an error in principle. Generally, appellate courts will only interfere with exercise of discretion by a court below where the court has incorrectly applied a legal principle or the decision is so clearly wrong that it amounts to an injustice. Although there is a presumption in favor of judicial discretion being rightly exercised, an appellate

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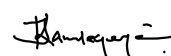
court may look at the facts to ascertain if discretion has been rightly exercised.

21. Therefore, allowing an appeal from a discretionary order is predicated on proof of: (i) “specific error,” i.e. an error of law (including acting upon a wrong principle), a mistake as to the facts, relying upon an irrelevant consideration or ignoring a relevant consideration, or (exceptionally) giving inappropriate weight to such considerations (relevancy grounds); and (ii) “inferred error, i.e. where, in the absence of identification of specific error, the decision is regarded as unreasonable or clearly unjust.

22. Where inferred error is found, this will have been brought about by some unidentifiable specific error as stated in the case of **Equity Bank (U) Limited v Mugisha Masesane Emmanuel Civil Appeal No. 1782 of 2021**

23. I find it pertinent to address the order issued by the Ass. Registrar ordering the Applicant to deposit security of 30% of the outstanding balance of the Mortgaged Properties within one month from passing of the ruling.

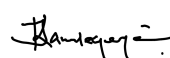
24. In his ruling, the learned Registrar found that basing on the evidence on record, it was clear that the suit properties;



if not protected are at risk of being alienated or sold off to third parties.

25. He further gave reasons that this is so because evidence had been adduced on the matrimonial properties that three mortgages were registered on each certificates of Title on various dates and times and this coupled with the advertisement of the said matrimonial properties in the News Paper by Fit Auctioneers for the 1<sup>st</sup> Respondent from the 10<sup>th</sup> day of August, 2022 and another advert for land in Rukungiri District vide Block 12 Plot 478 land at Nyakagyeme; Rukungiri District on the 6<sup>th</sup> day of September, 2023, left court convinced that the property was in danger of being alienated or sold off before the main suit is determined as per order 41 r 1 CPR SI 71-1.

26. The Learned Registrar further in his Ruling, having found that the property was in danger of being disposed of before the main suit is heard, he stated that it was incumbent upon that Honorable Court to exercise discretion to protect legal rights of parties through an injunction with the purpose of maintaining the status quo and considering Reg 13 of the Mortgage Regulations 2012



which provides that court may stop the sale upon payment of 30% of the forced sale value of the Mortgaged property of outstanding amount.

27. The question rising in this case is in contention with the grant of the temporary injunction but with a condition that the Applicant deposits 30% of the outstanding balance of the Mortgaged Property.

28. Regulation 13(1) of the Mortgage Regulations, 2012 provides that: ***“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”.*** ***Regulation 13(6) states that; 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.***

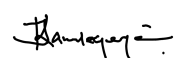




**29.** When dealing with Applications regarding mortgaged property, it must be done in conformity with the provisions of the law. The statutory requirements under the Mortgage Regulations thereby override traditional considerations for the grant of a temporary injunction as was stated in **Willis International Engineering and Contractors Ltd and another v. DFCU Bank, H. C. Miscellaneous Application No. 1000 of 2015.**

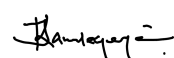
30. While the Applicant in his Application and Affidavit in Support of the Application claims that the Learned Assistant Registrar erred in fact and in law when he allowed Miscellaneous Application No. 2812 of 2023 on condition that the Applicant deposits 30% of the outstanding balance of the Mortgaged Properties within one month from the date of the ruling without considering her capacity to pay the said sum, the Respondent stated that this 30% deposit is a creature of law.

31. **Justice Mubiru Stephen** stated in the case of **Nakato Magaret v Housing Finance Bank (Supra)** that, **“Regulation 13 of The Mortgage Regulations, 2012 is an enactment of the principle “pay now, argue later.”**



**It is designed to restrict the ability of the mortgagor to use litigation or the courts, to vexatiously delay the realization of money due to the mortgagee. It is intended to reduce the number of frivolous objections to sales by a mortgagee and guarantee that the mortgagee will not be unnecessarily prejudiced by a delay in payments, inevitably occasioned by litigation. It ensures that the mortgagees are not left out of pocket due to the time that lapses over the course of litigation, while on the other hand encouraging a mortgagor to hasten the progress of litigation so as to improve on its ability to expand its business, or pay debts, or to mitigate any detrimental effect imposition of the condition may have had on the mortgagor's liquidity.**

32. In my opinion, court must evaluate the current circumstances before imposing a party to pay the 30% as per Regulation 13 of the Mortgage Regulations 2012. such circumstances must include establishing the property mortgaged, whether it is matrimonial property or not, issues regarding consent from one of the spouses before



property was mortgaged and the ability of the Applicant to pay the 30% deposit of the forced sale value of the Mortgaged property.

33. The Applicant in Miscellaneous Application No. 2812 of 2023 learnt that her matrimonial properties were advertised for sale in the Newspapers. She further averred that the matrimonial properties were mortgaged without her consent as the spouse. However, the 1<sup>st</sup> respondent in the Affidavit in reply to that particular Application stated that the 2<sup>nd</sup> Respondent declared to the 1<sup>st</sup> respondent that he is not married.

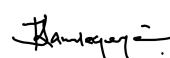
34. However, these are issues to be determined in the main suit. I need to emphasize that the Registrar makes his or her decision based on the evidence laid before him or her by the parties. In the same spirit, his discretion is premised on the evidence of circumstances that has been laid before him.

35. I have also noted that the appellant in paragraph 6 of the affidavit in support states that she adduced evidence of hardship through submissions which I believe was misconceived. Submissions are not evidence.



36. In **Nakato Margret (Supra)** Justice Mubiru observed as follows; ***“The considerations must be evaluated on a case by case basis and therefore the exercise of that discretion must be based on an individualized assessment of current circumstances that show that the eviction would cause significant difficulty, expense or disruption, beyond that to which every mortgage in default is necessarily subjected when foreclosure ensues..... The burden rests on the applicant to provide evidence in respect of these considerations if arguing that loss of possession of the property would cause undue hardship. These circumstances cannot be inferred from the illiteracy of the applicant, having ten children whose ages and circumstances are undisclosed and a mere averment that it is the only house she can live in.....Courts are persuaded by evidence and not mere arguments.”***

37. After thorough examination of the record and all pleadings of the parties, I conclude that the Learned Assistant Registrar duly exercised discretion. I discern no



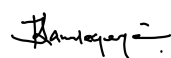
grounds to challenge his decision as it stands on sound legal principles and the evidence presented by the parties.

In the premises ground 1 and 2 of the appeal fail.

**Ground 2: That the Assistant Registrar erred in law and fact when he limited the injunction order for 6 months without considering the time the civil suit will be determined.**

**38.** The traditional principles for granting temporary injunctions are merely illustrative and neither exhaustive nor absolute rules. The grant of a temporary injunction is discretionary and equitable remedy and power to grant the injunction must be exercised in accordance with sound judicial principles. **(See; American Cyanamide Co v Ethicon Limited [1975] AC 396)**

**39.** Counsel for the appellant submitted that the purpose of a temporary injunction as expounded under Order 41 rule 2 of the Civil Procedure rules and the case of **ELT Kiyimba Kaggwa v Haji Abdu Nasser Katende [1985] HCB 43** is to preserve the status quo until determination of the main suit.



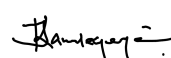
40. I have carefully perused the orders granted by the Assistant Registrar and among others they are as follows;

a) That a temporary injunction doth issue against the respondents, their agents, and or representatives restraining them from proceeding with the intended sale or effect any changes to the register for Land comprised in Kyadondo Block 266 Plots 1461 and 1462 Land at Seguku Kyadondo; Wakiso District and Block 12 Plot 478 Land at Nyakagyeme; Rukugiri District or doing any activity **thereon until the final disposal of Civil Suit No 1024** before this Honorable court.

**b) That the order to last for 6 months from today and subject to renewal upon proof of necessity.**

41. The purpose of a temporary injunction as I understand it is to preserve the status quo until disposal of the main suit. The temporary injunction should continue up to but not beyond the final hearing of the proceedings. **(Page 437, Spry Equitable Remedies (4<sup>th</sup> Edition) (1990)).**

42. The learned Assistant Registrar having granted the order that a temporary injunction doth issue against the respondents which order was unconditional, was



unfounded and contradictory to issue the subsequent order that the order lasts 6 months from the date of the ruling and subject to renewal upon proof of necessity.

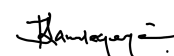
43. In other words, the subsequent order contradicted the primary order thereby defeating the ultimate objective of a temporary injunction.

44. In the premises, this 3<sup>rd</sup> ground succeeds.

45. In light of the foregoing, the appeal is partially granted, and the following orders are issued;

i) That a temporary injunction doth issue against the respondents, their agents, and or representatives restraining them from proceeding with the intended sale or effect any changes to the register for Land comprised in Kyadondo Block 266 Plots 1461 and 1462 Land at Seguku Kyadondo; Wakiso District and Block 12 Plot 478 Land at Nyakagyeme; Rukugiri District or doing any activity thereon until the final disposal of Civil Suit No 1024 before this Honorable court.

ii) That the applicant to deposit security of 30% of the outstanding balance of the Mortgaged properties within one month from the date of this ruling.

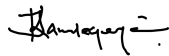


iii) The order that was to last for 6 months from the date of the ruling of the Assistant Registrar subject to renewal upon proof of necessity is hereby set aside.

iv) The order by the Assistant Registrar as to costs in Miscellaneous Application No.2812 of 2023 is hereby maintained.

v) No orders as to costs of this appeal.

**I SO ORDER.**



**NALUZZE AISHA BATALA**

**JUDGE**

**21<sup>st</sup> /03/2024**