

UGANDA / JUDGMENT

Solomon Champlain Lui & Anor v Stanbic Bank Uganda Ltd (Miscellaneous Application No. 766 of 2016) [2017] UGCommC 24 (6 March 2017)

[2017] UGCommC 24

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 766 of 2016

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 766 OF 2016

[ARISING FROM CIVIL SUIT NO 592 OF 2016]

[FORMERLY NAKAWA HIGH COURT CIVIL SUIT NO 83 OF 2016]

1. SOLOMON CHAMPLAIN LUI}
2. HAMIDAH KOBUSINGYE} APPLICANTS

VERSUS

STANBIC BANK UGANDA LTD} RESPONDENTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants application is for a temporary injunction restraining and prohibiting the Respondent and its agents from selling or dealing in anyway whatsoever with their property comprised in Kyadondo Block 257, Plot 944 land at Munyonyo and Kyadondo Block 257, Plots 920 and 921 land at Munyonyo until the hearing and final determination of the main suit. It is also for the costs of the application to be provided for.

The grounds of the application are that the Respondent's mortgage deeds are illegal and unenforceable as the Respondent breached the contracts by applying illegal interest and unlawful debits. Secondly, the scheduled sale is illegal for want of a statutory demand and a notice of sale. The suit properties are in immediate danger of alienation since they are scheduled

to be sold on the 2nd and 4th of March 2016 as the Respondent's auctioneer has issued a notice of eviction lapsing on the 24th of February 2016. Thirdly, the Applicants stand to suffer irreparable damage to which adequate compensation would not be sufficient if this order is not issued owing to the suit land's strategic location by the road side along Munyonyo and also because of scarcity of land in that area. Lastly, the Applicants have since instituted a suit against the Respondents with a high probability of success and it is just and equitable that this Application is allowed and a temporary order of injunction be issued to avert any damage.

The application is supported by the affidavit of HAMIDAH KOBUSINGYE who repeats the averments in the chamber summons regarding the filing of the main suit and adds that the Applicants are the registered proprietors of land comprised in Kyadondo Block 257, Plot 944 land at Munyonyo and Kyadondo Block 257, Plots 920 and 921, land at Munyonyo all of which are fully developed. Secondly, the Applicants operate bank accounts with the Respondent vide Accounts No. 9030006579190 and 9030008113180 held at Forest Mall Branch, Plot 3A2/3A3 Sports Lane, Lugogo, within the jurisdiction of this Honorable Court.

Thirdly, pursuant to a facility letter dated 3rd February 2012 and another dated 6th June, 2013 the Respondent agreed to disburse to the Applicants a sum of US \$ 255,000 [United States Dollars two hundred and fifty five thousand only] under the first facility and an aggregate sum of US \$ 846,029 [United States Dollars eight hundred and forty six thousand, twenty nine only] under the second facility. She averred that to secure the said facilities, mortgage deeds were drawn up but they are null and void *ab initio* for illegality, want of execution and want of attestation;

Fourthly, that consequent upon partial disbursement of the loan facilities, the Respondent unlawfully charged interest on the Applicants' accounts which was not contractual and kept its current accounts overdrawn thereby stifling the Applicants' construction project. She avers that the Respondent breached the contract by its failure to disburse a sum of US \$ 119,535 yet it continued to collect over and above the monthly installment of US \$ 12,883. As a result of the aforementioned breach, the Applicants were unable to complete their construction project and have as a result been deprived of income from their apartment hotel project. The Respondent arbitrarily increased its interest rates and unlawfully debited it on the Applicants' bank accounts without giving them notice and as a result of this illegal action, the Applicants' equity of redemption has been jeopardized since their account has been excessively and unlawfully debited by the Respondents hence causing the alleged "default." Under the home facility letter dated 6th June 2013, the Respondent paid out unconscionable sums to its valuers and MMAKS Advocates without having recovered the loan which debits were unlawful, arbitrary and not reasonably incurred. The Applicants maintain that the letter by the Respondent's lawyers did not recall the loan and does not amount to a statutory demand to warrant the foreclosure of the Applicants' securities.

The affidavit in reply of the Respondent opposes the application and was deposed by Mr. Godfrey Twinamatsiko, the Manager PB of the Respondent where he gives the following facts; By home loan letters dated 3rd February, 2012 and 6th June, 2013 the Applicants were granted loans in the sums of US\$ 255,000 (United States Dollars Two Hundred Fifty Five Thousand only) and US\$

846,029 (United States Dollars Eight Hundred Forty Six Thousand Twenty Nine only) by the Respondent for purposes of purchasing the properties comprised in Kyadondo Block 257 Plots 920-921 land at Munyonyo and Kyadondo Block 257 Plot 944 Munyonyo and completing construction of the development thereon. The properties were purchased and the Applicants are presently the registered proprietors thereof. Interest at the rate of 12.5% per annum applied to the first loan, and penal interest at the rate of 5% per annum over the agreed rate of 12.5% was also applicable in the event of default and under Clause 3.1.1 of the 2nd Home Loan Letter, interest was agreed at a rate of 13.5% per annum and pursuant to Clause 3.2 penal interest of 5% per annum above the rate of 13.5% applied in the event of default. Pursuant to clause 3.1.2, the Respondent reserved the right to amend this rate in line with prevailing market trends. The said loans were secured by a legal mortgage over the purchased property.

The disbursement of the Home Loan facilities was conditioned upon fulfillment of conditions set out in Clause 1.2 of the Home Loan Letters but the Applicants did not meet all the conditions as in particular the Applicants made structural alterations to the development on the property comprised in Plot 944 thereby affecting the bills of quantities and approved building plans. The Applicants did not service their loans in accordance with the terms upon which they were granted and as a result the Respondent issued a Notice of Default on 18th March, 2015 requiring them to pay a sum of US\$ 957,197 (United States Dollars Nine Hundred Fifty Seven Thousand One Hundred Ninety Seven only) which was the sum then owed within forty five (45) working days in default of which a Notice of Sale would be issued. The Applicants did not settle the sums owed and upon the lapse of the 45(Forty Five) working days the Respondent issued a Notice of Sale and served it on the Plaintiffs.

The Applicants again did not settle the amounts owed and as a result the Respondent advertised the securities in the New Vision newspaper of 3rd July, 2015. Subsequently, the Applicants by their lawyer's letter dated 8th July, 2015 requested to have their debt rescheduled contending that the amounts disbursed were less than the loan amount and further requesting for a meeting which was held on 9th July, 2015 between officials of the Respondent with the Applicants together with their then lawyer Mrs. Victoria Nakintu Katamba. As a result the Applicants paid a sum of US\$106,563 (United States Dollars One Hundred Six Five Hundred Sixty Three only) in part settlement of the debt sum and also undertook to make monthly payments to avert the disposal of the securities. In spite of their said undertaking, the Applicants did not effect payments in accordance therewith and the securities were re-advertised for sale in the New Vision Newspaper of 29th July, 2015 and 1st February, 2016. The Applicants expressly consented to the sale by private treaty as can be discerned from Clause 4 (xv) (i) of the Mortgage deed.

In rejoinder Hamidah Kobusingye made a deposition in which she objected to the affidavit in reply on the ground that it was filed out of time. In rejoinder to the affidavit in reply she the Respondent did not give a 15 days written notice as required by **S.12 of the Mortgage Act, 2009** before altering the interest rate. Secondly, the reply that it was false to say that the Respondent disbursed a loan of only US\$ 726,494 [United States Dollars seven hundred twenty six thousand four hundred ninety four] contrary to the loan facility. The documents that were drawn up are

null and void *ab initio* for illegality, want of execution and want of attestation. Furthermore, the "demand for payment of arrears" in the sum of US\$ 15,411.85 by Respondent's lawyers referred to did not recall the loan and do not amount to a statutory demand to warrant the foreclosure of the Applicants' securities. She contended that the Applicants maintain that there was no Statutory Demand or Notice of Sale issued to them in accordance with the Law as such they did not consent to sale by private treaty since the photographs of Plot 944 do not show the current building as at the date of advertisement; the auctioneer did not disclose the time for viewing the properties; the photographs did not show the full elevation of the properties and the Respondent has not carried out a pre-sale valuation. She further deposed that the Applicants' suit has a high likelihood of success because the purported mortgage instruments are illegal.

The court was addressed in written submissions. At the hearing of the application Counsel Dombi Reshila held brief for Counsel David Kaggwa who represented the Applicant while the Respondent was represented by MMAKS Advocates.

Submissions of the Applicant's Counsel

The Applicant's Counsel objected to the Respondent's Affidavit in Reply for being filed out of time and prayed that it should be struck off the record. It was filed on 11th October, 2016 more than 7 months from the date of service of the Application. Under **Order 12 rule 3 sub rule 2 of the Civil Procedure Rules** all replies to interlocutory application shall be made within 15 days from the date of service. The Respondent was served with the Applicants Application on 3rd March, 2016 according to the affidavit of service to that effect on record. The affidavit in reply was filed seven months later without leave of court. In support of the objection Counsel relied on **Stop and See (U) Ltd vs. Tropical Africa Bank Ltd Misc. Application No. 333 of 2010** where it was held that "These pleadings follow the same pattern as that of a plaint and a written statement of defence. It follows that the same time lines would apply to interlocutory applications. A reply or defence to an application has to be filed within 15 days. Failure to file within 15 days would put a defence or affidavit in reply out of the time prescribed by the rules. Once the party is out of time, he or she needs to seek the leave of court to file the defence or affidavit in reply outside the prescribed time. The practice of legal practitioners is to file an affidavit in reply at pleasure. This has to be discouraged. Order 12 rule 3 should guide advocates on the time lines for pleadings in interlocutory applications"

Without prejudice to the above submission, he contended that that the primary purpose of an application for a temporary injunction is to preserve the status quo pending the disposal of the main suit which status quo the Applicant sought to preserve at the time of filing the Application, as cited in **Noormohamed Jamamohamed vs. Kasamali Virgi Nadhaim (1953) 29 EACA 8**. Secondly, the granting of a temporary injunction is a matter within the discretion of Court which must be exercised judiciously as held in the case of **Edward Sargent vs. CJ Patel (1949) 16 EACA 63**; In the exercise of its discretion it is now settled that Court must consider whether the Applicant has raised a prima facie triable issue in its pleadings in the main suit (See **Kiyimba Kaggwa vs. Hajji Nasser Katende (1988) HCB 13** and **American Cyanamid Co. V Ethicon Limited**

[1975] AC 396). Secondly, the Applicant must show that he would otherwise suffer irreparable injury which would not be adequately compensated by an award of damages if the application is not granted. If the court is in doubt on the two grounds it will decide the application on the balance of convenience.

Pursuant to a facility letter dated 3rd February, 2012 and another dated 6th June, 2013, the Respondent agreed to disburse to the Applicants a sum of US \$ 255,000 under the first facility and an aggregate sum of US \$ 846,029 under the second facility. However, in total breach of the contract the Respondent failed to disburse a sum of US \$ 119,535 which fact the Respondent doesn't deny in its Affidavit in reply as it admits that it only disbursed US\$ 726,557 as such there is a prima facie triable issue raised. On whether an interest rate increased by the Respondent and applied to his outstanding sums without giving the Applicants 15 days notice of its increase contravenes **Section 12 of the Mortgage Act**, Learned Counsel submitted that under the facility letter dated 3rd February, 2012 the agreed interest rate was 12.5% per annum with a monthly installment of US \$ 3,733 while under that dated 6th June, 2013 the agreed interest rate was 13.5% per annum. However, without giving a 15 working days written notice to the Applicants, the Respondent arbitrarily increased its interest rates and unlawfully debited it on the Applicants bank accounts in total disregard to **S.12 of the Mortgage Act, 2009**. In the Affidavit in reply the Respondent claims a right to amend the interest rate in line with prevailing market trends and in an attempt to circumvent that statutory obligation the Respondent included clause 3.1.2 in the facility letter which provision is extortionate, unconscionable and illegal as such there is a prima facie triable issue. On whether there was a realization within the meaning of the law to entitle the Respondent payout sums to its lawyers and auctioneers. Counsel submitted that the Respondent under the home facility dated 6th June, 2013 paid out unconscionable sums to its valuers and MMAKS for valuation fees (US \$ 701) Loan Recovery (US \$ 58,773.80) Legal Fees of (US \$ 11,210) which they allege were debited pursuant to Clause 3.8 and Clause 11 of the Mortgage deed which provides that "all costs, charges and expenses incidental to the negotiation, preparation, completion and realization of the security are payable by the Applicants" yet the only aspect within which money could be deducted was in the category of realization as such there was no realization within the meaning of the law which is also a prima facie triable issue. Counsel submitted that contrary to the provisions of the Mortgage Act, without a prior statutory demand or a notice of sale to the Applicants, the Respondent unlawfully advertised the Applicants properties for sale which fact the Respondent does not deny in its Affidavit in reply. He relied on the case of **Siminyu vs. Housing Finance Co. of Kenya (2001) 2 EA 540** where Ringera J held:-

"... Without compliance with these statutory commands, there can be no valid exercise of sale and accordingly it cannot be said that the chargers equity of redemption is extinguished in any sale conducted in breach thereof".

On whether the Respondent can go ahead to enforce illegal documents? Counsel submitted that the documents drawn up to secure the facilities are null and void ab initio for illegality, want of execution and attestation which fact the Respondent does not deny in its Affidavit in Reply. Counsel submitted that basing on the above submissions there are prima facie triable issues in the Main suit.

In resolution of the second ground on **whether the Applicant would suffer irreparable injury which would not be adequately compensated by an award of damages**, Counsel submitted that the injury the Applicants will suffer in this case cannot be compensated by an award of damages owing to the suit lands strategic location by the road side along Munyonyo and also because of scarcity of land in that area. Counsel cited the **Emerald Case**, where Justice Ringera in the Case of **Siminyu V housing Finance Co. of Kenya (2001) 2 EA 540** at page 549 held that;

*“However, as I would understand the law it is not ordained that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in position to pay them. That is the normal course but not the invariable course. In my view the court has and must exercise a judicial discretion in the matter...”**

Counsel submitted that just because the bank has money does not entitle it to ride roughshod over the rights of the Applicants. With regard to the balance of convenience Counsel submitted that under paragraph 2 of the affidavit in support, the Applicants are the registered proprietors of the developed suit land and are in possession of the suit property. As a result the balance of convenience is more in their favour and prayed that this Application be granted and the Respondents bear the costs.

Submissions of the Respondent’s Counsel

In reply to the preliminary point, the learned Counsel submitted that the Applicants filed an Affidavit in Rejoinder on 26th October, 2016. He submitted that it is upon complying with the mandatory requirements of **Order 12 Rule 3(1)** that the Respondent would then be required to file its response within 15 days from the date of service upon it but in the instant case the dispute before the Court has neither been subjected to alternative dispute resolution nor has a scheduling conference been held. He submitted in the alternative that the Applicants having filed an affidavit in rejoinder they cannot allege that they were in anyway prejudiced by the alleged late filing of the Affidavit in reply. The Court is enjoined by **Article 126 (2) (e) of the Constitution** to administer substantive justice without regard to technicalities. He prayed that this application is prematurely before the Court and should be struck out on that basis with costs.

Without prejudice, in reply to the grounds for grant of an injunction, learned Counsel submitted that by the home loan letters the Applicants were granted loans in the sums of US\$ 255,000 (United States Dollars Two Hundred Fifty Five Thousand only) and US\$ 846,029 (United States Dollars Eight Hundred Forty Six Thousand Twenty Nine only) by the Respondent for purposes of purchasing the properties comprised in Kyadondo Block 257 Plots 920-921 and Kyadondo Block 257 Plot 944 Munyonyo and completing construction of the development thereon. Learned

Counsel further submitted that both loans were secured by Legal Mortgages over the suit properties and the titles are in the Respondent's possession as Mortgagee and the Applicants are indebted to the Respondent and do not deny being indebted. Learned Counsel submitted that the interim order issued by the Registrar was issued contrary to the **Office Instruction No. 1 of 2014** issued by the Principal Judge on December 2014 for guidance by the Registrars and that the provisions of **Rule 13(1) of the Mortgage Regulations 2012** were not complied with in issuing the interim order. Counsel referred to the **Miao case (Supra)** where this Court found that;

"...Discretionary power is given to court under the regulation whether to adjourn the sale or not. That discretion is exercised only upon deposit of 30% of the outstanding amount or forced sale value of the property..."

He submitted that the Interim order having been issued without regard to the statutory requirements for the deposit of security should be vacated for not complying with the requirements of the Mortgage Regulations. Counsel made reference to the case of **Kiyimba Kaggwa Vs. Katende (1985) HCB 43** which sets out the grounds for grant of a temporary injunction and submitted that the Respondent in its Affidavit in Reply stated that the Applicants breached the loan agreement on the basis of which it declined to disburse the full loan sum which is not rebutted by the Applicants in their Affidavit in Rejoinder as such this is a triable issue in the context of an injunction application. Counsel also submitted that it is also not denied that the Applicants are in default of settling the loan sum as out of the full (consolidated) loan sum of US \$ 1,101,029 (United States Dollars One Million One Hundred One Thousand Twenty Nine) only a sum of US \$ 119,535 (United States Dollars One Hundred Nineteen Thousand Five Hundred Thirty Five) which is just about 10% of the loan sum was not disbursed. In proportion to the debt sum, this amount cannot be a basis for the Applicants not to repay the amounts owed or seek to have an injunction against the bank restraining the disposal of the securities.

With reference to amendment of the rate of interest, Counsel submitted that Clause 8.1.2 of the facility letter which was executed by the Applicants is clear as it gives the Respondent the right to amend the interest and in law a party must be held to its bargain as was held in the case of ***Campbell Discount Co. vs. Bridge* (1961)2, *ALL ER* 97**, where Holroyd Pearce L. J *held* that;

"It would be a novel extension for the law to interfere on equitable grounds with ordinary contracts freely entered into by persons under no duress or mistake merely on the grounds that in certain events it turned out harshly for the parties who subsequently wished or were compelled by circumstances to abandon their contracts..."

With reference to **Section 101 of the Evidence Act, Cap. 6** the burden of proof is on the Applicants to prove that the revision of interest was contrary to the law. They must go a step further and adduce evidence to show that in fact there was a revision of interest, and tender the letters revising the interest rate which would clearly show the date of its issuance and the date the revision would be applicable. Since no evidence was adduced, there is no triable issue. On the issue of payment of legal fees on recovery and valuation fees, Counsel submitted that the sum spoken of is US \$ 58,773.80 and the sum presently owed is in excess of US \$ 906,991.68 as such this

cannot be construed as a triable issue in the context of a realization of US \$ 906,991.68 and as acceded to by the Applicants pursuant to Clause 3.8 of the Home Loan letters and Clause 11 of the Mortgage deeds, the Applicants are liable for the payment of these fees and expenses. On the allegation that there were no notices issued by the Respondent, Counsel submitted that they are attached to the Affidavit in Reply as annexure "E" and "F" which are the Notice on Default and the Notice of Sale respectively which were both issued and served on the Applicants who do not deny receiving them and cannot therefore allege that the advertisement which followed on those notices was unlawful. He observed that the Mortgage deeds attached to the Affidavit in Support of the application are not complete, but in any event bear the signatures of the Applicants and perhaps it is on the basis of their incomplete documentation that they contend that they are void for want of execution as such this is not a triable issue.

With reference to the ground on irreparable loss, the Applicant sought for the grant of a temporary injunction on the basis that the bank intends to sell off his property despite the fact that he is willing to surrender one of his properties which was more sufficient to settle his outstanding; the bank unreasonably rejected his request to reduce the monthly installment payment as he was undergoing a financially constrained time; the total outstanding claim by the bank was excessive and unlawful which he disputed; the bank advertised his property without service on him of a recall letter; and that the security was unlawfully re-valued to a sum less than its actual value, with the intension of causing loss to him. For these reasons he contended that he would suffer irreparable damage if his hostel and matrimonial home were auctioned and the displacement of his family would cause trauma. Counsel submitted that the Applicants do not stand to suffer irreparable loss on the basis that the property is strategically located by the road side along Munyonyo, and also because of scarcity of land in that area, if it were so they should never have pledged it to the Respondent. Secondly, the Applicants in the suit seek for an award of general damages and aggravated damages an indication that whatever loss they may suffer can be attained by an award of damages. On the ground of Balance of convenience, Counsel submitted that the purpose of both loans was to finance the acquisition by the Applicants of two securities both of which were actually purchased using the loan money and are presently registered in the Applicants' joint names. And now the Applicants are in default of paying their loan obligations which debt continues to attract interest yet they do not wish for the bank to realize the securities. As such the balance of convenience lies in favour of refusing to grant the injunction, as its grant would for all intents and purposes be unjust. Counsel referred to **Peter Bibangamba vs. Kapkwata Wood Works Limited Commercial Court Civil Suit No. 714 of 2012**, where Hon. Mr. Justice Musalu Musene held that;

"Finally, and in view of what I have outlined above, I find and hold that the balance of convenience does tilt very heavily in favour of the Respondent. The Applicant will stand to lose nothing if the temporary injunction is not granted since the property in question is under mortgage of a huge sum of money (1,320,000,000/= which will take time to be cleared. Secondly and as already stated above, it has not been shown that the Applicant will suffer irreparable damages, on the contrary, the Applicant can be paid compensation which he himself has prayed for in the alternative in the Plaintiff."

Counsel made reference to the **Mortgage Regulations 2012, regulations 13(4) and (5)** which provides that:

“13(4) where a sale is stopped or adjourned at the request of the Mortgagor, an agent of the mortgagor, the spouse of the mortgagor or any other interested party, the mortgagor, agent or spouse of the mortgagor or that interested party shall, at the time of stopping or adjourning the sale, pay to the person conducting the sale, a security deposit of 30% of the forced sale value of the mortgaged property or the outstanding amount, whichever is higher.

13(5) where the sale is stopped or adjourned at the request of the mortgagor for the purposes of redemption, the mortgagor shall at the time of stopping or adjourning the sale pay a security deposit of 50% of the outstanding amount.”

In the case of **Miao Hua Xian v Crane Bank & Anor (supra)** this Court held that;

‘The provision for the deposit of 30% or 50% upon the application or request of the mortgagor is mandatory...’

He submitted that regardless of the issues raised, it is mandatory, as was held in the **Miao case** for a payment of money to be made as a prerequisite for granting of the injunction. He submitted that under **Regulation 13(4)** they are required to pay 30% of the debt outstanding. In Mr. Godfrey Twinamatsiko’s affidavit in reply, he deposes in paragraph 23 that the amount outstanding is US \$ 906,991.63 (United States Dollars Nine Hundred Six Thousand Nine Hundred Ninety One and Sixty three) 30% of which is US \$ 272,097,479 (United States Dollars Two Hundred Seventy Two Million Ninety Seven Thousand Four Hundred Seventy Nine). He prayed that if the Court is inclined to granting the injunction, it should be granted upon payment of the sum of US \$ 272,097,497 (United States Dollars Two Hundred Seventy Two Million Ninety Seven Thousand Four Hundred Seventy Nine) to the Respondent.

Ruling

I have carefully considered the written submissions made with the reference to the Applicants application together with the affidavits in support and in opposition to the application. I have also taken into account the applicable legal principles which have been summarised by Counsels above.

The first matter for consideration is a procedural and a preliminary point of law as to whether the Respondent’s affidavit in reply filed on 11th October, 2016 should be struck out for having been filed out of time. The Applicants application had been filed on 17th February, 2015 about seven months from the date of service of the application and was therefore out of time under the 15 days prescribed by Order 12 rule 3 (2) of the Civil Procedure Rules as well as the case of **Stop and See (U) Ltd vs. Tropical Africa Bank Ltd Misc. Application No. 333 of 2010**. In that case this court held that the timelines applicable to filing and service of plaintiffs and written statements of defence applied to interlocutory applications as well and were incorporated by Order 12 rule 3 of the Civil Procedure Rules.

While it is true that the Respondents affidavit in reply was filed out of time and no leave of court was sought for extension of time to file and serve the affidavit out of time, it is also a fact that the Applicant filed an affidavit in rejoinder to the affidavit in reply on 26th October, 2016 and responded to all the material issues in the affidavit in reply. Consequently while the affidavit in reply was filed out of time, the question is whether the Applicant has been prejudiced in anyway. In the case of **Western Uganda Cotton Company Limited versus Dr George Asaba and three others HCCS No. 353 of 2009** an objection was raised by the plaintiff's Counsel that the counterclaim filed against the plaintiff and other Counter defendants was not duly served in accordance with the law and ought to be dismissed with costs. He informed the court that he had accessed a copy from the court record and filed a response thereto after he learnt about it during the mediation process. Hon Justice Helen Obura held that the time within which a defendant should file a defence is 15 days after service of summons. It is the duty of the counterclaimant to serve the written statement of defence together with the counterclaim on the plaintiff. Relying on **Mulla on the Code of Civil Procedure Volume 2 and 17 Edition** at page 231 the object of service of summons in whatever way is to enable the defendant be informed of the institution of the suit in due time before the date fixed for the hearing. The plaintiff did not show any prejudice or injustice that would be occasioned to his client by the defendant's omission to serve and the omission could be treated as an irregularity which could be cured under article 126 (2) (e) of the Constitution of the Republic of Uganda. The object of service in the case was achieved by Counsel for the plaintiff's action of helping himself to the counterclaim on the record and overruled the preliminary objection relating to service on the plaintiff of the counterclaim. The court followed the Supreme Court decision in **Mukasa Anthony Harris vs. Dr Bayiga Michael Philip Lulume Election Petition Appeal Number 18 of 2007** that though the petition was not served within the prescribed time the Respondent had helped himself to it probably within the prescribed time. He had pre-empted the service and did in effect enter appearance unconditionally and there was no material upon which the court could conclusively say that the appellant did not get the petition within the prescribed time of seven days and that article 126 (2) (e) of the Constitution would be applied. Whereas the rules prescribe under Order 12 rule 3 (2) of the Civil Procedure Rules that reply to an interlocutory application should be made within 15 days from the service thereof, the intention is to give notice to the Applicant of the defence and where the Applicant receives the reply before the hearing and does not object to it but instead files a rejoinder to it before the hearing, no prejudice has been occasioned and the reply will be validated.

In the premises, because the Applicant has suffered no prejudice, the reply of the Respondent is hereby validated by extension of time and shall be considered as having been filed in time the Applicant having responded to it on the merits and suffered no prejudice. The objection to the affidavit in reply is overruled.

On the merits of the application, the principles of law to be applied have been succinctly written in the submissions of Counsel and are not in controversy. In summary the Applicant must show that he or she has filed a suit in which there is a prima facie case or has raised by the pleadings arguable questions of fact or law which ought to be tried and that the suit is not frivolous or vexatious. So the first question to establish is whether the suit is frivolous or vexatious. The

second ground if the first ground is answered in the affirmative is to determine whether the Applicant would otherwise suffer irreparable injury which cannot be atoned for by an award of damages if the injunction is not granted. If the court is in doubt on the first two principles, it may decide the suit on the balance of convenience.

Prima facie case and Irreparable Injury

I have carefully considered the written submissions and the evidence in support of the application and the Applicant contends that the mortgage instruments were not duly executed and therefore it was illegal and unenforceable.

The Applicant also raises the ground that there was no statutory demand preceding the notice of sale.

In support of this ground the Applicant admits that they are the registered proprietors of the suit property and also that they obtained a loan facility from the Respondent bank. There was partial disbursement of the loan facility. The Respondent had agreed in the letter dated 3rd February, 2012 to disburse US\$255,000 under the first facility. Secondly a sum of US\$826,029 under the second facility in a letter dated 6th June, 2013. Under the first facility monthly repayment was computed on the basis of an interest rate of 12.5% per annum amounting to US\$3,733. In clause 3.1.2 it is stipulated that the bank reserved the right to amend the interest and the method for calculating it at any time, in line with the prevailing market rates. The Applicant relies on rule 12 of the Mortgage Regulations and submitted that the interest rate was arbitrarily amended by the Respondent bank without notice.

In the second facility letter the interest per annum is 13.5% amounting to US\$12,883 per month. In clause 3.1.2 of the agreement the bank reserves the right to amend the interest rate and the method of computing it at any time in line with prevailing market rates.

The mortgage instrument is allegedly signed by the Applicants and not by the Respondent bank.

Furthermore the Applicant alleges that the Respondent breached the contract by failure to disburse a sum of US\$119,535 yet the Respondent continued to collect over and above the instalment of US\$12,883.

The Applicants rely on section 12 of the Mortgage Act 2009 for the proposition that prior to altering interest rates the Respondent ought to have given them 15 working day's written notice to the Applicants.

The third contention is that there was no prior statutory demand or a notice of sale given to the Applicants contrary to the provisions of the Mortgage Act.

I have considered the three contentions and the question is whether they disclose arguable issues for trial which merit serious consideration or whether the issues disclosed are frivolous and vexatious and can be summarily disposed of at this stage by finding that the suit is frivolous and vexatious or does not disclose a cause of action.

The first contention which is not disputed is that out of a total of US\$255,000 and the first facility under a loan for the US\$846,029 and the second facility giving a total of US\$1,101,029, the Respondent failed to disburse US\$119,535. Does the failure to disburse this amount entitle the Applicants to avoid obligations to pay under the facility? The question is easily answered by considering clause 2 of the facility agreement which provides that the loan is to be repaid within a specified period of time commencing from the time of the month of the first drawdown. Repayment therefore commences from the first disbursement and the failure to disburse US\$119,535 does not take away the obligation to pay for what has been disbursed. In any case the property was for the purchase of land as far as the second facility of US\$846,029 is concerned while first facility was also for the purchase of land. There is no averment by the Applicant that the property could not realise any income for failure to disburse the said amount which was in deficit of the entire loan amount. This first contention does not raise a serious matter for trial because it does not avoid liability to pay and default in payment and may for that reason be determined summarily.

The second contention is whether the provisions of the Mortgage Act 2009 particularly section 12 thereof on the variation of the mortgage can be avoided by an express contract between the parties indicating how interest may be varied from time to time at the sole discretion of the Respondent bank according to prevailing market conditions. I have considered the language of section 12 of the Mortgage Act 2009 and as section 12 (1) is couched in permissive language in terms of whether the interest may be increased or decreased. The issue is whether where the Mortgagee increases or decreases there shall be notice in accordance with section 12 (1) of the Mortgage Act 2009 which provides as follows:

“12. Variation of a mortgage.

- (1) The rate of interest payable under a mortgage may be reduced or increased by a notice served on the mortgagor by the mortgagee which shall—
 - (a) give the mortgagor not less than fifteen working days’ written notice of the reduction or increase in the rate of interest;
 - (b) state clearly and in a manner which can be readily understood, the new rate of interest to be paid in respect of the mortgage;
 - (c) state the responsibility of the mortgagor to take such action as he or she is advised by the notice to take to ensure that the new interest rate is paid to the mortgagee.
- (2) The amount secured by a mortgage may be reduced or increased by a memorandum which —
 - (a) complies with subsection (5); and
 - (b) is signed—
 - (i) in the case of a memorandum of reduction, by the mortgagee; or

- (ii) in the case of a memorandum of increase, by the current mortgagor; and
- (c) states that the principal moneys intended to be secured by the mortgage are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum.
- (3) The term or currency of a mortgage may be shortened, extended or renewed by a memorandum which—
 - (a) complies with subsection (5);
 - (b) is signed by the current mortgagor and by the mortgagee; and
 - (c) states that the term or currency of the mortgage is shortened, extended or renewed, as the case may be, to the date or in the manner specified in the memorandum.
- (4) The covenants, conditions and powers expressed or implied in a mortgage may be varied, but not so as to impose any significantly greater burdens on the borrower than those set out in section 17 by a memorandum which—
 - (a) complies with subsection (5);
 - (b) is signed by the current mortgagor and the mortgagee; and
 - (c) states that the covenants, conditions and powers expressed or implied in the mortgage are varied in the manner specified in the memorandum.
- (5) A memorandum for the purposes of subsections (2), (3) and (4)—
 - (a) shall be endorsed on or annexed to the mortgage instrument; and
 - (b) when so endorsed or annexed to the mortgage instrument, operates to vary the mortgage in accordance with the terms of the memorandum.”

It is controversial whether it is a requirement for interest on a registered mortgage to be notified and as prescribed after the Mortgagee exercises an express power to vary. I note that the parties included in the mortgage instrument under paragraph 2 (i) (a) thereof the same provision giving the bank power to amend the interest. The issue is not whether the power to amend can be exercised as agreed but whether the requisite notice should be issued before it is done. Secondly whether it is necessary pursuant to the statutory notice if answered in the affirmative for the parties to register a memorandum of amendment in terms of section 12 of the Mortgage Act and have it annexed to the memorandum. There is for these purposes an arguable case.

Furthermore I have considered the contention that the mortgage was not duly executed. The mortgage is registered and the contention cannot be supported. In any case an equitable mortgage can arise by deposit of title. The agreement is binding on both parties.

Finally I have considered the contention that no statutory notice was given prior to the sale notice. The Applicant's contention is based on the letter of the Respondents lawyers dated 14th of December, 2015 demanding for arrears of US\$15,411.85 owing by 10th December, 2015. I have carefully considered the notice of default annexure E to the affidavit in reply which was issued on 18th March 2015 under the provisions of section 19 (2) – (4) of the Mortgage Act, 2009.

Sections 19 (2) (3) and (4) of the Mortgage Act, Act 8 of 2009 give the remedy of a Mortgagee under the Mortgage Act 2009. Section 19 (1) thereof is that where money secured by a mortgage is made payable on demand, a demand in writing creates a default in payment. This means that the mortgagee issues a demand for payment of any arrears. Upon failure by the mortgagor to clear the arrears, the mortgagee issues a second notice of default requiring the mortgagor to rectify the default. The second notices issued under section 19 (2) and has to be in writing notifying the mortgagor of the default and requiring the mortgagor to rectify the default within 45 working days. The notice has to be in the prescribed form (S.19 (3) of the Mortgage Act). The Mortgagee upon default of the Mortgagor may require the Mortgagor to pay all monies owing on the mortgage; appoint a receiver of the income of the mortgaged land; lease the mortgaged land; enter into possession of the mortgaged land or sell the mortgaged land. The Mortgagee may sell the property under section 26 of the Mortgage Act after expiry of the time provided for the rectification of the default stipulated in the notice served on him or her under section 19.

After annexure "E" was issued and served on the Applicants, the Respondent served a notice of sale annexure "F" to the affidavit in reply and the same intention to sell was advertised at page 42 of the New Vision of 3rd Friday, July 2015 and the sale was to take place on 4th August 2015. Subsequently on 8th July, 2015 the Applicants requested for rescheduling of the debt whereupon the Applicants after a discussion with the Respondents paid a sum of **US\$106,563**. The Applicants further undertook to make monthly payments. However again the Applicants failed and defaulted and the Respondent by letter dated 14th of December 2015 demanded for payment of the arrears pursuant to the undertaking of the Applicants. Payment was supposed to be effected to the lawyers by the close of business on 21st of December 2015 failure for which the lawyers threatened to re-advertise the securities for sale and for recovery of the entire debt sum.

In a letter dated 14th of January 2016 the first Applicant wrote to the lawyers of the Respondent bank offering to settle the arrears amounting to US\$42,441.58 and pleaded that the period up to 15th of January 2016 was very short. By 2nd February, 2016 the Applicants wrote to the Respondent bank requesting for confirmation of the outstanding amount and undertaking to release the securities upon full payment of the outstanding balance. On 3rd February, 2016 the lawyers by letter dated 3rd of February 2016 gave this information. This application was filed on 7th February, 2016 soon thereafter. The property was due for sale in March 2016.

The intended sale was stopped by the registrar of this court by an interim order dated 26th February, 2016 to last up to 7th September, 2016.

I have carefully considered the facts and come to the conclusion that there is not clear evidence as to whether at the first instance the Respondent had not rectified the default. Where default has been rectified fresh notices in terms of section 19 of the Mortgage Act have to be served afresh. These include notice of default under section 19 (1) and also a notice to rectify after the new default. Can the Respondent just rush to sell? The entire process has to begin afresh and this is also an issue for trial.

Last but not least the status quo has been maintained and the advertisement referred to in this application cannot stand after a period of 14 days. This is the down side of interim orders that last more than is required.

That notwithstanding the sale of the mortgaged property had been advertised and the advertised sale was not adjourned but stopped for a very long period when the main application eventually came for hearing in 2017. Where an adjournment or stoppage of sale has been achieved under regulation 13 (7) for a period of more than 14 days, a fresh advertisement has to be issued in accordance with regulation 8. Regulation 13 (7) of the Mortgage Regulations 2012 provides as follows:

"(7) Where a sale is adjourned under this regulation for a period longer than 14 days, a fresh public notice shall be given in accordance with regulation 8 unless the mortgagor consents to waive it."

The advertised sale was supposed to take place in March 2016. It is now about a year since then. Secondly the Applicants allegation that there is not due process before the alleged sale also raises an issue of compliance with statutory law. Non compliance with statutory law cannot be an issue of whether damages would be an adequate remedy. Courts should ensure that the statutory provisions are complied with and therefore non compliance would irretrievably affect the rights of the Applicant which breach of law cannot be atoned for by an award of damages.

Most importantly Regulation 8 of the Mortgage Regulations 2012 provides that a mortgagee exercising a power of sale under the Act shall subject to the Act and Regulations, sell the mortgaged property by public auction and the sale shall not take place before the expiration of 21 working days from the date of service of the notice as specified in section 26 of the Act. Any person who contravenes Regulation 8 commits an offence. It is now necessary to re-advertise the property, and have a current valuation of not more than 6 months under regulation 11 (2) of the Mortgage Regulations 2012.

An injunction should be granted with care and with due regard to the principles of justice. These include adherence to the statutory principles. In the premises the acts of the Applicants to try to redeem the property to the inevitable conclusion that their statutory rights are only procedural and if proved is to pave way for them to exercise any of the rights either of rectifying default or redeeming the property. In either case this should be preceded by an undertaking to meet their obligations under the loan in the very least. For the above reasons, the applications application shall be granted to try the issue of failure to follow statutory provisions in terms of interest and statutory notices conditionally.

1. An injunction will issue on the condition that the Applicants shall deposit with the Respondent a sum of US\$ 287,159.1 representing about 30% of the demand of the Respondent which deposit shall be made within 45 days from the date of this order.
2. An injunction issues under the above condition restraining the Respondents, their agents, servants, workmen, or any person deriving authority or instructions from them from evicting the Applicants, selling, transferring, taking possession, advertising for sale or dealing in anyway whatsoever with the properties comprised in Kyadondo Block 257, Plot 944 land at Munyonyo and Kyadondo Block 257, Plots 920 and 921 land at Munyonyo pending final disposal of the suit or until such further orders of this court.
3. Should the Applicants fail to comply with the order in item 1 above, this injunction shall lapse and the Respondent shall be at liberty to re-advertise the property for sale and only after the lapse of the 45 days.
4. In the circumstances of this case considering the duration between the interim order and the hearing and disposal of the application when the Applicants have not been rectifying any default if is just that the costs of this application shall be borne by the Applicants.

Ruling delivered in open court on the 6th of March 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Earnest Sembatya for the Respondent

Counsel Lukongwa Aubrey holding brief for David Kaggwa for the Applicant

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

6th March 2017

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