

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL COURT DIVISION)**

**HCT-00-CC-MA-471 -2014**

*(Arising from HCT-00-CC-CS-390 OF 2014)*

**NAKAYAGA GRACE:.....:APPLICANT**

**VERSUS**

**1. FINA BANK LTD }  
2. NYWEVU JOHN BOSCO }.....:RESPONDENTS**

**BEFORE HON. LADY JUSTICE HELLEN OBURA**

**RULING**

Nakayaga Grace, the applicant, brought this application under Order 41 rules 1 and 9 of the Civil Procedure Rules SI 71-1(CPR) seeking for orders that:

1. A temporary injunction does issue restraining the respondents, their agents and workmen from evicting, selling and/or disposing of/alienating and/or interfering with the suit property comprised in Mailo Register Kyadondo Block 266 Plot 1216 Land at Seguku in any manner whatsoever until the disposal of the main suit.
2. Costs of this application be provided for.

The brief grounds of the application as contained in the chamber summons and affidavit in support deposed by the applicant are that; the applicant is the wife of Mr. Nywevu John Bosco, the 2<sup>nd</sup> respondent who is the registered proprietor of property comprised in Mailo Register Kyadondo Block 266 Plot 1216 Land at Seguku (hereafter called the suit property) which is the matrimonial home of the applicant and their children; the 2<sup>nd</sup> respondent mortgaged the suit property to FINA Bank Ltd

for a loan on the 27<sup>th</sup> December 2011 and now the 1<sup>st</sup> respondent through its lawyers has released a notice of sale of the suit property which appeared in the Daily Monitor Newspaper of 4<sup>th</sup> June 2014 due to failure of the 2<sup>nd</sup> respondent to settle his loan obligation; upon receipt of the letter from the lawyers of the bank, the applicant went to the offices of the 1<sup>st</sup> respondent and protested its content; the applicant has never granted consent to the mortgage or memorandum of mortgage variation between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and she has never obtained independent advice in respect of the mortgage of the family/matrimonial property and therefore the intended sale is unlawful and illegal.

Furthermore, that the applicant is not fully conversant with the English language and has never at any moment been advised on the dealings between the bank and the 2<sup>nd</sup> respondent; the applicant has filed a suit which has high chances of success and she will suffer irreparable damage if the temporary injunction is not granted and lastly, that it is just and equitable that this court grants a temporary injunction as prayed.

The affidavit in reply and opposition to the application was deposed by Mr. Charles Elong the Credit Manager of GTBANK (U) Ltd (formerly FINA Bank (U) Ltd, the 1<sup>st</sup> respondent). He admitted the contents of paragraphs 1-6 of the affidavit in support which are basically about the relationship between the applicant and the 2<sup>nd</sup> respondent, the letter written by the 1<sup>st</sup> respondent's lawyers and the pledging of the suit property for a loan by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent. In brief, his specific reply to the contents of paragraphs 7-16 of the affidavit in support are; that on 27<sup>th</sup> December 2011 the 2<sup>nd</sup> respondent accepted offer for banking facilities (a term loan of Ushs. 288,394,367/= and an overdraft facility of Ushs. 200,000,000/=) which was secured by a legal mortgage over the suit property and on 17<sup>th</sup> January 2012 a spousal consent was duly signed by the applicant who also signed the offer letter.

Furthermore, that the 1<sup>st</sup> applicant exercised all reasonable care and due diligence in ascertaining and obtaining spousal consent and advancing independent advice to the applicant and besides, the memorandum of mortgage variation in issue was not varying the property pledged as alleged but varying the overdraft limit availed to the mortgagor. Additionally, that the applicant has at all times been aware of the dealings with the bank and has always consented to the mortgage which in the event of default would result into the sale of the mortgaged property and therefore this application is a ploy by the 2<sup>nd</sup> respondent to delay the foreclosure.

It is also averred that the 2<sup>nd</sup> respondent totally neglected or refused to pay any monthly instalment of either the principal or interest from the date of disbursement of the loan amount, therefore the 1<sup>st</sup> respondent is only seeking to enforce its rights under the mortgage to recover the sum due and owing. It is contended that the content of the affidavit in support are deliberately false and are designed to mislead court. It is further averred that it is not just and equitable for a temporary injunction to issue since it would serve to deprive the 1<sup>st</sup> respondent of its right to recover money due to it and consequently it would endanger its business and the ability to return money due to its depositors. He also averred that in the event that court is inclined to grant the order sought then court could order the applicant to deposit security in court of 30% of the forced sale value of the suit property as provided by the Mortgage Regulation 2012.

The 2<sup>nd</sup> respondent did not file any affidavit in reply. The applicant filed an affidavit in rejoinder to the 1<sup>st</sup> respondent's affidavit in reply in which she specifically denied the contents thereof, reiterated the averments in the affidavit in support and stated that her application has merit and therefore it is just and equitable that the order for a temporary injunction is granted without any deposit of security so that her rights and interests are protected until the main suit is disposed of.

When this application came up for hearing, the applicant was represented by Ms. Samalie Nsubuga and the 1<sup>st</sup> respondent was represented by Ms. Angella Kobel. There was no representation of the 2<sup>nd</sup> respondent who himself did not appear in court. Counsel for the applicant and the 1<sup>st</sup> respondent agreed to file written submissions which they did and I have duly considered them in this ruling.

In her submissions, counsel for the applicant referred to the case of ***Kiyimba Kaggwa vs. Abdu Nasser Katende [1985] HCB 43*** to explain that the purpose of granting a temporary injunction is to preserve matters in status quo until questions to be investigated in the suit can be finally disposed of. She also relied on ***Geilla vs. Cassman Brown and Co. Ltd [1973] EA 358*** for the three conditions that must be met by the applicant, namely that; (1) the applicant must show a prima facie case with a probability of success, (2) an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, (3) if the court is in doubt, it will decide the application on the balance of convenience.

### **Status Quo**

On the status quo of the instant application, it was contended that the applicant is in possession of the suit property where she resides with her children which fact is not rebutted by the 1<sup>st</sup> respondent. Counsel for the applicant referred to the content of the affidavit in support which point out some actions that have been taken under the instructions of the 1<sup>st</sup> respondent with a view of selling the suit property which would in effect change the status quo. She then submitted that a temporary injunction ought to be issued to stop the threatened sale and eviction and thus maintain the status quo.

In reply to the applicant's submission, counsel for the 1<sup>st</sup> respondent submitted that the status of the suit property is that it is under a legally defined financial relationship under the mortgage transaction which makes the property available to the 1<sup>st</sup> respondent as a *bona fide* mortgagee for its use as and when the 2<sup>nd</sup> respondent defaults on the loan repayment. She argued that since the 2<sup>nd</sup> respondent defaulted in payment of the monthly instalments from the date of the loan disbursement, the 1<sup>st</sup> respondent is entitled to commence or exercise its right of foreclosure as provided under the Mortgage Act and legally the suit property belongs to the 1<sup>st</sup> respondent who is the legal owner since the applicant and the 2<sup>nd</sup> respondent failed to redeem the property after the 1<sup>st</sup> respondent made a formal demand for the repayment of the loan and the period to do so had expired.

He therefore submitted that the status quo which this court should preserve is the status of the property under that legally defined financial relationship under the mortgage transaction.

I have considered the submissions of both counsel on the status quo to be preserved and I am of the view that the right the applicant is seeking to enforce in the main suit is her occupancy of the matrimonial home as protected by the Land Act Cap. 227 as amended by the Land Amendment Act No. 1 of 2004 and section 6 of the Mortgage Act 2009. Therefore the status quo the applicant seeks to maintain in the circumstances of this case is her continued occupation of the matrimonial home together with her family until the issue of legality of the mortgage is determined. To that end, the fact that the applicant is still in possession of the matrimonial home is important in determining whether or not that status quo should be maintained by grant of a temporary injunction or be allowed to change by declining to grant it. This will be determined by considering whether or not the applicant has met the three conditions for grant of a temporary injunction which I now turn to deal with.

## **Prima-facie case**

On this condition, counsel for the applicant relied on the case of *Uganda Development Bank vs. ABA Trade International and Others Misc. Application No. 568 of 2010* where it was held that a temporary injunction could be granted to protect the legal right of an applicant who made out a prima-facie case. He submitted that at this stage all the plaintiff needs to show by his action is that there are serious questions to be tried and the action is not frivolous or vexatious and there is no requirement for the plaintiff to establish a strong prima facie case with a high probability of success as was held in *American Cynamide Co. vs. Ethicon [1975] 1 ALL E.R. 50*.

While relying on the averments in the affidavit in support, counsel for the applicant submitted that the applicant has made out a case based on the following facts;

- (1) The applicant is the wife of the 2<sup>nd</sup> respondent and she resides with her children in the suit property.
- (2) The suit property is under the threat of intended sale due to failure of the 2<sup>nd</sup> respondent to settle/pay his loan obligation.
- (3) The applicant neither granted consent to the memorandum of mortgage variation between the 1<sup>st</sup> and 2<sup>nd</sup> respondents nor did she obtain independent advice in respect of the use of the matrimonial home as security for the mortgage variation deed which makes the transaction illegal.
- (4) The applicant is not fully conversant with the English language and has never at any moment been advised on the dealings between the respondents in a language she fully understands.

On the basis of the above allegations, counsel for the applicant submitted that the applicant has established that she has a defensible case with a possibility of success and court should grant her relief of a temporary injunction to protect her rights pending the hearing and determination of the main suit.

In reply, counsel for the 1<sup>st</sup> respondent submitted that in the instant case there is no serious question to be determined in the main suit because the 1<sup>st</sup> respondent is not carrying out any illegal activity as the applicant consented and authorised the 2<sup>nd</sup> respondent to mortgage the matrimonial home to the 1<sup>st</sup> respondent. Furthermore, that the applicant was well aware of the acts and consequences of the 2<sup>nd</sup>

respondent pledging the certificate of title for the land to obtain a loan and overdraft facilities.

She contended that the applicant on the 17<sup>th</sup> of January 2012 executed the spousal consent to mortgage the suit property and was duly given an independent advice in compliance with the Mortgage Act and there is nothing illegal that was committed by the 1<sup>st</sup> respondent.

On the allegation that the applicant is not fully conversant with the English language, it was submitted that the applicant executed consent before her counsel Mr. Deus H. Nsengiyunva who also gave her independent advice about the transaction. Counsel argued that the applicant cannot turn around after and allege that she did not understand English and the dealings between the respondents. She contended that the applicant and the 2<sup>nd</sup> respondent are just trying to avoid their financial obligation by filing this application which has no merit with intention to waste court time. Counsel concluded on this point that the applicant has no right to be protected in the suit property and she has failed the test of prima-facie case.

I have carefully considered the above submissions and the authorities relied upon as well as looked at the pleadings in the main suit. Indeed, as correctly stated by counsel for the applicant, there is no need to delve into the merits of the main suit at this stage. All the applicant needs to show is that there are serious questions to be tried and the action is not frivolous or vexatious. As gleaned from the allegations in the pleadings and the affidavit in support of this application, the applicant raises serious questions for consideration in the main suit.

Firstly, she denies giving her consent to the transaction and getting an independent advice about the import of her husband pledging the suit property to the 1<sup>st</sup> respondent for a loan facility. Secondly, although the 1<sup>st</sup> respondent has produced a copy of the consent to mortgage property and a statement confirming that the applicant received independent advice which she allegedly signed, the applicant's contention is that she is not fully conversant with the English language. This issue cannot merely be determined on the affidavit evidence used in this application. It would require additional evidence to explain the circumstances under which the applicant signed the consent to mortgage property and the statement confirming that she received independent advice on the terms and condition of the mortgage.

In coming to the above conclusion, I also considered the undisputed fact that the applicant is a spouse of the 2<sup>nd</sup> respondent (mortgagor) and her right of occupancy of the matrimonial home is protected by the Land Act Cap. 227 as amended by the Land Amendment Act No. 1 of 2004 and the Mortgage Act. Section 39 (1) of the Land Act Cap. 227 as amended by the Land Amendment Act No. 1 of 2004 prohibits the mortgaging of family land except with the prior consent of a spouse. Section 38A (1) of the same Act guarantees security of occupancy of a spouse on family land and family land is defined under subsection (4) of that section to mean inter-alia land on which is situated the ordinary residence of a family. Sections 5 and 6 of the Mortgage Act 2009 also accord further protection by putting an obligation on the mortgagee to ensure that the consent obtained from the mortgagor's spouse is informed and genuine. Therefore if there is an allegation which suggests that the consent is not informed and genuine it is the duty of this court to ensure that the allegation is properly investigated by giving the parties opportunity to adduce oral evidence as opposed to the limited affidavit evidence. This can only be done conclusively by hearing of the main suit on the merits.

For the above reasons, I find that the applicant has a prima-facie case which merit grant of a temporary injunction to preserve the status quo pending the hearing and determination of those issues in the main suit.

### **Irreparable Damage**

On this 2<sup>nd</sup> condition, counsel for the applicant referred to the definition in *Kiyimba Kaggwa (supra)* to the effect that irreparable injury means injury that is substantial or material and cannot be adequately compensated for in damages. He then submitted that the applicant cannot easily be resettled into another home together with her family because she has lived in the suit property for the last ten years and now she attaches sentimental value to it which cannot be atoned in damages. She buttressed his submission with the authority of *Jane Francis Mpungu vs. DFCU Bank HCMA No. 14 of 2003* where an injunction was granted on the basis of the threatened sale of matrimonial property. She concluded that the applicant will suffer irreparable damage if a temporary injunction is not granted because sale of her matrimonial home cannot be atoned in damages.

Conversely, counsel for the 1<sup>st</sup> respondent submitted that in the circumstances of this case the applicant has not shown that she will suffer irreparable damage which

cannot be adequately atoned by the award of monetary damages. She argued that instead it is the 1<sup>st</sup> respondent's business and ability to return money due to its depositors as and when demanded which is greatly affected by the conduct of the applicant and the 2<sup>nd</sup> respondent. She therefore concluded that it is just and equitable that this court allows the 1<sup>st</sup> respondent to foreclose the suit property to recover the money that is due and owing.

I have considered the above submissions and I am of the considered view that if at all the applicant neither gave her consent to mortgage the suit property nor understood the terms and conditions of the mortgage then in such a situation she would suffer an irreparable injury due to loss of her matrimonial home which she has a sentimental attachment to. This is because she would not have been mentally, emotionally and physically prepared to lose the property unlike when she consents after understanding the terms and condition of the mortgage and expects sale of the mortgaged property upon default on the repayment.

Although the issue of consent and independent advice is a matter to be determined in the main suit, I will for purposes of this application give the applicant the benefit of the doubt and agree that she will suffer irreparable loss if the sale is not restrained and she loses the matrimonial home.

### **Balance of Convenience**

Finally, on this 3<sup>rd</sup> condition, counsel for the applicant submitted that it favours the applicant who is in possession of the suit property and would suffer and be greatly inconvenienced if injunction is not granted unlike the 1<sup>st</sup> respondent who will not suffer any loss as it still has an option of sale if court rules in its favour. She concluded that the applicant has made a proper case for grant of a temporary injunction which should issue and costs of the application be catered for.

On the other hand, counsel for the 1<sup>st</sup> respondent submitted that the balance of convenience favours her client who disbursed money to the 2<sup>nd</sup> respondent and the applicant gave spousal consent and so the application should not be granted.

In the alternative and I believe without prejudice to the foregoing, counsel submitted based on the contents of paragraphs 16 & 17 of the affidavit in reply that if court is inclined to grant this application it should order the applicant to

deposit 30% of the forced sale value of the suit property as security in accordance with the Mortgage Regulation 2012.

Following my conclusion on the 1<sup>st</sup> and 2<sup>nd</sup> conditions, I find that the balance of convenience favours issuing an injunction to preserve the status quo because the applicant has a prima-facie case and she will suffer irreparable loss if she loses the matrimonial home and court finds in her favour in the main suit. In comparative terms, the loss that the 1<sup>st</sup> respondent is likely to suffer if the application is granted can be adequately atoned by award of damages because it can always foreclose if the main suit is found in its favour and whatever interest would have continued to accrue can be recovered.

Before I take leave of this matter, I wish to make some observation regarding the prayer of the 1<sup>st</sup> respondent that if court is inclined to grant this application it should order the applicant to deposit 30% of the forced sale value of the suit property as security in accordance with the Mortgage Regulation 2012. It is pertinent to note that the requirement for deposit of security under regulation 13 (1) of the Mortgage Regulations 2012, as clearly spelt out in that provision, only applies where court for reasonable cause, adjourns a sale by public auction to a specified date and time, which in my view presupposes that the mortgagee's right to foreclose is not in dispute like in the instant case. The above regulation is therefore not applicable to this application for a temporary injunction pending determination of the rights of the parties in the main suit and for that reason, I decline to make the order for deposit of security.

In conclusion, it is the finding of this court that the applicant has met all the three conditions for grant of a temporary injunction. In the result, I order that a temporary injunction does issue restraining the respondents, their agents and workmen from evicting, selling and/or disposing of/alienating and/or interfering with the suit property comprised in Mailo Register Kyadondo Block 266 Plot 1216 Land at Seguku in any manner whatsoever until the disposal of the main suit.

Costs of this application shall be in the main cause.

I so order.

Dated this 15<sup>th</sup> day of January 2015.

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 4.00 pm in the presence of Mr. Kabayo Alex h/b for Ms. Samalie Nsubuga for the applicant and Mr. Mugisa Ronald h/b for Ms. Angella Kobel for the 1<sup>st</sup> respondent. All the parties were absent.

**JUDGE**

15/01/15