

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**COMMERCIAL DIVISION**  
**MISCELLANEOUS APPLICATION NO. 0165 OF 2023**  
**ARISING OUT OF HCCS 0095 OF 2023**

**1. OLIVE SEBUGUZU**  
**2. IAN ANDREW MANZI ::: APPLICANTS**  
**VERSUS**  
**PRIDE MICROFINANCE LIMITED ::: RESPONDENT**

Before Hon. Harriet Grace Magala

**RULING**

**[1] Introduction and Background**

This is an application that was brought under section 98 of the Civil Procedure Act and Order 41 rule 1 of the Civil Procedure Rules for orders that :

- a) a temporary injunction be issued restraining the Respondent, their agents and officers from selling, alienating, subdividing, transferring or in any way dealing with land and property comprised in LRV 4176 Folio 3 Plot No. 5823 Kyadondo Block 273 at Nakinyugunzi Wakiso District and LRV 2566 Folio 23 Plot 28-34 Coronation Avenue, Kampala District pending the hearing and determination of the main suit; and
- b) costs of the application be provided for.

The grounds of the Application were set out in the affidavit in support of the application deposited by the 1<sup>st</sup> Applicant but they are briefly that:

- a) The Applicants filed HCCS 0095 of 2023 against the Respondent praying for among others for a declaration that the Applicants are not indebted to the Defendant in the sums of approximately Ugx. 486,360,432 and Ugx. 522,495,250.05 and that the Applicants have statutory right to redeem their property mortgaged with the Respondent;



- b) The Respondent has through the Daily Monitor Newspaper on 7<sup>th</sup> December 2022 advertised the Applicants' mortgaged property without following the due process;
- c) The Respondent through its agent Tzilla Trust Agencies has also gone ahead to threaten the eviction of the Applicants' tenants on the mortgaged properties;
- d) The Applicants have a *prima facie* case with a likelihood of success since the Respondent is in breach of its statutory and fiduciary duties owed to the Applicants;
- e) The property is prime with no substitute and the Applicants will suffer irreparable loss if the application is not granted; and
- f) The balance of convenience lies in favor of the Applicants.

The Affidavit in Reply to the application was deposed by Isaac Gumisiriza, the Credit Supervisor who was at the time of deposing the affidavit stationed at the Abayita Ababiri Contact Office/Branch of the Respondent. He generally stated that the 1<sup>st</sup> Applicant's affidavit was tainted with a lot of falsehoods and that the 1<sup>st</sup> Applicant was at all material times aware that she was in arrears. He further deposed that the Applicants' main suit had no probability of success, they would not suffer irreparable loss / damage if the property was disposed of and this application was filed to frustrate the Respondent's effort to recover their money. He prayed that if court was inclined to grant the application, the Applicants should pay 30% as per regulation 13 of the Mortgage Regulations.

The 1<sup>st</sup> Applicant in her affidavit in rejoinder largely reiterated her earlier position in the affidavit in support and also added that she was the right person to swear the affidavits supporting the application.

## **[2] Representation and appearance**

The Applicants were represented by Mr. Micheal Akampulira while the Respondent was represented by Ms. Natukunda Lillian. When the matter was called for mention, learned counsel for the Respondent indicated to court that she had two preliminary objections to raise. The first was that the 1<sup>st</sup> Applicant wrongly deposed an affidavit in support of the Application for and on behalf of the 2<sup>nd</sup> Applicant. The second was that there was a misjoinder of parties to the main suit since the Applicants took out two separate loans, two different loan



agreements were executed and two different properties were pledged as security for the loans.

The Court guided that in the interest of time, the Respondent should consider the preliminary objections as the first issues and submit on the same. If in the finding of court this disposed of the application, then there would be no requirement for court to pronounce itself on whether the Applicants should be granted the reliefs sought for.

The Parties were given timelines within which to file their written submissions. The Parties complied and the Court has relied on the same to determine this matter.

### **[3] Issues**

1. Whether there was a misjoinder of parties
2. Whether the 1<sup>st</sup> Applicant rightly deposed the affidavits in support and rejoinder of the Application on behalf of the 2<sup>nd</sup> Respondent
3. Whether a temporary injunction should be granted to the Applicants
4. What other remedies are available to the Parties?

### **[4] Resolution**

#### **4.1 Issue No. 1: Whether there was a misjoinder of parties**

**Order 1 rule 1 of the Civil Procedure Rules** states that:

*“All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or a series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if those persons brought separate suits, any common question of law or fact would arise”.*

I have perused the Plaint in the main suit and the annexures attached thereto. I have established that the 1<sup>st</sup> Applicant borrowed money to the tune of Ugx. 430,000,000/= from the Respondent and a loan agreement was executed to that effect on the 5<sup>th</sup> March 2021. Property comprised in Plot 5823 Block 273 situate at Nakinyunguzi, Kyadondo- Wakiso District was pledged as security. The loan agreement also has a certificate of translation/explanation which indicates that the Respondent read over and explained the contents of the loan agreement to the 1<sup>st</sup> Applicant. She was therefore fully aware of what she appended her signature to.



I also established that the 2<sup>nd</sup> Applicant borrowed money to the tune of Ugx. 450,000,000/= from the Respondent and a loan agreement was executed to that effect on the 2<sup>nd</sup> September 2021. Property comprised in LRV 2566 Folio 23 Plot 28-34 situate at Coronation Avenue- Kampala District was pledged as security. The loan agreement also has a certificate of translation/explanation which indicates that the Respondent read over and explained the contents of the loan agreement to the 2<sup>nd</sup> Applicant. He was therefore fully aware of what he appended his signature to.

These were two separate transactions. The fact that the Applicants are related and that the loan taken out by the 2<sup>nd</sup> Applicant was secured by property belonging to the 1<sup>st</sup> Applicant did not automatically mean that the transactions were the same. I therefore find that there was a misjoinder of Parties in the main suit and in accordance with Order 1 rule 2 of the Civil Procedure Rules, I hereby by order that two separate suits should be filed in respect of the loan transactions.

#### **4.2 Issue No. 2: Whether the 1<sup>st</sup> Applicant rightly deposed the affidavits in support and rejoinder of the Application on behalf of the 2<sup>nd</sup> Respondent**

It is indeed true that the Application was only supported by the affidavit of the 1<sup>st</sup> Applicant. The 1<sup>st</sup> Applicant deposed the affidavit in support and one in rejoinder as a person that was conversant with the facts relating to the matter before court. Nowhere in her affidavit did she purport to swear the affidavit for and on behalf of the 2<sup>nd</sup> Applicant thereby making it a requirement for her to produce before court a registered power of attorney or any document authorizing her to do so. This in essence means that the application by the 2<sup>nd</sup> Applicant was not supported by evidence as it ought to be and is dismissed forthwith. See the ruling of Mr. Justice FMS Egonda –Ntende, J (as he then was) in **Ready Agro Suppliers Limited & 2 Others versus Uganda Development Bank Limited – Misc. Application 0379 of 2005.**



#### 4.3 Issue No.3: Whether a temporary injunction should be granted to the Applicants

##### Law Applicable

The Black's Law Dictionary 11<sup>th</sup> Edition at page 938 defines a temporary injunction as:

*"a court order commanding or preventing an action before or during the trial to prevent an irreparable injury occurring before the court has a chance to decide the case".*

Temporary injunctions under the laws of Uganda are governed by **section 38 of the Judicature Act** and **Order 41 of the Civil Procedure Rules as amended** (*hereinafter referred to as the CPR*). For purposes of determining this matter, I shall restrict myself to the provision of section 38(1) and (2) of the Judicature Act and Order 41 rule 1(a) of the CPR.

##### **Sec. 38 (1) of the Judicature Act states that:**

*"The High Court shall have the power to grant an injunction to restrain any person from doing any act as may be specified by the High Court".*

##### **Sec. 38(3) of the Judicature Act further states that:**

*"Where before, at or after the hearing of any cause or matter, an application is made for an injunction to prevent a threatened or apprehended waste or trespass, an injunction may be granted, if the High Court thinks fit-*

*(a) Whether or not the person against whom the injunction is sought is in possession under any claim of title or claims a right to do the act sought to be restrained under any color of title; and*

*(b) Whether the estates claimed by the parties or any of the parties are legal or equitable"*

##### **Order 41 rule 1(a) of the CPR states that:**

*"Where in any suit it is provided by affidavit or otherwise – that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; the court may by order grant a temporary injunction to restrain such act , or make such other order for the purpose of staying and preventing the wasting , damaging , alienation, sale, removal or disposition*

*Meagan*

*of the property as the court thinks fit until the disposal of the suit or until further orders”.*

His Lordship Hon. Justice Yasin Nyanzi in the case of **Lukwago Elias and KCCA versus The Attorney General and Another Misc. Application No. 445 of 2013** cited the case of **E.L.T Kiyimba Kaggwa -vs- Hajji Katende Abdu Nasser (1985) HCB 43** where Odoki, J (as he then was) stated that before court grants injunctive reliefs, a party asking court to do so must fulfill the following:

- 1) That the granting of a temporary injunction is an exercise of judicial discretion. Its purpose is to preserve the status quo until questions to be investigated in the suit are finally disposed of
- 2) That the condition relevant to granting the application are:
  - (i) that the applicant has a prima facie case with a probability of success
  - (ii) that the applicant might suffer an irreparable loss that would not be adequately compensate for by an award of damages
  - (iii) that when court is in doubt it decides the application on the balance of convenience

In considering the above principles (as laid out in **Kiyima Kaggwa, supra**), the court should bear in mind the following guidelines:

- a) That temporary injunctions are discretionary orders and therefore all the facts of the case must be considered and balanced judiciously,
- b) That the same being an exercise of judicial discretion, there are no fixed rules and the vetting may be kept flexible,
- c) The court should not attempt to resolve issues related to the main suit

The 1<sup>st</sup> Applicant in her affidavit in support of the Motion stated that the Demand Notice/Notice of Sale of the Mortgaged Property dated 3<sup>rd</sup> October 2022 gave the Applicant only a seven (7) days' notice. Whereas I agree with the 1<sup>st</sup> Applicant that the notice period did not comply with the provisions of the law, M/s Tzilla Trust Agencies, acting for and on behalf of the Respondent did not advertise the property for sale not until the 7<sup>th</sup> December 2022 (two months and four days later) when an advertisement for sale was run in the Daily Monitor Newspaper for the sale by public auction of the property comprised in **Plot 5823 Block 273 land at Kyadondo, Waksio District measuring approximately 0.1200 Hectares**. According to the said advertisement, the property should have been sold thirty (30) days from the 7<sup>th</sup>

*MuDiagawa*

December 2022. Further to this, the Respondent in a letter dated 20<sup>th</sup> December 2022 to the Applicants gave the latter a grace period of fifteen more days. The sale was therefore extended. There are also various correspondences between the 1<sup>st</sup> Applicant and the Respondent where the 1<sup>st</sup> Applicant was given a chance to make good the debt to the extent of giving the 1<sup>st</sup> Applicant an opportunity to find buyers for one of the properties so as to settle the debt with the Bank. I therefore find that the defence or reasoning advanced by the 1<sup>st</sup> Applicant that the Respondent did not give her audience or a chance to negotiate terms of settling the debt and / or that adequate notice of the sale was never given is not tenable. The 1<sup>st</sup> Applicant is merely clutching at straws which is intended to delay the Respondent from recovering what is due to her.

The Respondent submitted that this Application was an abuse of the Court process and the main suit was frivolous and vexatious with no likelihood of success. As earlier stated, as Court when considering such an application, we should guard against resolving the issues in the main suit or looking at the merits of the main suit.

Odoki, J (as he then was) in **Kiyimba Kaggwa (supra)** stated that:

*“a prima facie case or a strong prima facie case in the context of the exercise of discretion of any power to grant an interlocutory injunction leads to confusion as to the object of this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious. In other words, that there is a serious question to be tried”.*

Is it therefore impossible for court to be satisfied that the Applicant has a *prima facie* case without being tempted to consider the merits of the main suit? My answer is no. I believe it is for this reason that where everything fails or court is not fully convinced that an injunctive relief should be granted or is in doubt, the default position is to decide the application on a balance of convenience.

That said, the 1<sup>st</sup> Applicant in her affidavit stated that there was a discrepancy in the amount stated as what was due and owing. The 1<sup>st</sup> Applicant believes that what is owed to the Respondent is less than what the latter claims. This calls for a reconciliation of accounts which cannot be done at this stage but during the hearing of the main suit. This in my considered opinion gives raise to existence of a *prima facie* case.



The 1<sup>st</sup> Applicant further stated that and prayed that the injunctive relief sought should be granted because if it were not, she would suffer irreparable damage if the property was sold. The property is prime and once sold, it would not be replaced.

The 1<sup>st</sup> Applicant cannot be seen to plead irreparable loss at this point. She ought to have known that the moment she walked through the doors of the Respondent, borrowed money and pledged her property as security, there could only be one of many results in the event that there was a default on the loan repayment. **Section 20 of the Mortgage Act, 2009** on Remedies of the mortgagee states that:

- “Where the mortgagor is in default and does not comply with the notice served on him or her under section 19, the mortgagee may—
- (a) require the mortgagor to pay all monies owing on the mortgage;
  - (b) appoint a receiver of the income of the mortgaged land;
  - (c) lease the mortgaged land or where the mortgage is of a lease, sublease the land;
  - (d) enter into possession of the mortgaged land; or
  - (e) sell the mortgaged land.

The Respondent opted to proceed under **section 20(e) of the Mortgage Act**. In the circumstances, disposing of the Suit Property would not in my considered opinion occasion irreparable loss since it is one of the expected outcome when one defaults on mortgage repayments.

That said, this being a matter that involves a mortgage, the Court cannot determine this Application or grant the temporary injunction without taking into account the provisions of the Mortgage Act, Act 8 of 2009 and the Mortgage Regulations of 2012.

The Respondent in her affidavit in reply and submissions stated that if court was inclined to give the Applicant the injunctive relief, regulation 13 of the Mortgage Regulations should be applied.





**Regulation 13(1) of the Mortgage Regulations** states that:

*“the court may on the application of the mortgagor, spouse, agent of the mortgagor or any other interested party and for a 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(4) of the Mortgage Regulations** states that:

*“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”.*

Regulation 13 is designed to restrict the ability of the mortgagor to use litigation or the courts, to annoyingly delay the realisation of money due to the mortgagee. In the matter before court, a default notice on the loan was issued to the borrowers and several notices of default were issued to the 1<sup>st</sup> Applicant informing her of her breach of the loan repayment terms. The court shall not condone conduct of litigants who want to use and abuse the court process as a way of running away from or delaying to meet their obligations. Regulation 13 is also intended to reduce the number of frivolous objections to sales by mortgagees and guarantee that the mortgagee will not be unnecessarily prejudiced by a delay in payments that has been inevitably occasioned by litigation.

I am also in agreement with the submissions of the learned counsel for the Respondent that the requirement under section 43(1) of the Microfinance Deposit Taking Institutions Act, 20023 to make provisions for defaulting mortgagors affected the profitability of the Respondent’s business.

In the result, this application for a temporary injunction is granted **ON CONDITION** that the 1<sup>st</sup> Applicants pays the agent of the Respondent, in this case M/s Tzilla Trust Agencies 30% of the forced sale of the mortgaged property (Plot

*MeDiagan*

No. 5823 Kyadondo Block 273 at Nakinyugunzi Wakiso District) or the outstanding amount (in relation to the 1<sup>st</sup> Applicant), whichever is higher within thirty (30) days of delivering this Ruling. Failing which, the Respondent shall be at liberty to dispose of the ~~securities~~ in accordance with the prevailing laws, rules and regulations. security *McCracken*

#### **4.4 Issue No. 4: What other remedies are available to the Parties?**

It is a general rule that costs shall follow the event unless the court or judge shall for good reason otherwise order.

**Section 27 (1) of the Civil Procedure Act** states that:

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

The costs of this Application shall abide the outcome of the main cause.

#### **[5] *Obiter dictum***

While resolving the second issue, the application by the 2<sup>nd</sup> Applicant was dismissed because it was not supported by affidavit evidence. This dismissal order is of no consequence for the simple reason that while resolving the first issue, I found that there was a misjoinder of parties and ordered that two separate suits should be filed.

Secondly, this application sought an injunctive relief to stop the Respondent from disposing of the securities (LRV 4176 Folio 3 Plot No. 5823 Kyadondo Block 273 at Nakinyugunzi Wakiso District and LRV 2566 Folio 23 Plot 28-34 Coronation Avenue, Kampala District) pledged by the Applicants on borrowing from the Respondent. However, a clear reading of the Application and examination of the **annextures “D”** and **“D 1”** attached thereto, showed that the property advertised for sale was that comprised in LRV 4176 Folio 3 Plot No. 5823 Kyadondo Block 273 at Nakinyugunzi Wakiso District which only related and/or affected the 1<sup>st</sup> Applicant.

Delivered electronically this 15th day of September 2023 and  
uploaded on ECCMIS.



**Harriet Grace MAGALA**

**Judge**

**15<sup>th</sup> September 2023**

XX