**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISC. APPLICATION NO. 159 OF 2012**

**(ARISISNG FROM HCCS NO. 116 OF 2012)**

**HERBERT KABUNGA TRADERS:::::::::::::::::::::::::APPLICANT**

**VEVRSUS**

**STANBIC BANK (U) LIMITED::::::::::::::::::::::::::RESPONDENT**

**BEFORE : HON. LADY JUSTICE HELLEN OBURA**

**RULING**

This application was brought under Order 41 rules 1 & 9 of the Civil Procedure Rules (CPR) and section 101 (I believe it is section 98) of the Civil Procedure Act (CPA). The applicant is seeking for orders that a temporary injunction doth issue against the respondent, its servants and agents restraining them from auctioning, advertising, foreclosing or in any manner disposing of the pieces of land comprised in LRV 2382 Folio 6 Plot 5 at Janmohammed Road –Masaka, Busiro Block 347 Plot 600 at Nalumunye, Freehold Register Volume 452 Folio 8 Plot 17 at Hobart Avenue Masaka, Mailo Register Volume 1900 Folio 9 Plot 178 Komamboga-Kyaddondo, Kyaggwe Block 101 Plot 801 at Misindye and Sonde, Kibuga Block 12 Plot 1497 at Mengo, Kibuga Block 12 Plot 159 Kisenyi-Mengo and Kibuga Block 12 Plot 1225 Mengo until the final disposal of the suit. The applicant also seeks for provision to be made for the costs of this application.

The brief grounds for the application are stated in the affidavit in support sworn by Mr. Herbert Kabunga on the 28th February 2012. They are firstly, that the respondent’s, its servants and/or agents intend to unlawfully auction the properties listed above despite the fact that the applicant has been satisfactorily servicing the loan. Secondly, that if the order is not given the applicant will suffer irreparable loss as the property would be unjustly auctioned off and permanently lost. Thirdly, that the suit has a likelihood of success and on the balance this court ought to grant the application.

An affidavit in reply and opposition to the application was sworn by Ms. Hilda Kamugisha the Legal Officer of the respondent bank. She deposed that the respondent by a facility letter dated 31st May 2011 advanced to the applicant a loan sum of UShs. 3,150,000,000/= (hereinafter called the 1st facility) with interest rate of 1% per annum above the respondent’s Uganda Shillings Prime Rate prevailing from time to time. The loan was to be repaid in one hundred twenty (120) successive monthly installments of UShs. 54,675,606/=. A copy of the facility letter was attached as annexture “A”.

She further deposed that by another facility letter dated 19th July 2011 the respondent advanced to the applicant a further loan sum of UShs. 1,800,000,000/= (hereinafter called the 2nd facility) with interest rate of 2% per annum above the respondent’s Uganda Shillings Prime Rate prevailing from time to time. The loan was to be repaid in one hundred twenty (120) successive monthly installments of UShs. 35,384,815/=. A copy of the facility letter was attached as annexture “B”.

The deponent stated that the respondent’s prime rate was contractually susceptible to change and did change and as such the respondent in both facility letters reserved the right to amend the interest rate including the method of calculating it any time if the market condition necessitated it or if the applicant’s conduct increased the bank’s risk regarding the facility. The respondent by reason of market conditions did change its prime rate during the duration of the applicant’s loan facilities and the monthly installments payable by the applicant also changed.

She further deposed that the applicant defaulted in repayment of both facilities and the respondent issued a statutory demand for payment on 2nd January 2012. Copies of the applicant’s loan repayment ledgers for both facilities and the demand letter were annexed as “C”, “D” and “E”. Further that the respondent holds a Further Charge and Legal Mortgage over the five securities listed in the affidavit in support of the application in relation to the 1st facility and two of the securities listed in the affidavit in support in relation to the 2nd facility. Copies of the security deeds were annexed as “F1” and “F2”.

Ms. Kamugisha deposed that in the circumstances as stated above the respondent was well within its rights in seeking to realize the securities in default of the applicant servicing the two facilities. She deposed further that the applicant’s suit has no probability of success and the applicant will not suffer irreparable injury as the securities are of a known value which the respondent is able and willing to compensate in the unlikely event that it should ever be established that the applicant’s claim is valid.

When this application came up for hearing, it was argued for the applicant by Mr. Godfrey Kibirige and for the respondent by Mr. Masembe Kanyerezi. Counsel for the applicant first cross examined the deponent of the affidavit in reply on the content of her affidavit. He then submitted that the applicant was satisfactorily servicing its loan when suddenly the loan installment was increased from Shs. 95,000,000/= to Shs. 139,000,000/=. He argued that the increment of Shs. 44,000,000/= was made without any notice to the applicant as required by law. He contended that the increment was not only onerous but amount to unjust profiteering on the part of the respondent bank and this court should not just close its eyes and uphold it. He argued that the applicant would suffer irreparable damage if the properties that had been advertised are sold since they also include a matrimonial home.

Counsel for the applicant contended that the applicant’s case has a likelihood of success given that the increment of the monthly installments allegedly due to the market condition had not been satisfactorily explained. He supported this argument with the decision in ***David Lincoln Ndaula v DFCU Bank Misc. Application No. 269 of 2009*** (arising from ***HCCS No. 179 of 2009***).

He further contended that the applicant had already paid a sum of Shs. 850,000,000/= to 900,000,000/= and therefore it would be unjustifiable to auction the applicant’s properties to recover the loan. Mr. Kibirige argued that the same market condition that the respondent referred to also affected his client and when the monthly installments were increased suddenly it failed to service the loan.

He concluded that the applicant had shown that its suit has a likelihood of success and it would suffer irreparable damages if this application is not granted. He prayed that this application be allowed and costs be in the cause.

Counsel for the respondent in opposition to this application contended that it must fail as it lacks merit. He submitted that the relationship between the applicant as borrower and the respondent as lender is governed by a contract which clearly spelt out the terms of the loan facilities. He referred to clause 5.1.1 of annexture “A” which provides for interest based on the prevailing rate from time to time and clause 5.1.2 which provides that the bank reserves the right to amend the interest rate. He submitted that the same terms were also contained in annexture “B” in respect of the 2nd facility. He argued that the amount due for repayment kept growing as the prime rate kept changing and so the monthly installments also moved upwards varying from month to month.

He contended that the applicant defaulted in the repayment and argued that at least the applicant should have paid the agreed monthly installments that it does not dispute. He referred to annexture “C” and pointed out that since 13th November 2011 when part of the 5th installment was paid, the applicant had not made any payments in respect of the 1st facility. As regards the 2nd facility, he referred to annexture “D” and observed that only three full installments and a small part of the 4th installment was paid and since December 2011 nothing was paid.

Counsel for the respondent contended that the only ground stated in this application is that the respondent intends to unlawfully auction of the listed property despite the fact that the applicant is satisfactorily servicing the loan. He submitted that this ground must fail because there is a contractual provision for increase of interest rate based on increase on the prime lending rate.

He referred to the case of ***Kiyimba Kaggwa v Katende [1985] HCB 43*** which states the three conditions for grant of a temporary injunction as likelihood of success; irreparable injury and balance of convenience. On the 1st condition, he argued that the applicant’s case has no likelihood of success because increase on the interest rate was contractual.

On irreparable injury, he referred to ***Pan African Commodities Ltd v Aya Biscuits (U) Ltd Misc. Application No. 385 of 2007 (arising from HCCS No. 528 of 2007)*** where it was held that if the applicant can be compensated in damages and the respondent is in a position to pay then no injunction should issue. He submitted that as stated in paragraph 10 of the affidavit in reply, the respondent is willing and able to pay for the value of the properties if it is established that it did not have authority to sell it.

As regards the submission of the applicants counsel that part of the property was a matrimonial home, he argued that sentimental value cannot apply to items that have been specifically mortgaged. He referred to ***Maithya v Housing Finance Company of Kenya and Another [2003] 1 EA 133 (CCK)*** where it was held that properties that are subject to a charge are commodities that are monetized and the intention of the parties are that they should be sold in case of default. He argued that once a spousal consent has been obtained (like it was done in this case) as required by law then even matrimonial homes that are subject of a charge are capable of being sold.

He submitted that the applicant is seeking an equitable remedy and therefore it must come with clean hands. He argued that as was held in ***Maithya v Housing Finance company of Kenya and Another*** (supra), failure to service the loan or to pay the lender takes the applicant outside the realm of exercise of the court’s jurisdiction. He concluded that the applicant had failed to meet the conditions for grant of a temporary injunction and prayed that the application be dismissed with costs.

With court’s permission, Mr. Kibirige filed a written rejoinder to the respondent’s submission in which he among other things blamed the respondent for being responsible for the applicant’s failure to service the loan when it suddenly increased the monthly installments. He reiterated his earlier prayer that the application be granted.

Upon listening to the submissions of both counsel and on perusal of the affidavits and all the documents attached to them as well as the pleadings in the main suit, the only issue for determination is whether the temporary injunction craved for should be granted.

I wish to observe from the outset that grant of an interlocutory injunction is an exercise of judicial discretion and no appellate court will interfere unless it be shown that the discretion has not been exercised judicially. See **Giella v Cassman Brown and Company Ltd [1973] EA 358** as per Spry V – P at page 360 and ***Kiyimba Kaggwa v Katende*** (supra).

The legal principal upon which court exercises its discretion to grant a temporary injunction in all actions pending determination of the main suit is now well settled as seen in the wealth of authorities.

In the leading case of **Giella** (supra) Spry V – P at page 360 stated as follows;

*“The conditions for grant of an interlocutory temporary injunction are now I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction would normally not be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.* (**Emphasis added**).

See also **Robert Kavuma v Hotel International Ltd Supreme Court Civil Appeal NO. 8 of 1990 reported in (1993) II KALR 73** as perWambuzi CJ (as he then was), ***Kiyimba Kaggwa v Katende*** (supra) and ***Pan African Commodities Ltd v Aya Biscuits (U) Ltd*** (supra) relied upon by counsel for the respondent.

The purpose of a temporary injunction is to preserve the status quo until the dispute to be investigated in the suit can be finally disposed of. See ***Clovergem Fish & Foods Ltd v International Finance Corp & 7 Others MA. No. 441 of 2001 (2002-2004) UCLR 132 at page 137*** as per Arach-Amoko, J (as she then was).

In view of the above conditions, the applicant in the instant application must show that it has a prima-facie case with a probability of success. Counsel for the applicant argued that this application has a likelihood of success because the interest rate was increased without notice to the applicant. On the other hand it was argued for the respondent that increase of the interest rate was contractual.

This court is alive to the holding of Lord Diplock in the case of **American Cynamide Co. v Ethicon [1975] 1** ALL E.R. 504 at page 508 paragraphs j – page 509 Para (b) to the effect 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. There is no requirement for the plaintiff to establish a strong prima facie case. In other words for purposes of grant of a temporary injunction it is sufficient for the applicant to prove that triable issues have arisen that merit judicial consideration. This is intended to prevent the court from prejudging the merits of the case.

I have carefully looked at the term loan letters (annextures “A” and “B” to the affidavit in support) which spelt out the terms of the two loan facilities that were advanced to the applicant. I have also read the plaint filed by the applicant in the main suit. I wish to first of all observe that the applicant is not challenging the provision for increase of interest rate from time to time as stated in the offer letter. However, it is specifically attacking the increment of the monthly installments as being without basis and therefore unlawful.

It was strongly argued for the applicant that increment of the monthly installments from Shs. 95,000,000/= to Shs. 139,000,000/= giving a difference of Shs. 44,000,000/= was made without any notice to the applicant as required by law.

First of all the amount of Shs. 44,000,000/= said to be onerous by the applicant must be looked at in its context. The applicant stated in its plaint that it borrowed a total of Shs. 4.78 billion. Any small percentage increment of interest on that figure would definitely sound onerous if not stated in its context. Secondly, to my mind the argument that the increment did not have basis and was without notice is unconvincing and not tenable. This is because the applicant was given advanced notice when it signed the offer letter which clearly stipulated that interest would be increased depending on the prime rate prevailing from time to time.

Counsel for the applicant did not assist this court by stating the law which required notice to be given to the applicant that was violated. If the parties had agreed on the requirement of any such notice, it should have, in my view, been spelt out in the offer letter which formed the basis of the contractual relationship between the parties.

I therefore find that the applicant has not raised any arguable case as clearly the increase on the interest rate and the monthly loan installments were contractual. I also wish to observe that when the applicant defaulted in servicing the loan the respondent was justified in demanding payment and exercising the remedies available to it under the facility agreement.

The respondent is a banking institution that lends out its customers’ money and not a charitable organization. It could not therefore just sit and watch quietly as the applicant defaulted at leisure on the loan repayment schedule. In my view, it was prudent of it to act swiftly in accordance with the terms of the loan facilities. For that reason, I do not find any merit on the main ground of this application that the applicant acted unlawfully.

Without dwelling so much on this condition, I find that the applicant has not shown a prima-facie case with a possibility of success or even raised any serious questions to be tried. Consequently, I would conclude that the first condition for grant of a temporary injunction has not been met by the applicant.

Ordinarily this finding would dispose of this application but just in case I misdirected myself on this condition, I will proceed to consider the other conditions as well.

On irreparable damage, I find very instructive the words of **Lord Diplock** in the case of **American Cynamide Co** (supra). He states;

***“The governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted…”***

It was also held in the case of ***Kiyimba Kaggwa*** (supra) that:-

“*Irreparable damage does not mean that there must not be physical possibility of repairing injury,* ***but means that the injury must be a substantial or material one, that is, one that cannot be adequately compensated for in damages”***(emphasis added).

It was strongly argued for the applicant that it will suffer irreparable damage when the securities are sold by the respondent. It was on the other hand contended for the respondent firstly, that properties that are subject to a charge are commodities that are monetized and the intention of the parties are that they should be sold in case of default. Secondly, that since the value of the properties are known the respondent was able and willing to compensate the applicant in the event that it is later established that it did not have authority to sell it.

I do not see any irreparable damage or injury that the applicant will suffer that cannot be compensated by an award of damages if the properties he gave as securities are sold. I agree with the argument of counsel for the applicant that by subjecting these properties to a charge the applicant intended that they should be sold in case of default. It cannot now turn around and claim that it will suffer irreparable damages if they are sold. I am inclined to reject that argument because it lacks sincerity. In the circumstances, I am not satisfied that the applicant will suffer irreparable damage if a temporary injunction is not granted. Consequently, the applicant has also not met the condition on irreparable damages.

Lastly on the balance of convenience, whereas this court is not in doubt in view of its conclusion on the two conditions, it is important to point out that even the balance of convenience would still not favour the applicant. The applicant is seeking an equitable remedy of a temporary injunction but as argued by counsel for the respondent, it has not come to court with clean hands. I do not see the justification for failure to service the loan completely. Even if the applicant was aggrieved by the increment on the monthly installments, it should have still continued to pay what was originally agreed upon as it sought redress in court.

I am fully persuaded by the holding in ***Maithya v Housing Finance company of Kenya and Another*** (supra), that those who come to equity must do equity. I agree that failure to service the loan or to pay the lender takes the applicant outside the realm of exercise of the court’s jurisdiction to grant a temporary injunction.

In the premises, the balance of convenience in this case favours the respondent who lent money and its repayment is now at stake. Granting a temporary injunction at this stage would therefore be more prejudicial to the respondent than to the applicant.

In conclusion, this court finds that the applicant has not met any of the conditions for grant of a temporary injunction. In the result I decline to grant the orders sought in this application and I dismiss it with costs.

I so order.

Dated this 26th day of June 2012.

**……………………..**

Hellen Obura

**JUDGE**

Ruling delivered in open court at 3.30 pm in the presence of Mr. Godfrey Kibirige for the applicant and Mr. Masembe Kanyerezi appearing together with Mr. Bwogi Kalibala for the respondent.

**JUDGE**

26/06/2012