**THE REPUBLIC OF UGANDA**

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

**COMMERCIAL DIVISION**

**MISCELLANEOUS APPLICATION NO.711 OF 2015**

**(ARISING OUT OF HCCS NO.580 OF 2015)**

**BAKERS’ WORLD LTD**

**ABDULLH WASSWA**

**MARGARET SEMPAGAMBE WASSWA**

**NANTALE SOPHIE:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPLICANTS/PLAINTIFFS**

**VERSUS**

**EQUITY BANK (U) LTD::::::::::::::::::::::::::::::::::::::::: RESPONDENT/DEFENDANT**

**BEFORE THE HON. MR .JUSTICE HENRY PETER ADONYO:**

**RULING:**

1. **Background:**

This is an application brought by way of chamber summons under **Order 41 Rule 1 & 2 of The Civil Procedure Rules** and **Section 98 Of The Civil Procedure Act** seeking for orders that a temporary injunction issues against the respondent, its agents and any one acting under its authority or direction from disposing of, alienating and or sale of security / property comprised in Block 13 Plots 354, 355 and 246 at Kabowa pending the hearing and determination of the main suit and that costs of the application be provided for.

1. **Grounds for the application:**

The grounds for the application are contained in the application and further expounded in the affidavit in support of it deposed by Abdullah Wasswa who is the second applicant. Briefly they are that the applicants sued the respondent in High Court Civil Suit No. 580 of 2015 seeking among other injunctive orders against the respondent in relations to their intent of disposing of security Block 13 plots 354, 355 and 246 land located at Kabowa which arose from the fact of the 1st applicant / plaintiff having previously applied to the respondent for business loan amounting to Ug. Shs. 520,000,000/- but received only Ug. Shs 492,487,483 which was remitted to the 1st applicant’s company account No.10015397565 held with DFCU Bank with the stated loan facility to be paid back within a period of sixty months and with that disbursement all loans to the 1st applicant were consolidated but the respondent immediately started charging interests and penalties on the said loan amount without recourse to clause 3 of the loan agreement when it decided to recall the entire loan amount hardly before the expiry of the agreed period and subsequently advertising the security given by the applicants for sale as a way of enforcing the loan thereby if the sale proceeded the main suit would be rendered nugatory with the applicants likely to suffer loss which cannot easily be atoned for in damages yet the main suit is not vexatious or frivolous and has high chance of success and that the balance of convenience was in their favour for they were in occupation of the suit properties.

The respondents on the other hand dismissed this application through an affidavit in reply deposed by Arocha Joseph in which it is deposed that the applicants’ affidavit in support of this application was materially defective for it contained vague and false statements which did not disclose sufficient cause for grant of temporary injunction in that since the applicants received credit facilities by the respondent they persistently defaulted on their obligations to regularly service the same which led to its restructuring by an offer letter dated 20th June 2014 but that inspite that and consolidation the applicants continued to default necessitating the respondent to recall the whole of the loan facility and even commence foreclosure processes which actions were taken by the respondent well within the conditions of the restructure arrangement and the law that in the event of default by the applicant no irreparable damage to be suffered by the applicants since they were the ones in default of contractual obligations to the detriment of the respondent’s business with the head the application having no chances of success and actually the balance of convenience lying on the other hand with the respondent and therefore it was in the interest of justice, equity and fairness that this application be dismissed with costs to it.

1. **Submissions:**

On the 22nd day of October when the parties appeared before court for the hearing of the application, Mr. Edward Ocen represented the respondent while M/s Sharon Tem appeared for the applicants. This court then directed parties to file written submissions. The applicants filed theirs within the period allowed while the respondent filed its outside time and with no permission of the court. That submission is thus not considered as it was filed in utter disobedience of the court order.

1. **Resolution:**

Consideration has been made of this application including the affidavits in support and against it in addition to the submission in support with all these related to the law applicable and the relevant decisions of the courts.

In the first instance **Order 41 Rule 1 of The Civil Procedure Rules** is the relevant law in relations to applications of this nature and it provides as follows;

**Order 41 Rule 1 of The Civil Procedure:**

**“where in any suit it is proved that by affidavit or otherwise –**

1. **That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongly sold in execution of a decree, or**
2. **That the defendant threatens or intends to remove or dispose of 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 of the property as the court thinks fit until the disposal of the suit or until further orders,**

with **Order 41 Rule 2(1)** of the same rules providing giving an applicant the authority to apply for a temporary injunction to restrain a defendant from committing the breach of contract or injury complained of or any injury of a like kind arising out of a contract or relating to some property or right with the law on granting of temporary injunctions in Uganda well settled in the classic case of **E.L.T Kiyimba Kaggwa v Haji Abdu Nasser Katende [1985] HCB 43** in that **Odoki J** (as he then was) laid down the conditions to be satisfied before grant of a temporary injunction is made that since the granting of a temporary injunction is an exercise of judicial discretion with its purpose to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of then following conditions must be met ;

1. An applicant must show that he or she has a prima facie case with a probability of success.
2. An applicant is likely to suffer irreparable injury not capable to adequately be compensated by an award of damages.
3. The balance of convenience is in the favour of the applicant*.*

These principles were cited and confirmed in a recent decision of the Court of Appeal of Uganda of **Nasser Kiyingi and Another v Attorney General and Two Others Constitutional Application No 29 of 2012**.

The above principles are thus considered here in relations to the orders sought herein as below.

For an application to establish a *prima facie* case with probability of success case law is that though an applicant has to satisfy the court that there is merit in its case an applicant need not prove at this stage that his or her case has a chance of success but must raise triable issue which raises a *prima facie* case for adjudication.

**See:**

1. ***American Cynamide versus Ethicon [1975] ALL ER 504,***
2. ***b.* Kiyimba Kaggwa (supra) ,**
3. **Wanendeya v Norconsult [1987] HCB 89 and,**
4. **Devon V Bhades [1972] EA 22.**

In this application the applicants aver that the first applicant applied for a business loan of Ug. Shs 520, 000, 000/- from the respondent as working capital and this was consolidated to be paid within a period of sixty months with a debenture charge of similar amount registered in the favour of the respondent on the first applicant’s current and future assets in addition to personal guarantees of the second, third and fourth applicants who are the registered proprietors of Block 13 plots 354,355 and 246 at Kabowa. Upon the disbursement of the loan facility it is contended that the respondent immediately began charging interests on the said amount without regard to clause to clause 3 of the loan facility and the period negotiated by the parties and even in utter disregard of the fact that the first applicant had substantially paid up the loan facility to the tune of Ug. Shs 356,665,750/= as informed by averments in paragraphs 3, 6, 7, 8, 10 and 11 of the affidavit in support of this application.

The respondent on the other hand indicates that it took the action it did due to the fact that the first applicant had defaulted on its loan obligations even after the consolidation and the restructuring of the loan facility prompting it to issue a notice of default on the 19th September 2014 requiring the first applicant to rectify the default and upon it failing to do so the respondent then exercised its right under both the law and loan agreement to realize its loan by foreclosing the securities attached to it thus is the position as seen from paragraphs 5, 6, 7, 8, 9 and 10 of the affidavit in reply.

That is the position of the parties herein and from the fact that each of the parties herein poses a divergent view in regard own obligation as seen from the depositions clearly is indicative of a dispute which require investigations by the court in order for a correct conclusion to be arrived at thereby showing that the applicants in this matter have raised a prima facie case requiring adjudication *inter partes*.

The other requirement for a temporary injunction to be granted is that an applicant must show that he or she will suffer irreparable injury which cannot be atoned for by an award of damages with the court in the case of **Kiyimba Kaggwa v Hajji Abdu Nasser Katende *(supra*)** explaining that to suffer an irreparable injury does not mean the existence of a physical injury only but such injury substantial or material that cannot be adequately compensated for in damages and in relations to this aspect the second, third and fourth applicants depose that the property which is subject to foreclosure and sale that is Block 13 Plots 354, 355 and 247 were all registered in their names respectively and were offered in that capacity of guarantors of the loan of the first applicant and thus cannot foreclosed before the securities under a debenture and charge of the first applicant’s assets is done as they are not the primary obligators of the loan facility and that is if the said properties were sold given the fact that they were the matrimonial homes of the said applicants and from which their family derives sustenance that sale would not only render the family homeless but deprive them of their means of survival. This scenario is not disputed by the respondent who argues that it was within the applicant’s knowledge before placing their assets as security for the loan facility that there would dire consequences in case of default and that a sale as such cannot lead to irreparable loss *per se* as was held in the case of **Kakooza Abdullah v Stanbic Bank Limited Miscellaneous Application No.614 of 2012** as a general rule rather that it is the contractual arrangement or intention of the parties which is expressly provided for in the agreement or mortgage that counts and therefore since that is the case the applicants herein cannot be seen to be pleading that they will suffer irreparable damage.

In this matter the second, the third and the fourth applicants point out and correctly so that they were not the principal debtors of the loan taken from the respondent but rather the guarantors to the loan facility advanced to the first applicant with their properties which are the principle means of earnings for their families as well as their matrimonial homes being used as guarantee of the said loan. This fact is not disputed either by the respondent. These applicants argue that since they are currently in occupation of those properties they and their families would be denied of their means of earning income but also rendered homeless. Given the fact that there is indeed raised the issue of the fact that there were taken a debenture and charge of the first applicant’s present and future assets and that the second, the third and the fourth applicants were merely guarantors and not the principal borrowers and given the fact that they are in occupation of the same would this principle fall in their favour.

Where the court is in doubt on any of the above two principles then it will decide an application before it on the balance of convenience. The term balance of convenience means that if the risk of doing an injustice is going to make an applicant suffer then probably the balance of convenience would be in such an applicant’s and the Court would most likely be inclined to grant to him /her the application for a temporary injunction. This position was well arrived at in the case of **Victoria Construction works Ltd v Uganda National Roads Authority HCMA No. 601 of 2010 by** the High Court while citing with approval the decision in **J. K. Ssentongo v Shell (U) Ltd [1995] 111 KLR 1** in whichJustice Lugayizi observed that an applicant fails to establish that he or she has a *prima facie* case with likelihood of success or that is likely to suffer irreparable injury then he/she must show that the balance of convenience was in his / her favor. From the point of view that the applicants herein have shown that they were in occupation of the suit properties and the fact that selling of them would not only render them homeless but would deny them means of livelihood, this court would conclude that the balance of convenience are in their favor.

1. **Orders:**

In the result and for the reasons given above, I would find that the applicants herein have made a case for the grant of the injunctive orders sought which I find is meritorious and therefore the orders sought are accordingly granted upon the terms as are proposed and indicated on the first and second pages of this Chamber Summons which was filed on the 8th day of September, 2015 in this court.

Secondly , I would order that the costs of this application to be in the cause.

I do so order accordingly

**HENRY PETER ADONYO**

**JUDGE**

**13TH November, 2015**