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**THE REPUBLIC OF UGANDA**

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

**CIVIL APPLICATION NO. 360 OF 2017**

*(Arising from Civil Application No. 359 of 2017)*

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**Nkwanzi Edith Kalebu :: Applicant**

***VERSUS***

- 1. Stanbic Bank (U) Limited**
- 2. Gimex Uganda Limited**
- 3. Kalebu Gershom**

} :::::::::::::::::::::::::: Respondents

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**Coram: Hon. Mr. Justice Remmy K. Kasule, JA sitting as a single Justice**

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# **Ruling**

The applicant seeks an Interim Order that the 1<sup>st</sup> Respondent does not dispose of the suit property comprised in plot 10 Summit View, LRV 3138 Folio 17, Kampala- Uganda.

30 The 2<sup>nd</sup> Respondent, a company registered with limited liability is registered as proprietor of the said suit property as from 15.07.2014. The 3<sup>rd</sup> Respondent is a director of the 2<sup>nd</sup> Respondent.

35 The Applicant claims to be a wife of the 3<sup>rd</sup> Respondent as from 18.12.2010 according to the exhibited marriage certificate. The applicant asserts that, at all material time, the said suit property was their matrimonial property, that is herself and her husband, the 3<sup>rd</sup> respondent, and that it is in that property that they both stay as a family. Both had purchased the same in 40 2011 for that purpose.

On 20.02.2015, the 2<sup>nd</sup> respondent through its authorized directors namely the 3<sup>rd</sup> respondent and one Faith Kyasimire, director/secretary, secured a loan from the 1<sup>st</sup> respondent and mortgaged the suit property as security.

45 The 2<sup>nd</sup> respondent failed to repay the loan to the 1<sup>st</sup> respondent. HCCS No. 351 of 2016 was lodged by the 1<sup>st</sup> respondent against the 2<sup>nd</sup> respondent in the High Court, Commercial Division, Kampala to recover the loaned money. On 10.10.2016 a consent Judgment was entered in the suit and the 2<sup>nd</sup> 50 respondent undertook to pay the decretal sum due together with costs of the suit to the 1<sup>st</sup> respondent by the 31<sup>st</sup> March, 2017. The 2<sup>nd</sup> respondent however failed to meet the undertaking and the 1<sup>st</sup> respondent took steps to recover the decretal sum due by sale through public auction of the mortgaged suit property.

55 The applicant then started her litigation. **She filed in the High Court, Kampala, (Land Division) Civil Suit No. 221 of 2017**

**against the respondents.** It is unexplained why the applicant did not file the suit in the Commercial Division where HCCS No. 35 of 2016 had been filed. In the suit the applicant asserted that the registration of the suit property into the names of the 2<sup>nd</sup> respondent was fraudulent, the fraud being perpetuated by her husband, the 3<sup>rd</sup> respondent, amongst others. She further claimed that the three respondents were all aware of the fraud in that her spousal consent had not been obtained before the mortgage was executed, yet the respondents were, at all material time, aware that the property was matrimonial property. She thus prayed that the suit property be released from the mortgage.

At the same time of lodging in the High Court the said **HCCS No. 221 of 2017**, the applicant also lodged in the same Court **Miscellaneous Application No. 444 of 2017** seeking to preserve the status quo of the suit property pending disposal of the main suit.

On 18.10.2017, the High Court (Lady Justice Alexandra Nkonge Rugadya, J.) dismissed Miscellaneous Application No. 444 of 2017 and awarded costs to the 1<sup>st</sup> respondent. The learned Judge held that the applicant had failed to establish before Court that the suit property was matrimonial property thus requiring spousal consent before being mortgaged.

After the dismissal of **Miscellaneous Application No. 444 of 2017** by the High Court, the applicant then came to this Court through **Civil Application 359 of 2017** for a substantive order of stay and this Application (**360/2017**) for an Interim Order.

85 Counsel Andrew Wetala for the applicant, prayed this Court to grant an Interim Order since the applicant had lodged a Notice of Appeal against the High Court Ruling in **High Court Miscellaneous Application No. 444 of 2017** and had also lodged the substantive **Application No. 359 of 2017**. The 1<sup>st</sup> respondent had advertised the suit property for sale by public  
90 auction. Thus the applicant stood to be evicted from the same.

Counsel also asserted that the appeal to this Court stood great chances of success, the applicant had established ~~of~~ triable issues and that she was likely to suffer irreparable injury by being evicted and losing a family property. In terms of who was  
95 likely to suffer most inconvenience as between the applicant and the respondents, applicant's Counsel contended that it was the applicant who is being thrown away from the family suit property.

Counsel Andrew Munanura for the 1<sup>st</sup> respondent submitted  
100 that the application ought to be dismissed with costs. No appeal had been filed in this Court by the applicant and no reason had been given for not doing so. According to Counsel, there was no need for waiting to prepare the proceedings of the lower Court, since written submissions had been submitted to that Court  
105 which had proceeded to make its decision based on those written submissions. Thus the proceedings were ready and available for the record of appeal to be compiled and filed in this Court. The applicant therefore had no excuse for failure to lodge the appeal and to file the record of appeal in time.

110 Counsel further contended that the applicant had failed to  
adduce any evidence that she contributed to the purchase of the  
suit property and that the same was bought to be owned as a  
matrimonial property by her and her husband, the 3<sup>rd</sup>  
respondent.

115 As to irreparable injury, Counsel contended that there was none  
to be suffered in this case. At any rate, were the applicant to  
suffer any, then she will be atoned for with damages and the 1<sup>st</sup>  
respondent was in a position to meet those damages once  
awarded to her. In respect of inconvenience, the sum loaned to  
120 the 2<sup>nd</sup> respondent was more than US\$ 2 million and its loss by  
non-payment is a big loss and inconvenience to the 1<sup>st</sup>  
respondent. Finally Counsel prayed that, if Court was not to  
dismiss the application, then it should order the respondent to  
deposit security pursuant to Regulation 13(1) of the Mortgage  
125 Regulations, 2012.

This Court has carefully considered the pleadings and the  
submissions made by respective Counsel in this application.

The main considerations for granting or rejecting an interim  
application are whether the Court is seized of jurisdiction to  
130 entertain the application, whether the suit from which the  
application arises discloses triable issues and is not frivolous  
and/or vexatious, whether the failure to grant the application  
will render the disputed matter nugatory in a manner that  
cannot be redressed through an award of damages, and in case  
135 of doubt, the Court decides the application on the balance of  
convenience.

Further, an injunction, whether interim or substantive, is by its own nature an equitable remedy, and as such, the one seeking this remedy must act and conduct himself/herself in compliance with the maxim that one who relies on equity must come to Court with clean hands. The Court will deny an applicant who comes to Court with dirty hands the equitable relief of an interlocutory injunction. See: **Hon. Anita Bangirana Kawooya vs Attorney General & Another: Constitutional Court Miscellaneous Application No. 46 of 2010: [2010] UGCC 8 (5<sup>th</sup> November, 2010)**. See also: **Hon. Jim Muhwezi vs The Attorney & IGG: Miscellaneous Application No. 18 of 2007 (COA)**.

**Giella V Cassman Brown and Company Ltd [1973] EA 358**

150 **and**

**Moody V Cox & Another [1916-17] Aller CA 548.**

The first consideration for this Court to determine in this Application is whether or not the applicant has satisfied the burden on her that her cause has triable issues. There are no pleadings of HCCS No. 221 of 2017 that is still obtaining in the High Court, Land Division, that the applicant availed to this Court. There are no proposed grounds of appeal availed to this Court. In paragraph 5 of her affidavit in support of this application the applicant alleges that she filed **HCCS No. 221 of 2017** against the respondents jointly and severally for their fraudulent conduct and for lack of spousal consent. There is not an iota of evidence given by the applicant as to what constituted the alleged fraudulent conduct on the part of each

of the respondents as regards the suit property. No copy of the  
165 agreement of purchase of the suit property, if any, has been  
availed to this Court to show that the property was jointly  
bought by the applicant and the 3<sup>rd</sup> respondent, and that the  
same was fraudulently registered in the names of the 2<sup>nd</sup>  
respondent to the exclusion of the applicant. The applicant does  
170 not show in her pleadings any evidence, documentary or  
otherwise, as to how the 2<sup>nd</sup> respondent fraudulently got  
registered as proprietor of the suit property. Indeed the  
Certificate of Title, annexure "BB" to the applicant's affidavit in  
support, clearly shows that on 15.07.2014 through Instrument  
175 No. KCCA-00008241 the suit property was transferred from the  
predecessor registered proprietor KARIM HIRJI into the names  
of the current registered proprietor, the 2<sup>nd</sup> respondent. The  
applicant has never been registered proprietor of the same,  
whether singly or jointly with others.

180 The burden upon the applicant at this stage is to have the Court  
look at the relevant pleadings of the application and be satisfied  
of the applicant's case. At this stage, the Court need not inquire  
any further than that. See: **Constitutional Court Application  
No. 07 of 2014 Horizon Coaches Limited -vs- Mbarara  
185 Municipal Council & 2 Others**, unreported.

In particular, the applicant to be able to succeed in her  
application has the burden to plead and show, prima facie, that  
she is a spouse of the mortgagor whose consent is required  
under the relevant provisions of the Land Act. The purpose of  
190 the Land Act Provision is to impose restrictions on spouses from

dealing with family land properties in the manner described in the Act without the consent of the other spouse. In **Civil Appeal No. 63 of 2007: Agnes Bainomugisha -vs- DFCU Ltd**, this Court observed that:

195           ***“However I do not think the consent under the section applies to a company even if the company is owned by family members. The framers of the Section did not envisage a company having a spouse owning family property/land. In my view the Section can only apply in***  
200           ***circumstances where one spouse is going to deal with family property/land with third parties”.*** (Byamugisha, JA (RIP))

Accordingly, on consideration of the pleadings and submissions made in this application, on their face of it, this Court has come  
205           to the conclusion that the applicant has not made out a prima facie case with a probability of success to be granted an interim order on the basis that her spousal consent was not obtained before the suit property was mortgaged.

It also follows from the above conclusion that the applicant has  
210           also not made out a case that she is to suffer irreparable injury if she is not granted this interim order. The suit property is, on the face of it, the property of the 2<sup>nd</sup> respondent and as such the 2<sup>nd</sup> respondent had the liberty to mortgage the same. The applicant, being not a spouse of the 2<sup>nd</sup> respondent, is  
215           occupying the suit property, if such a claim is true, with the permission and consent of the 2<sup>nd</sup> respondent. It is up to the applicant, now that she is aware that the suit property is



220 mortgaged to the 1<sup>st</sup> respondent, to arrange for a peaceful  
vacation of the same so that the 1<sup>st</sup> respondent can deal with  
the property in a way that will ensure recovery of the money that  
was advanced to the 2<sup>nd</sup> respondent.

225 It is the law that an interim injunction order is not grantable as  
a matter of course, let alone, as a matter of routine. The Court  
issues it only in compelling circumstances to prevent defeat of  
justice and strictly pending ascertained hearing of a proper  
substantive application by the full Court. See: **Supreme Court  
Civil Application No. 9 of 2003: Wilson Mukiibi -vs- James  
Ssemusambwa.**

230 Therefore this Court, while resolving this interim order  
application, has to ensure that the applicant is not resorting to  
such an application to defeat justice and/or as an abuse of  
Court process.

235 It is a fact that the applicant commenced her litigation  
concerning the suit property in the High Court, Kampala, only  
after the 2<sup>nd</sup> respondent in which the applicant's husband, the  
3<sup>rd</sup> respondent, is a director, had failed to meet the loan  
repayment obligations undertaken with the 1<sup>st</sup> respondent and  
to whom the suit property had been mortgaged. As already  
pointed out the applicant has not at all provided to this Court  
240 any independent evidence of her participation in purchasing the  
suit property and as to how the same came to be family property  
requiring her spousal consent before the same could be  
mortgaged. Even after learning that the suit property had been  
mortgaged to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent, the

245 applicant does not claim and has adduced no evidence of having  
reported the criminal fraudulent acts of the 2<sup>nd</sup> and 3<sup>rd</sup>  
respondents regarding the suit property to any Police Station or  
other authority. All that the applicant has done is to resort to  
use of Court process to prevent the 1<sup>st</sup> respondent from  
250 disposing of the suit property to recover from the 2<sup>nd</sup> respondent  
the sums due under the mortgage. While all this is going on,  
the 3<sup>rd</sup> respondent, as husband to the applicant, has not  
confirmed as true or denied as untrue, to this Court and the  
Court below, what the applicant claims to be the true status of  
255 the suit property. Yet, the applicant claims, she is and has all  
along been staying with the 3<sup>rd</sup> respondent as a family, in the  
said suit property.

Coupled with all this is the fact, already pointed out, that the  
applicant has remained very vague as to the particulars of fraud  
260 the respondents are alleged to have carried out in the mortgage  
transaction involving the suit property. There is no evidence at  
all from the applicant as to what frauds the 3<sup>rd</sup> respondent  
carried out to have the suit property registered into the names  
of the 2<sup>nd</sup> respondent as registered owner, and later having the  
265 same mortgaged to the 1<sup>st</sup> respondent. The applicant gives no  
explanation as to how, if she participated in the purchase of the  
suit property, her names were left out when registering the suit  
property into the names of the 2<sup>nd</sup> respondent.

Accordingly, this Court given all the circumstances, cannot rule  
270 out the possibility that the applicant is generating this litigation  
as part of the plan by herself, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the

latter being husband to the applicant and also apparently the  
controlling director of the 2<sup>nd</sup> respondent, to prevent, or at least  
to delay as much as possible, the 1<sup>st</sup> respondent from dealing  
with the suit property in such a manner as authorized by the  
mortgage deed, to recover the moneys advanced to the 2<sup>nd</sup>  
respondent as a loan, and which the 2<sup>nd</sup> respondent has failed  
to repay.


This Court must take a firm stand against such a party, like the  
applicant, who is not acting bonafide, but rather in a  
scandalous, frivolous or vexatious way so as to defeat the course  
of justice.

In conclusion, bearing the above considerations in mind, this  
Court has come to the conclusion that this is not a fit and proper  
case for the applicant to be granted the interim order prayed for  
in this application. The application stands dismissed. Costs  
are awarded to the 1<sup>st</sup> respondent against the applicant.

This Court notes that application for the interim order is in the  
same terms as the substantive **Application No. 359 of 2017**,  
(though in this application it is indicated as being Civil  
Application No. 359 of 2014), which is an obvious mistake in  
the year. It is in effect having duplicity of applications in this  
very same Court when the only apparent difference is that one  
is seeking an interim order and the other is for a substantive  
order. Otherwise the two applications are identical. Accordingly  
pursuant to Section 12(1) of the Judicature Act, Cap.13, which  
vests in a single Justice of the Court of Appeal power to exercise  
any power vested in the whole Court in any interlocutory cause

or matter before the Court of Appeal, I hold that the ruling in  
300 this application also disposes of the **substantive Application**  
**No. 359 of 2017** (though referred to as 359 of 2014 in the Notice  
of Motion of this interim application). Hence **Civil Application**  
**No. 359 of 2017** also stands dismissed with no order as to costs  
since the applicant had not yet served the same upon the  
305 respondent.

Dated at Kampala this **15<sup>th</sup> day of November, 2017.**

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**Remmy Kasule, Justice of Appeal**