**THE REPUBLIC OF UGANDA**

**IN THE COURT OFAPPEAL OF UGANDA**

**CIVIL APPLICATION NO. 220 OF 2018**

**(Arising out of HCMA No. 231/2018 & HCCS No. 264/2018)**

*Coram: Cheborion Barishaki; Stephen Musota; Percy Night Tuhaise; JJA*

**Shumuk Properties Ltd..... Applicant**

**Versus**

**Guaranty Trust Bank (U) Ltd..... Respondent**

**Ruling of Percy Night Tuhaise**

The applicants filed this application for a stay of a condition in an order for temporary injunction for payment of 30% of the outstanding amount or forced sale value of the applicant's property comprised in Block 192 Plot Numbers 1454, 1455, 1460 and 1461 at Nganda Kyagwe in Mukono.

The application was brought under sections 10 and 12 of the Judicature Act Cap 13 and rules 2, 6(2)(b), and 43 of the Judicature (Court of Appeal) Rules. It is supported by the affidavit of Mukesh Shukla, the Managing Director of the applicant. The respondent filed an affidavit in reply sworn by Ms. Stella Ladonna Wattanga, the respondent's Company Secretary.

The orders sought were that:-

a) A temporary injunction doth issue to stay the condition requiring the applicant to pay 30% of the forced sale value of the suit property or outstanding balance ordered by Justice Billy Kainamura of the Commercial Division of the High Court in Miscellaneous Application No. 631/18.
b) A temporary injunction doth issue to restrain the respondent, its agents servants or anyone claiming title under it from selling, disposing, transferring and or tampering with the property comprised in Plot Numbers 1454, 1455, 1460, 1461 and 1463 Block

192 Naguru Kyaggwe in the district of Mukono until the final disposal of the intended appeal.

The brief facts are that the applicant borrowed money from the respondent an overdraft facility of Uganda shillings 500,000,000/= (five hundred million) and a term loan of Uganda shillings 968,000,000/= (nine hundred and sixty eight million) pursuant to a facility agreement dated 31st January 2017. The said facilities were secured by the applicant's property comprised in Block 192 Plots 1454, 1455, 1460, 1461, 1462, and 1463 Ngandu, Kyaggwe, Mukono. The overdraft facility was repayable in 12 months and the term loan was repayable in forty eight equal monthly installments of Uganda shillings 32,652,751/= (thirty two million, six hundred fifty two thousand, seven hundred and fifty one)

The applicant did not comply with the repayment terms. The respondent consequently issued a notice of default on 16th of January 2018 recalling both facilities. The applicant did not comply with the notice of default, following which the respondent issued a notice of sale, and also placed an advertisement of sale of the suit property. This prompted the applicant to file ***HCCS No. 264 of 2018*** against the respondent. The applicant also filed ***Miscellaneous Application Nos. 231 of 2018 & MA 232 of 2018*** seeking a temporary injunction and an interim order respectively.

The temporary injunction in ***Miscellaneous Application No. 231 of 2018*** was granted to the applicant by the High Court on 13th July 2018. It restrained the respondent Bank from selling the suit property until the final determination of the main suit. The temporary injunction was conditional upon the applicant making a deposit of 30% of the outstanding balance under the mortgage loan or forced sale value of the applicant's property within 30 days of the order of 13th July 2018. Dissatisfied with the decision, the applicant filed a Notice of Appeal and applied for a copy of the ruling and record of proceedings.

The applicant now seeks a temporary injunction from this Court to stay the condition in the order for temporary injunction until the final determination of the intended appeal and or main suit in the High Court.

The applicants were represented by Mr. Badru Bwango while the respondents were represented by Mr. Kavuma Terance.

When the application came up for hearing, Counsel for the appellant abandoned the prayer for the second order.

**Applicant's Submissions**

Mr. Badru Bwango the appellant's counsel submitted that rule 12(2) of the Rules of this court empower the Court of Appeal to make such orders as may be necessary for attaining the ends of Justice, and that rule 6(2)(b) of the same rules allow this Honorable Court to order a stay of execution or an injunction on such terms as the Court may think just.

He submitted that the ends of Justice are better attained if the main suit is heard on merit. According to Counsel, this implies that it is imperative to stay the condition in the order of temporary injunction until the final determination of the main suit.

The appellant's counsel submitted that the applicant contested the outstanding amount under the mortgage loan in the application for temporary injunction, since several payments were made which were not reflected by the respondent on the loan account. He also submitted that the forced sale value of the suit properties is not known since no current valuation report of the mortgaged properties was ever made by the respondent in the last six months.

Counsel submitted that it is mandatory under regulation 11 of the Mortgage Regulations for a mortgagee to value the mortgaged property to ascertain the current market value and the forced sale value before sale, and a valuation report must be made within six months before the date of the sale of the mortgaged property. According to Counsel, the respondent contravened the said mandatory provision of the regulations and cannot now want to benefit from the same regulations by enforcing its rights under it.

Counsel contended that the condition issued in the order for temporary injunction requires the applicant to deposit a very substantial amount of money, albeit unknown at present, before the determination of the main

suit on its merits. He prayed that the condition in the order for the said deposit be stayed to preserve the *status quo* until the final determination of the main suit and or intended appeal. He cited **Margaret Kato and Joel Kato V Nuulu Nalwoga Civil Application No. 1 of 2011** (Supreme Court) to support his proposition.

**Respondent's Submissions**

Mr. Kavuma Terance, in his submissions for the respondent, referred Court to the case of **Peter Kisawuzi V DFCU Bank CACA 0064 of 2016** which sets out the criteria for the grant of a temporary injunction.

On the aspect of a *prima facie* case, he submitted that the applicant has not attached a proposed memorandum of appeal to this application to enable the Court assess whether the intended appeal raises any triable issues. He maintained that the applicant has not even attached the decision of the learned trial judge to this application to enable the court assess the reasons behind the decision, on which ground alone this court ought to dismiss the present application for failing to disclose a *prima facie* case.

The respondent's counsel also submitted that the decision of the trial judge was premised on regulation 13(1) of the Mortgage Regulations which require a mortgagor to adjourn a sale by public auction upon payment of a security deposit of 30% of the forced sale value of the mortgaged property. He further contended that the learned trial judge also based his decision the Court of Appeal decision in **Ganafa Peter Kisawuzi V DFCU Bank, Civil Application 64 of 2016,** where an application for a temporary injunction was dismissed for non-compliance with the regulation 13 of the Mortgage Regulations.

He maintained that in such circumstances, it is inconceivable that applicant's intended appeal raises any triable issues.

The respondent's counsel further submitted that the applicant's notice of appeal is deemed to have been withdrawn under rule 84 of the court of Appeal rules; that it is therefore incapable of supporting the present application. He maintained that the applicant filed a letter requesting for

a typed record of proceedings on 17th of July 2018 and did not serve the same upon the respondent. He submitted that the letter is attached to the application but it does not bear any endorsement by the respondent. He maintained that rule 83 of the Court of Appeal Rules required the applicant to have filed the intended appeal within 60 days from the date of lodging the notice of appeal, but the applicant did not file the appeal within sixty day of filing the Notice of Appeal.

He submitted that in such circumstances rule 84 of the Court of Appeal Rules deems the notice of appeal to have been withdrawn, which renders the instant application unsustainable.

On irreparable damage, the respondent's counsel submitted that it is not in doubt that the applicant borrowed Uganda shillings (Ugx) 1,468,000,000/= from the respondent; that the overdraft facility of Ugx 500,000,000/= expired but is yet to be repaid; that the loan of Ugx 968,000,000/= was recalled for default and is yet to be repaid by the appellant; and that the suit properties were pledged as security in case the applicant defaulted in repayment of the loan.

The respondent's counsel submitted that the eventuality for which the property was pledged as security by the applicant has occurred, that is, that the applicant has failed to repay the facility. The respondent's counsel argued that the sale by the respondent of the suit property was envisaged by the applicant when pledging the same. He contended that under Clause 10(c) of the further charge, at page 106 of annexure B to the respondent's reply, the applicant gives the respondent power to sell the suit property by private treaty in case of default. He contended that the applicant cannot now renege on the power it gave to the respondent to claim that it will suffer damage if the property is sold in recovery of the sums due.

Counsel further argued that the foregoing notwithstanding, the applicant's evidence is insufficient to show that it will suffer irreparable damage that cannot be atoned by an award of damages. He argued that the respondent is a global financial institution with means to atone for damages in case the High Court rules in favour of the applicant.

On the balance of convenience, the respondent's counsel submitted that the applicant's loan is now categorized as a non-performing loan under the Financial Institutions Credit Classification Regulations. He argued that consequently, rule 11(1) – (6) of the Financial Institutions Credit Classification Regulations requires the respondent to provide for the applicant's loan entirely after a certain period, which means the respondent has to source for a sum equal to what is outstanding on the applicant's loan and provide for it with Bank of Uganda.

The respondent's counsel maintained that this means that the respondent is being deprived of the money it lent to the applicant and also the money that it uses to provide for the loan, thus causing a lot of financial inconvenience to the respondent. He argued that on the other hand, if the property is sold, the applicant only loses property which was pledged as security for repayment of the loan which the applicant is yet to repay.

He accordingly submitted that the balance of convenience lies with the respondent and as such this application ought to be dismissed with costs.

The respondent's counsel also referred Court to the case of **Anifa Kawooya V Attorney General MA 46 of 2016** where a temporary injunction was denied because the applicant was seeking the relief with 'dirty hands'. He suggested that this court should assess the conduct of the applicant, the application for a temporary injunction being an equitable relief. He contended that in the instant case, the applicant has failed to pay the overdraft facility of Ugx 500,000,000/= which was given to it on 31st day of January 2017 for a period of 12 months; that it is now over two years and the same is yet to be repaid. He wondered why Court would grant relief to the applicant in such circumstances.

The respondent's counsel prayed that the application be dismissed with costs.

**Court's Resolution**

I have read the application together with the affidavits, and the submissions of both Counsel. I have also addressed the law and authorities cited by both Counsel.

It is now settled law that before granting a temporary injunction, a court must be satisfied that the applicant has a *prima facie* case with a probability of success; and that the applicant might otherwise suffer irreparable damage which would not adequately be atoned in damages. If the court is in doubt on the above two points, it will decide the application on a balance of convenience. See **Peter Kisawuzi V DFCU Bank CACA 0064 of 2016.**

On whether the applicant has a *prima facie* case with a probability of success, the question to address is whether the intended appeal raises triable issues. This Court can only assess the question by looking at the memorandum of appeal alongside the decision or judgment of the trial Court. The applicant has not attached a memorandum of appeal to his supporting affidavit to the application to enable the Court assess whether the intended appeal raises any triable issues.

There is a copy of a letter written by the applicant's counsel addressed to the Registrar of the High Court Commercial Division requesting for a typed copy of the proceedings and the ruling in ***Miscellaneous Application No. 231 of 2018***. The letter does not bear the respondent's endorsement, which may suggest that the respondent was not served with a copy of the same. The applicant has in any case, not availed this Court any proof that he served the respondent with a copy of the letter in question. This then, as is stipulated under rule 83(3) of the Rules of this Court, would infer that the applicant is not entitled to rely on rule 83(2), in which case the applicant would be required to institute the appeal by filing a memorandum of appeal within 60 days from the date of lodging the notice of appeal.

There is nothing on record to show that this was done by the applicant. In such circumstances, rule 84 of the Court of Appeal Rules deems the notice of appeal to have been withdrawn, which renders the instant application unsustainable.

On this ground alone, this application would be dismissed for failing to disclose a *prima facie* case.

On irreparable damage, the affidavit evidence from both sides is to the effect that there is an outstanding balance on the credit facilities availed by the respondent to the applicant, and that the suit properties were pledged as security in case the applicant defaulted in repayment of the loan or credit facility. The applicant's evidence on record is insufficient to show that it will suffer irreparable damage that cannot be atoned by an award of damages if the condition requiring it to pay 30% of the forced sale value of the suit property is not stayed. The respondent being a financial institution must be having the means to atone for eventuality of damages in case the decision of the case is in favour of the applicant.

On the balance of convenience, the respondent's affidavit evidence is that the applicant's loan is now categorized as a non-performing loan under the Financial Institutions Credit Classification Regulations, meaning the respondent is under an obligation to realize the security to recover the outstanding balances, otherwise the respondent would be liable to provide the outstanding balance. There is clearly a financial inconvenience to the respondent as it means that the respondent Bank is being deprived of the money it lent to the applicant as well as the money it uses to provide for the loan.

The affidavit evidence also reveals that the decision of the trial judge was premised on regulation 13(1) of the Mortgage Regulations which require a mortgagor to adjourn a sale by public auction upon payment of a security deposit of 30% of the forced sale value of the mortgaged property. Regulation 13(1) provides as follows:-

> *'The court may on the application of the mortgagor, spouse, agent of the mortgagor or any other interested party and for 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'.*

This Court held in **Ganafa Peter Kisawuzi V DFCU Bank, Civil Application 64 of 2016,** that if the applicant is in breach of the above provision of the law, a grant of a temporary injunction stopping the intended sale is not available to him.

Finally, in **Anifa Kawooya V Attorney General MA 46 of 2016**, a temporary injunction was denied by the Constitutional Court because the applicant was seeking the equitable relief with "dirty hands". In the instant case, the affidavit evidence shows the applicant has for over two years failed to honour its contractual obligations to the respondent. In such circumstances, granting the applicant a stay of a condition the same applicant is required to honour under the mortgage laws and regulations would be a mockery of justice.

Thus, based on the analysis of the evidence on record and the cited authorities, I would dismiss this application with costs.

**Dated at Kampala** this 8th day of July 2019

Hon. Lady Justice Percy Night Tuhaise
**Justice of Appeal**

**THE REPUBLIC OF UGANDA**

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

(Coram: Cheborion Barishaki, Stephen Musota & Percy Night Tuhaise, JJA)

**Civil Application No. 220 of 2018**

**Shumuk Properties Ltd==========Applicant**

**Versus**

**Guaranty Trust Bank (U) Ltd==========Respondent**

*(Arising out of HCMA No. 231/2018 & HCCS No. 264/2018)*

## Ruling of Cheborion Barishaki, JA.

I have read in draft the ruling of my sister Percy Night Tuhaise JA, in the above matter and I agree that this application should fail.

Since Justice Stephen Musota JA also agrees, this application is dismissed with costs to the respondent.

Dated at Kampala this 8th day of July 2019.

Cheborion Barishaki

Justice of Appeal

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

**CIVIL APPLICATION NO. 220 OF 2018**

**SHUMUK PROERTIES LTD :::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**GUARANTY TRUST BANK (UGANDA) LTD :::::::::::::::::::::::::::: RESPONDENT**

**CORAM:**

**HON. JUSTICE CHEBORION BARISHAKI, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**HON. JUSTICE NIGHT PERCY TUHAISE, JA**

**RULING OF JUSTICE STEPHEN MUSOTA, JA**

I have had the benefit of reading in draft the Ruling of my learned sister Hon. Justice Night Percy Tuhaise, JA.

I agree that for the reasons she has given this application should be dismissed with costs.

Dated at Kampala this.....8th.....day of .....July.....2019

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Stephen Musota

**JUSTICE OF APPEAL**