

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO 0064 OF 2016

(ARISING FROM CIVIL APPEAL NO 54/2016)

GANAFA PETER KISAWUZI ::APPLICANT

VS

DFCU BANK LIMITED ::RESPONDENT

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

RULING

This is an application for an order of temporary injunction and stay of execution against the respondent, its agents and assignees or persons acting for it or on its behalf stopping them from disposing off the Applicant's property or executing any of the High Court orders until disposal of the appeal brought by way of Notice of Motion under Rule 2(2), 6(2) (b), 53(3), of the Rules of this Court.

The facts giving rise to this Application are as follows;

The plaintiff (now the Applicant) initially instituted a suit against three defendants namely DFCU Bank Ltd, Mr Lujuzza and Mr Kiwanuka Ponny. On 9th March, 2015, the Registrar of High Court Commercial Division endorsed a notice of withdrawal of the suit against the second and third defendants. The suit proceeded against the first defendant only. The suit against the surviving defendant (now the Respondent) was for a declaration that the Plaintiff is not liable for the loan sum that the Defendant advanced to the former second and third Defendants (borrowers) in excess and after the Financing Contract was

executed without his knowledge and consent. The loan was purportedly secured by his title described as LRV 3808 Folio 20 Plot 665 Kyadondo Block 187 at Kasangati. The Plaintiff sought for a declaration that he was not liable for the loan sum and accrued interest that the Defendant advanced to the Borrowers without his knowledge and consent, a declaration that he was not liable for the loan sum and accrued interest that the Defendant advanced to the Borrowers in excess. A declaration that by advertising his property without giving him notice of default, the defendant's action was illegal and wrongful, a declaration that the loan-sum the Defendant advanced the Borrowers without the knowledge and consent of the Plaintiff was fraudulent, a claim for payment of general damages, an order that the Plaintiff's property be released, costs and any other remedy that the court may deem fit to grant. Judgment was given in favor of the defendant on the 7th day of December, 2015. Being dissatisfied with the said judgment, the Applicant filed an Appeal in this Court vide Civil Appeal No 54/2016 and filed an application for interim stay of execution and a temporary injunction/stay of execution before this court.

The grounds in support of the Application are contained in the Notice of Motion and the Affidavit in support and a supplementary Affidavit deponed by the Applicant dated the 7th day and 24th day of March 2016 respectively. The grounds are as follows;

- a) *That the Applicant has lodged a notice of appeal and filed a memorandum of Appeal in this Honorable Court*
- b) *That the Respondent has advertised his property for sale and has gone ahead to appoint an auctioneer for purposes of selling his house.*
- c) *That the sale is real and therefore it is in the interest of justice that this application be granted and status be maintained.*
- d) *That if this Application is not granted, the appeal will be rendered nugatory and hence a serious miscarriage of justice.*
- e) *That the appeal raises serious questions of law particularly the difference between a mortgagor and a guarantor or surety which merit consideration by this Court*
- f) *That the building is a commercial building where he derives his income and if sold without hearing the appeal, he will suffer irreparable damage.*

On the other hand, the Respondent opposed the application and filed an Affidavit in Reply deponed by Elekwa Apamaku, the Legal Manager of the Respondent dated 29th of March, 2016. The grounds in opposition were;

- a) *That the Applicant took no further steps after his letter of 15th December, 2015 to retrieve the record of proceedings which are in electronic form and are usually readily available*
- b) *There are no special circumstances that the Applicant has demonstrated that warrant this court to grant this application*
- c) *That the Applicant has not complied with the provisions of the law that govern the grant of applications such as this*
- d) *The Appellant's appeal is without merit.*
- e) *That the Applicant agreed to all the facility terms when he signed the requisite agreement, mortgage deed and powers of attorney on which terms the Respondent is exercising its contractual rights upon default of repayment*

At the hearing of the Application, the Applicant was represented by Mr. Katabalwa Herbert while the Respondent was represented by Mr. Bakayana Isaac. The Applicant was present in court while there was no representative of the Respondent.

Counsel for the Applicant abandoned the application for the interim stay of execution and chose to argue the application for substantive stay of execution and temporary injunction together.

Counsel submitted that the application is premised on 4 grounds expounded in the affidavit of the Applicant. On the first ground, he submitted that the Applicant was dissatisfied with the decision of the High Court and has commenced appeal process in this Court. The memorandum of appeal was filed on 23rd March 2016.

On ground two, he submitted that the Respondent has advertised the Applicant's property for sale through Dak and Co. Associate which published the mortgage property for sale by public auction/private treaty in the Daily Monitor of Tuesday, 1st March 2016. According to the advert, the intended sale was slated to take place after 30 days. Counsel for the Applicant submitted that the notice period was expiring on 30th of March, 2016 which was the following day. He contended that if a stay was not ordered, then the Applicant's appeal before this Court would be rendered nugatory and the Applicant will suffer

irreparable damage because his property will have been sold and all the proceedings before this Court will become irrelevant. He relied on the case of **Uganda Air Cargo Corporation Vs Kirunda and others CAMA No. 174 of 2015** in support of his submission.

The third ground was that it is in the interest of justice that this application is granted to preserve the status quo pending the hearing and disposal of the appeal

On the fourth ground, he submitted that the balance of convenience is in favour of the Applicant. He contended that the Respondent is a mortgagee to the Applicant's property which has a legal mortgage registered on the suit property. If the status quo is maintained, both parties are catered for because the Applicant is the owner and is in possession of the suit property while the Respondent has a legal mortgage registered. Therefore it was argued, its interests are also safely guarded because the property cannot be disposed of without its knowledge and consent. It was contended on the other hand that if the property is disposed of, the Applicant will lose his interest in it.

In reply, counsel for the Respondent opposed the application. Firstly, he submitted that the Applicant has not shown that there are special circumstances that warrant this Court to stay the execution of the decree of the High Court.

Secondly, counsel submitted that the Applicant has not demonstrated that this application was made in the High Court and the High Court declined to exercise its jurisdiction. That the Applicant has not shown that there are circumstances that warrant him to come to this Court first and not the High Court. He submitted that the application was improperly before this court.

Counsel argued that the Applicant had not shown that he would suffer irreparable damage and that the Respondent was incapable of atoning the damage they would suffer if this property was sold or if this appeal were to be allowed.

He stated further that the Applicant had not complied with Regulation 13(1) of the Mortgage Regulations which provides that any person who wants an interim relief from Court must deposit 30% of the outstanding amount or the value of the mortgaged property. He added that the application did not indicate that the said sum had been deposited in court nor was there a statement of undertaking to deposit any security.

Counsel further submitted that the Applicant had not demonstrated any merit in the appeal that is pending before this Court.

He further submitted that the cost of money is important and where an Applicant admits a mortgage, admits default and wants the Respondent to continue carrying a bad loan on its books then the balance of convenience is in the bank's favor to sell the property and realize the little it can from this property.

In rejoinder, counsel for the Applicant submitted that he was not aware of the law requiring the Applicant to deposit 30% as security and he prayed that the Applicant be given a chance to deposit that money if it is important and imperative for this Court to proceed with the appeal. He faulted counsel for the Respondent for not demanding the said deposit in the lower court.

He reiterated his submission on balance of convenience.

On irreparable damage, counsel submitted that the Applicant deponed in his affidavit in support of the application that he gets income from the suit property and if it is sold, he is not certain whether he will get a similar building in the same location and in the same style.

On the issue of not filing the application before the High Court first, counsel submitted that this court has jurisdiction to hear applications for temporary injunction when there are no pending matters before the High Court and that the Applicant did not file this application in High Court because of limitation of time. He stated that the property was being sold the following day and the Applicant could not take chances, saying that created a special circumstance. Secondly, he contended that the execution doesn't arise from Court but out of a mortgage so there was no decision to that effect because this was not a stay of execution per se, it is an injunction. He relied on the case of **Hajji Ali Cheboi v Kiroko Mesulamu CAMA No 105/2014** where Justice Kakuru, JA, held that ***"I am very well aware of the authorities of this court and the Supreme Court which are to the effect that this court has jurisdiction to entertain applications such as this one of stay of execution or stay of proceedings without the same having first been filed at the High Court. I agree that indeed this Court and the High Court have concurrent jurisdiction to do so. Such an application may be filed in the High Court or in this court. However, as I have already noted above the conditions set out in the Lawrence Musiitwa Kyazze (Supra) case must be in existence before an application of this nature is filed first in this court"***.

Counsel further submitted that this is a matter where the Applicant is invoking the inherent powers of this Court for purposes of justice. He invited this Court to exercise its discretionary powers for purposes of safe guarding the right of appeal so that it is not rendered nugatory.

We find it pertinent to first dispose of the issue regarding the competence of the application before this court. It was argued that this application ought to have been brought before the High Court first and the Applicant has not shown special circumstances to warrant it to be in this court.

Rule 42 of the rules of this Court provides:

1. ***Whenever an application may be made either in the court or in the High Court it shall be made first in the High Court.***
2. ***Notwithstanding subrule (1) of this rule, in civil or criminal matter, the court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any as the justice of the case requires, or entertain an application under rule 6 (2) (b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court.***

The case of **Lawrence Musiitwa Kyazze vs Eunice Busingye, SCCA No.18 of 1990** offers guidance in matters concerning the above provision. The Supreme Court held as follows;-

“The practice that this Court should adopt, is that in general application for a stay should be made informally to the Judge who decided the case when judgment is delivered. The Judge may direct that a formal motion be presented on notice (Order XLVIII rule 1.), after notice of appeal has been filed. He may in the meantime grant a temporary stay for this to be done. The parties asking for a stay should be prepared to meet the conditions set out in Order XXXIX Rule 4(3) of the Civil Procedure Rules. The temporary application may be ex parte if the application is refused, the parties may then apply to the Supreme Court under Rule 5(2) (b) of the Court of Appeal Rules where again they should be prepared to meet conditions similar to those set out in Order XXXIX Rule 4(3). However there may be circumstances when this Court will intervene to preserve the status quo. In cases where the High Court has doubted its jurisdiction or has made some error of law or fact,

apparent on the face of the record which is probably wrong, or has been unable to deal with the application in good time to the prejudice of the parties in the suit property, the application may be made direct to this Court. It may however be that this Court will direct that the High Court would hear the application first, or that an appeal be taken against the decision of the High Court, bearing in mind the interests of the parties and the costs involved. The aim is to have the application for stay speedily heard, and delays avoided

In **Kyambogo University v Prof. Isaiah Omolo Ndiege CACA No. 341 of 2013**, which was an application for an interim stay of execution, **Justice Kakuru** held that ***“It is now settled law that this court and the High Court have concurrent jurisdiction in this matter. It appears to me that applications of this nature should be first filed in the High Court as a general rule, and should only be filed in this court, where exceptional circumstances exist”***.

We agree with the position of the law that this court and the High Court have concurrent jurisdiction on an application for stay of execution. This locus does not mean that the procedure laid down in the Rules should not be followed.

From the Notice of Motion, this application is for both a temporary injunction and stay of execution although during the hearing of the same, counsel for the Applicant seemed to suggest that the Applicant was more interested in the temporary injunction than a stay of execution because the intended sale is arising out of a mortgage, not a suit as the Civil Procedure Rules provide. It is our considered view that it arises out of the judgment of the trial court. The trial Judge held that: ***“Whereas the plaintiff is not personally liable, the Defendant is entitled in the absence of repayment of the loan to use the security of the property to realize its money in the absence of efforts to redeem it.”*** [Emphasis added]. The intended sale is an effort by the Respondent to realize its money. It is this very decision that the Applicant is not satisfied with and is appealing against.

Having found so, the Applicant was required under Rule 42 of the rules of this Court to have filed the application for a stay of execution in the High Court first and file it in this court if special circumstances existed. According to counsel for the Applicant, the special circumstance was limitation in time especially in light of the fact that the suit property was due to be sold the following day. He further submitted that it would be an uphill task for the applicant to convince

the trial judge to overturn a decision he had pronounced himself on. However, we are not satisfied that time factor constituted a special circumstance in this application. The Applicant did not adduce any evidence to prove that the High Court refused to hear the application for stay of execution as soon as possible or that a much later date was fixed to hear the same. It was mere speculation that the High Court would not have heard the application in time which is untenable. We therefore, find that the application for stay of execution is incompetent before this court. On that ground alone, we would dismiss the application.

Regarding the temporary injunction, O.41 (1) of the Civil Procedure Rules (CPR) provides that:

“Where in any suit it is proved by affidavit or otherwise—

(a) 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; or

(b) that the defendant threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors, 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”.

The CPR is applicable to the High Court and the subordinate courts thereto. From the above provision, one can apply for a temporary injunction only when there is a pending suit before the court which has not been disposed of. In the present application, the Applicant could not apply for a temporary injunction in the High Court because the suit was disposed of when judgment was delivered. There is no requirement for an application for a temporary injunction to first be filed in the High Court. The application for a temporary injunction is properly before this Court under Rule 6 (2) (b) of the Rules of the Court which provides thus:

“Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a

stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just”.

An order for injunction is one whereby court requires a party to do or refrain from doing a particular act. A temporary injunction is intended to maintain the status quo of things pending the determination by court of some serious cause pending before it. In ***Robert Kavuma Vs Hotel International Supreme Court Civil Appeal No.8 of 1990***, Wambuzi CJ, as he then was, held:-

“It is generally accepted that for a temporary injunction to issue, the court must be satisfied:-

- i. That the Applicant has a prima facie case with a probability of success.***
- ii. That the Applicant might otherwise suffer irreparable damage which would not be adequately compensated for in damages.***
- iii. If the court is in doubt, on the above two points, then the court will decide the application on a balance of convenience. In other words, whether the inconveniences which are likely to issue from withholding the injunction would be greater than those which are likely to arise from granting it”.***

We find it pertinent to address the issue raised by Counsel for the Respondent in respect of interlocutory applications involving mortgage property like the present one. He submitted that the Applicant had not deposited 30% of the value of the mortgage property contrary to the Mortgage Regulations. Counsel for the Applicant conceded to this but submitted that the Applicant is willing to deposit the said amount if ordered by this court.

Regulation 13(1) of the Mortgage Regulations, 2012 provides that:

“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”.

The Applicant is in breach of the above provision of the law and as such, grant of an order of a temporary injunction stopping the intended sale is not available to him. We therefore decline to grant the same. We do not find it necessary to consider the other conditions for grant of a temporary injunction as highlighted above.

In conclusion, we decline to grant an order for a temporary injunction and stay of execution. We accordingly dismiss the application with costs to the respondent.

Dated this.....*28th*.....day of.....*April*.....2016

.....*Karubuta*.....

HON. MR. JUSTICE RICHARD BUTEERA, JA

.....*[Signature]*.....

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

.....*[Signature]*.....

HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA