Kampala Associated Advocates

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INJUNCTIONS IN DEBT RECOVERY CASES:

THE 2016 KAA EXPERIENCE

THE INSIDE STORIES.

BACKROUND

There are 25 commercial banks in Uganda, operating in a market of four million bank account holders.
The banking sector has been grappling with the issue of bad debts and delays in credit recovery due to a number of factors including, of importance to this article, legal cases filed by distressed borrowers seeking to prevent attachment of assets, with only the slightest of inclinations to repay their debt.

In most of the aforementioned cases, the borrowers institute claims in several courts with the aim of frustrating the Banks from recovering money that is due under the mortgages and debentures they entered into and defaulted upon. Increasingly, there is a tendency for borrowers that have failed to successfully obtain injunctive orders aimed atprotecting their assets to enlist the assistance of their spouses who then institute fresh suits claiming that their spousal consent was never obtained before their 'family property' was mortgaged.

Our Experience

Our 2016 experience at KAA has led us to believe that up to 90% of the law suits by borrowers have no merit and are nothing more than an avenue to try and stop the Banks' recovery measures. In this article, we highlight some of those experiences and how we overcame some of these challenges on behalf of our Clients:

In 2015, we issued a notice of default against Steel Rolling Mills. Two days to the lapse of the default notice we were served with a plaint, and an application for a temporary injunction-
Steel Rolling Mills Ltd, Nyumba Ya Chuma & Scrap Processors Ltd V Standard Chartered Bank, Miscellaneous Application No 829 of 2015. As is the case in nearly all banking matters regarding recoveries, we were served with an interim order application just days from the date on which it was slated to be heard and determined. When we appeared for the hearing of the interim order, we argued that the suit was premature and that before the matter is entertained by the court, the Applicants must first pay 30% of the entire outstanding amount of the loan, in accordance with the Mortgage laws. The interim order application, however, was granted without the conditions we prayed for.

When the temporary injunction application came up for hearing, we argued that the suit was premature and baseless and should be dismissed. We prayed that in the alternative the Court orders that the Applicants pay the required statutory 30% of the outstanding amount. The Court agreed that the suit was premature and stated further that the Applicant had not proved by affidavit or otherwise which provisions of the offer letter and master credit terms were unlawful or manifestly unfair and that there were no facts to support the assertion that the Respondent bank did in its sole discretion charge interest to the detriment of the Applicant.

The Court further found that the law permits the Mortgagee, after serving all the statutory notices requiring the mortgagor to rectify default, to exercise any of the remedies under the Mortgage Act 2009.
The Judge stated specifically that,

"Secondly it is well established that the essence of the pledging of property as security by necessary implication gives power to the Mortgagee to control the property for purposes of realising its money upon default of the borrower. This is the essential function and purpose of collateral used as security in the banking industry."

In the premises, the Court held that the Applicant's application for a temporary injunction lacked merit and was dismissed with costs.

In 2015, we issued a demand notice against another borrower. The borrower admitted the default in writing and attempted to seek out measures for the parties to make an amicable joint recovery. We accepted his requests, however a couple of weeks after the default notice had lapsed we were served with an application for an interim order, temporary injunction and permanent injunction- **Standard Chartered Bank Uganda Ltd Vs Kalwana Emmanuel HCT-00-Ma-122-2015**. The interim order application was granted in contravention of Regulation 13(5) of the Mortgage Regulations, which requires a payment of 50% of the outstanding loan amount before a sale of the mortgage property can be stopped. We immediately appealed against the application and sought to have it fixed on the same date for hearing the temporary injunction application. Court held that by way of the Respondent's communication to several government officials requesting their intervention to stop the intended foreclosure by the Applicant, as well as a letter from his financial consultants to the Bank, the Respondent had severally acknowledged that he was indebted and alluded to the fact that he had received the notices of default. The Judge analysed the borrower's behaviour and concluded that,"It appears to me that this is the conduct of a man seeking to save his property with no intention of settling his obligations with the Applicant."

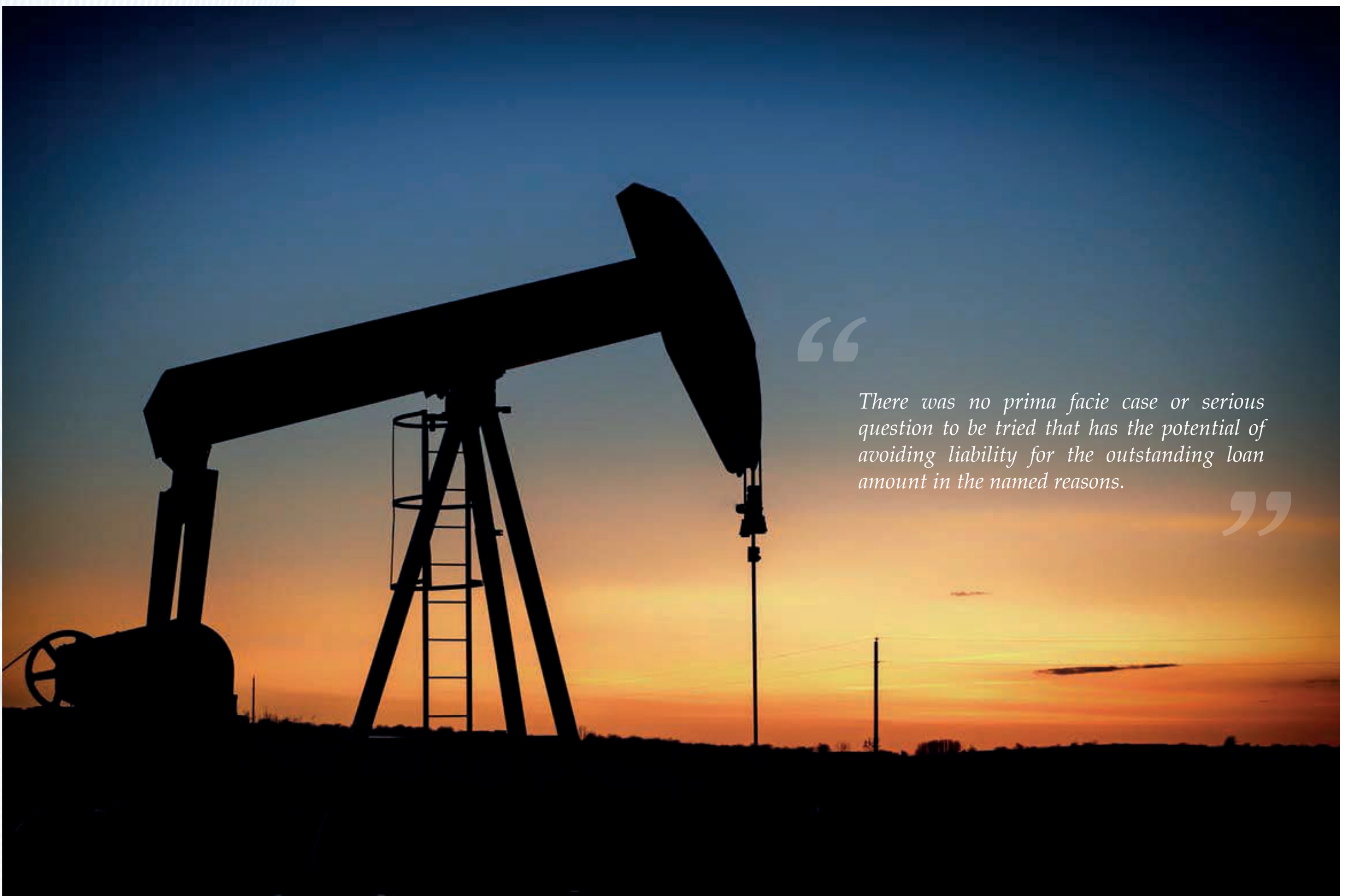
The Court thus found that the Respondent was indeed in default, had failed to show that the interest charged was inflated or excessive and yet he had failed to make any attempts to pay his debts; and the Judge accordingly set aside the interim order that had been obtained by the Respondent.

> *It appears to me that this is the conduct of a man seeking to save his property with no intention of settling his obligations with the Applicant.*

About 7 months into receiving the ruling in the Commercial Court regarding the Kalwana Emmanuel case, we then received an application from his wife seeking an interim order, temporary injunction and permanent injunction to stop the Bank from recovering its money-**Nakivumbi Robinah Vs. Kalwana Emmanuel &Standard Chartered Bank Uganda Limited Misc. Application No. 1037 Of 2016.** The wife in the aforementioned suit claimed that she had not given the spousal consent. We opposed the application and brought it to the attention of Court that on top of the clear evidence of Applicant's undisputed signature acknowledging that she was aware and had consented to the mortgage of the property in question, this was an abuse of court process as the borrower had himself instituted claims to frustrate the same recovery process. The Court agreed with us and noted thus,

> *"..., it is not a coincidence that it only came up after the 1st Respondent failed to secure a stay of sale of the suit property through a suit that is pending in the Commercial Division."*

The Court thus held that it is unethical for the two parties to pursue actions that may lead to similar remedies or conflicting decisions in different sections of the same High Court. This is so, especially, since the wife could have raised her interests in the case before the commercial court either through joinder of party or third party proceedings. The application was dismissed accordingly with costs.



In 2017, we yet again managed to make progress in the determination of frivolous suits before the Courts of law regarding debt recovery cases. **In Habib Oil Limited & 4 Ors Vs Standard Chartered Bank Uganda Limited H.C.M.A No 872 of 2016,** the Applicants tried to stop the Bank from selling property that had been advertised following a default in their loan obligations. The Applicants got an unconditional interim order and we sought to set it aside. The Applicants argued, among others, that there was frustration of the contract which caused their breach and as such, the Bank could not recover its monies. The Learned Judge held that the 1st Applicant had not proved that the contract between it and the Respondent had indeed been frustrated, since there were on record, several correspondences from both the 1st Applicant and ElectroMaxx, the 3rd party company responsible for making payments to the 1st Applicant, admitting that there were only delays in making the payment but that these would be rectified if they were given more time. The Court went further to note that even if the Applicants could prove that the contract was frustrated, which they had not, this did not mean that the Respondent bank was unable to realise the securities pledged by the Applicant in the event of default.

The Judge held that:

The Applicants security pledged in case of default cannot be released for reason that the purpose for which the money was obtained was frustrated by failure to pay a third party Messrs Electro-Maxx by UETCL. In other words the alleged frustration does not discharge the security and it remains enforceable in the very minimum to get a refund of the loan.

The Judge held that for the above reasons, there was no prima facie case or serious question to be tried that had the potential of avoiding liability for the outstanding loan amount and dismissed the application with costs to the Respondent.

In all our recovery cases, we have always argued that in order for a borrower to stop a sale they must pay 30% of the amounts outstanding or the forced sale value, whichever is higher, in accordance with Regulation 13 of the Mortgage Regulations SI No 2 of 2012. The Court of Appeal, when dealing with this issue, has held that the payment of 30% should occur before the filing of a suit: **In Ganafa Peter Kisawuzi vs. DFCU Bank, CACA 64 of 2016,** the Court of Appeal held that:

"The Applicant is in breach of the above provisions 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.".

We used the same argument in a recent case of **Lakeland Holdings Ltd V Standard Chartered Bank Uganda Limited H.C.M.A No 292 of 2016**. In this case, we largely argued that the borrower should pay the 30% of the amounts outstanding before the Court can consider the arguments it put forth. The Judge agreed with the Respondent that the Applicant had to comply with Regulation 13 of the Mortgage Regulations and pay to the Respondent a 30% security deposit of the forced sale value of the property and granted a temporary injunction on that condition. No orders were given as to costs.

OUR FINDINGS

The common principle that runs through the highlighted cases is the Court's emphasis on compliance with the statutory provision of the Mortgage Regulations requiring payment of a 30% security deposit of the forced sale value of the property or the outstanding amount where the borrower mortgages property as security for the loan monies and seeks to stop the mortgagee from exercising its statutory remedies in cases of default.

The Court has highlighted the enforceability of loan facility agreements even when there are claims of frustration. Alleged frustration does not discharge the security and it remains enforceable to get a refund of the loan advanced. The issue of irreparable loss in relation to property pledged as security for a loan had also been clarified in that, where one pledges property as security for a loan, there is expectation of default and therefore the sale of that property cannot lead to irreparable loss per se.

The Courts also appear to be relying more heavily on the mortgagor's conduct while determining cases intended to stop a mortgagee from exercising its statutory remedies. Where the conduct of the mortgagor/borrower reflects indebtedness along with unwillingness to repay the debt but instead use the Courts as means of protection from recovery mechanisms, the Courts often refrain from intervening. The mortgagee is in such instances left at liberty to pursue its legal remedies against the mortgagor as long as the proper process is followed and that the Courts are obliged, and have thus far opted to refrain from prematurely interfering with the operation of the Mortgage Act.

We believe that the above represents positive steps in litigation aimed at debt recovery and with more decisions like these from the Courts, we shall continue to be enabled and empowered to maintain our high success rate in serving our clients and debt recovery litigation in Uganda.

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