

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
CIVIL APPEAL NO. 13 OF 2021
(Arising from Misc. Application No. 100 of 2020
Arising out of Civil Suit No. 898 of 2020)

MADATALLY ALLIBHAI POPAT APPELLANT

VERSUS

MASTER MANAGERS & TRADERS LIMITED..... RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

JUDGMENT

Introduction

The Appellant brought this appeal under Sections 76(1)(h), and 98 of the Civil Procedure Act, Cap 71; Order 50 Rule 8 and Order 44 Rule 1(q) of the Civil Procedure Rules, SI 71-1 for orders that:

1. The order issued by the learned registrar Her Worship Lillian Bucyana on 15th March, 2021 in Misc. Application No. 1002 of 2020, allowing the application for an order of temporary injunction be set aside and be substituted with an order dismissing the application for temporary injunction as brought in Misc. Application No. 1002 of 2020.
2. The Respondent pays the costs of this appeal and of Misc. Application No. 1002 of 2020 in any event.

Background

The Respondent sued the Appellant vide Civil Suit No. 898 of 2020 (the main suit which was previously Civil Suit No. 480 of 2020) for a declaration that it is a co-owner of the suit property comprised in LRV KCCA 8 Folio 7, Kibuga Block 9 Plot 712, land at Kagugube, an order for its name to be entered on the register of titles as co-owner, a declaration that the sale agreement between the parties dated 26th April, 2019 is null and void, an order of vacant possession, a permanent injunction, general damages, and costs of the suit. The Respondent also filed an application seeking a temporary injunction restraining the

Ashifa Madatally
for appellant

[Signature]

Appellant, his servants and agents from selling, disposing off or alienating the suit property.

The application for a temporary injunction was, together with the main suit, originally filed in the Land Division. It was originally Misc. Application 867 of 2020 in the Land Division but upon transfer to this division, it became Misc. Application No. 1002 of 2020. The Ag. Deputy Registrar of this court heard the application for a temporary injunction and granted it, delivering a ruling in favour of the Respondent.

The Appellant alleges that the Ag. Deputy Registrar found that there was no triable issue and the Respondent (Applicant at the time) would not suffer irreparable loss if the injunction were not granted, but still proceeded to grant the temporary injunction on a balance of convenience. That this was in total disregard of the law and based on wrong principles in law. The Appellant therefore claims that the temporary injunction was given without merit and the order should be set aside by this court and instead an order be made dismissing the application for a temporary injunction entered.

The Respondent opposed the appeal and proponent that once the suit property is sold off, there is no evidence that the Appellant will have capacity to compensate the Respondent upon conclusion of the main suit. That also there is no guarantee that even with the compensation of cash that the Respondent will be able to get land in the exact location.

Representation

At the hearing, the Appellant was represented by Paul Kuteesa, while Allan Barya appeared for the Respondent. Parties were ordered to file written submissions in support of the appeal within court's set timelines. The last date for filing the last submissions was 4th June, 2021. However, as of time of this judgment, neither party has filed written submissions in the matter.

Grounds of Appeal against the Ruling of the Ag. Deputy Registrar

1. The learned trial Registrar erred in law in allowing the Respondent's application in total disregard of the law and based on the wrong principles of the law.
2. The learned trial Registrar erred both in law and fact to allow the application and yet she had found as a fact that the Applicant in its application had not proved the existence of triable issues and had not

proved that irreparable loss would be suffered by the Applicant if the order was not granted.

3. The learned registrar granted the order of temporary injunction on the basis of balance of convenience favoring the grant of the injunction and yet she had found as a fact that no triable issues had been proved and that the Respondent had not proved that it would suffer irreparable loss.
4. The learned trial Registrar erred in fact and law when she proceeded on wrong principles of law and without evidence on record in determining that the balance of convenience was tilted in favour of the Respondent and granting the temporary injunction.
5. The learned Registrar failed to determine that the balance of convenience was tilted in favour of Appellant and hence dismissing the application.

Resolution

Issue: Whether the ruling of the Ag. Deputy Registrar in Misc. Application No. 1002 of 2020 should be set aside.

Sections 76(1)(h) of the Civil Procedure Act provides:

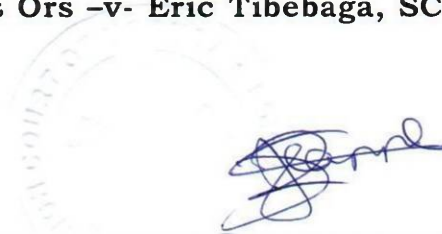
- (1) An appeal shall lie from the following orders, and except as otherwise expressly provided in this Act or by any law for the time being in force from no other orders—
 - (h) any order made under rules from which an appeal is expressly allowed by rules.

Order 50 Rule 8 of the Civil Procedure Rules provides:

Any person aggrieved by any order of a registrar may appeal from the order to the High Court. The appeal shall be by motion on notice.

Order 44 Rule 1(q) of the Civil Procedure Rules allows for appeals against any order made under Order 41 Rules 1,2,4,8 of the same rules. The application for temporary injunction was made pursuant to Order 41 Rule 1 of the Civil Procedure Rules. The Ag. Deputy Registrar made her ruling under the powers of Registrars to handle interlocutory applications under Order 50 Rule 3 of the Civil Procedure Rules as amended by Rule 6 of the Civil Procedure (Amendment) Rules, SI No. 33 of 2019. Appeals from such orders may be made to a judge under Order 50 Rule 8 of the Civil Procedure Rules.

The duty of a first appellate court is to re-evaluate/reappraise the evidence on the court record. See **Fr Narsensio Begumisa & Ors -v- Eric Tibebaga, SCCA**

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No. 17 of 2002. This appeal shall be determined by re-examining the evidence on record in Misc. Application No. 1002 of 2020, vis a vie the law on temporary injunctions as captured in Order 41 Rule 1 of the Civil Procedure Rules, other laws and case law.

The purpose of the remedy of a temporary injunction “*is primarily to maintain the status quo of the subject matter of the dispute pending the final determination of the rights of the parties, in order to prevent the ends of justice from being defeated. See Daniel Mukwaya v. Administrator General, H.C.C.S No. 630 of 1993; Erisa Rainbow Musoke v. Ahamada Kezala [1987] HCB 81.*” This is per Justice Andrew Bashaija in **Farida Nantale -v- Attorney General & 5 Others, Misc. Application 230 of 2013.**

Spry V.P in **Giella -v- Cassman Brown & Co Ltd [1973] 1 EA 358**, a case before the Court of Appeal in Kampala held that:

“First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially (Sargent v. Patel (1949), 16 E.A.C.A. 63).

The conditions for the grant of an interlocutory injunction are now I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

This court shall therefore evaluate each of the requirements for a temporary injunction stated above in line with the Respondent’s application in Misc. Application No. 1002 of 2020.

Whether the Applicant in Misc. Application 1002 of 2020 had a prima facie case

Misc. Application No. 1002 of 2020 (formerly Misc. Application No. 867 of 2020, Land Division) was supported by an affidavit sworn by Amin Ali Muhammad, director at Master Managers & Traders Ltd. It is now trite law that for an Applicant to satisfy court that their suit main suit raises a prima facie case with a probability of success, he or she only needs to show that there is a serious question to be tried and that the suit is not vexatious or frivolous. See **Alley**



Route Ltd -v- Uganda Development Bank Ltd, Misc. Application 634 of 2006.

The Respondent (then Applicant) spelt out the entire background to the claim in the main suit in paragraphs 2-11 of the affidavit in support of Misc. Application No. 1002 of 2020 sworn by Amin Ali Muhammad. Mr. Amin Ali Muhammad averred in paragraph 12 of his affidavit that the main suit, Civil Suit No. 898 of 2020 has a high probability of success.

The claim as I understand it from the plaint and Misc. Application No. 1002 of 2020 is as follows. The Respondent partnered/co-invested with the Appellant to develop the suit property- that is they undertook a construction project together. They agreed in a Memorandum of Understanding dated 30th April, 2019 that the Appellant would take over the Respondent's debt with ABC Bank Limited to the tune of USD 120,000. A land sale agreement between the Appellant and Respondent for the suit property was signed on 26th April, 2019. The Respondent contends that this was upon the understanding that it was security for the debt undertaken by the Respondent and ownership would transfer back in the agreed upon percentages.

The Respondent's majority shareholder, Mr. Amin Ali Muhammad and the Appellant agreed in the Memorandum of Understanding on 30th April, 2019 wherein they agreed to, upon conclusion of the building project, share the suit property in a ratio of 34% to 66% respectively. Upon conclusion of the project, the Appellant claimed ownership of the suit property. The Respondent claims that the Appellant took advantage of his friendship and trust with the Respondent company and tricked it into signing vague Memorandum of Understanding. The Respondent also claims that the Appellant is guilty of fraud and filed a separate application vide Misc. Application No 580 of 2021 seeking leave to amend the plaint to include and particularize fraud as a cause of action, as well as join its majority shareholder as a Plaintiff to the suit.

The Ag. Deputy Registrar in regard to whether there was a prima facie case in the main suit with a probability of success, the Ag. Deputy Registrar held as follows:

"I have taken note of the MOU that appears to be the basis for the Applicant's claim. It's dated 30th April, 2019 after the sale of the property had taken place. It's executed between Amin Ali Muhammad and the Defendant/Respondent. The company is not a party. The majority shareholder and the company are different. If the Memorandum of

understanding was intended to bind the company, the same would have been specifically done as was done in the sale agreement. I doubt that the case raises a prima facie case. The first ground is not proved.”

The background of this claim as detailed above shows that the Respondent’s claim is hinged on not only the Memorandum of Understanding dated 30th April, 2019, but also the Land Sale Agreement dated 26th April, 2019. Paragraph 3 of the Affidavit in Reply in Misc. Application 1002 of 2020 demonstrates this. A wholesome reading of the claim also shows that it also is hinged on the facts surrounding the transaction between the parties, and not just the documents. Therefore, the learned Ag. Deputy Registrar was wrong to conclude that based on the Memorandum of Understanding dated 30th April, 2019 there was no prima facie case. This conclusion was misguided in light of the entire claim as captured in both the plaint and Misc. Application 1002 of 2020.

In the premises, I find that the Respondent’s (then Applicant) claim raised a prima facie case.

Irreparable damage/loss

The next consideration is whether the Respondent company proved that it would suffer irreparable loss if the temporary injunction were not granted. Irreparable loss is understood to mean damage/loss that cannot be compensated by an award of damages should the Applicant/Plaintiff be successful in the main suit. Lord Diplock in **American Cyanamid Co -v- Ethicon Ltd [1975] 1 WLR 316** was of his opinion.

Amin Ali Muhammad stated in paragraph 13 of his affidavit in support of Misc. Application No. 1002 of 2020 that the Respondent company will suffer irreparable loss and damages if the Appellant is not stopped from selling or disposing off and alienating the property, before the main suit is determined. To support this, the Respondent referenced advertisements of sale marked Annexures E and F to the Affidavit in support. See paragraph 10 of the affidavit in support. What these pictures show is that the apartments bore a “For Sale” poster. The poster was putting up the townhouses/apartments for sale to willing buyers.

The Respondent’s damage spelt out in paragraphs 10 & 13 of the affidavit in support of Misc. Application No. 1002 of 2020 and the annexures mentioned above is not irreparable. That is to say it can be compensated for by an award of damages in the main suit, should the Respondent win the main suit. There was

no indication by the Respondent in Misc. Application No. 1002 of 2020 that if it were successful in the main suit, the Appellant would not be able to pay the damages. Instead, the Respondent brought this allegation on appeal in paragraph 8 of Amin Muhammad's affidavit in reply in this appeal. The duty of this court as an appellate court is to re-evaluate the evidence on record in the application that was before the Registrar. Arguments and pleadings ordinarily are based of the already existing record of proceedings before the Registrar. What the Respondent now raises amounts to new evidence on appeal, which was not properly adduced in line with the rules of evidence. It shall therefore not be considered.

I therefore agree with the Ag. Deputy Registrar that the Respondent did not prove that it stands to suffer irreparable damage in case the temporary injunction is not granted. It only proved that the Appellant wanted to sell the suit property. However, the injury the Appellant would suffer could, in the event that it is successful in the main suit, be remedied by an award of damages to a tune of the worth of his share in the suit property. After all, the value of the suit property is ascertainable.

The Respondent did not prove that it would suffer irreparable damage if the temporary injunction was not granted.

Balance of Convenience

The law is that it is only where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. See **American Cyanamid Co -v- Ethicon Ltd**. It is only where the court is in doubt as to the whether there is a prima facie case or irreparable damage that it resorts to determining the case on a balance of convenience. This is the holding in **Alley Route Ltd -v- Uganda Development Bank Ltd (supra)**.

The application for temporary injunction was clear cut with regard to the first two considerations. That is that there was a prima facie case but no irreparable damage that the Respondent stood to suffer. Therefore, there was no need for the Ag. Deputy Registrar to determine the application on a balance of convenience.

In any event, the learned Ag. Deputy Registrar's consideration of where the balance of convenience lay was misconceived. She held:



"Court is enjoined to weigh the Applicant's and respondent's case to ascertain in whose favour the dictates of justice tilt. This is at the backdrop of the fact that temporary injunctions are intended to maintain the status quo and preserve the rights of the parties to be heard...

I note that the respondent has used words like stopping "utilizing" and "using" as opposed to alienating/selling. What the applicant seeks is stopping the sale/alteration. The applicant concedes that the respondent has possession and has title.

This is the status sought to be protected. In the event that court finds in favor of the respondent he would still be in possession and have rights to dispose of the property. If not granted, applicant will have lost out without an opportunity to choose physical possession as against monetary compensation. The balance of convenience therefore favors the grant. The application is granted as sought. Costs in the cause."

The balance of convenience in cases of a temporary injunction is to be assessed in relation to the Applicant's need for protection by way of a temporary injunction, versus the Respondent's need for protection against possible injury resulting from the grant of the temporary injunction that cannot be atoned for by damages. Lord Diplock explained as much in **American Cyanamid Co -v- Ethicon Ltd** above at page 508.

The learned Ag. Deputy Registrar did not consider the Appellant (Respondent then) case in considering the balance of convenience in the application. The Appellant in paragraphs 15 of the affidavit in reply in Misc. Application No. 1002 of 2020 that he purchased the suit property at a considerable sum and has invested additional money in the improvement of the property. That if the injunction was granted, he would greatly be inconvenienced and would not be able to recoup his investment in the property.

Secondly however, as already stated, the Plaintiff/Applicant (Respondent in the appeal) in Misc. Application No. 1002 of 2020 did not meet the threshold for protection of its interest by way of a temporary injunction. Therefore, there was essentially nothing to weigh against on the Applicant's (now Respondent) side in way of loss, because after all there was no risk of irreparable loss on its side. In other words, there was no need to weigh where the balance of convenience lay. I find that the Ag. Deputy Registrar injudiciously exercised her discretion in this case.




In conclusion, I find that Misc. Application No. 1002 of 2020 portrayed that there was a prima facie case. However, there was no irreparable loss that the Respondent risked to suffer, and therefore, the application was not warranted. In **American Cyanamid Co -v- Ethicon Ltd** (supra) it was explained that the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. Therefore, in the absence of such a need/objective, it remains clear to the court that grant of the temporary injunction was not justified.

Conclusion

1. The ruling and orders of the Ag. Deputy Registrar in Misc. Application No. 1002 of 2020 granting a temporary injunction to the Respondent against the Appellant is hereby set aside.
2. Costs of this appeal and in Misc. Application No. 1002 of 2020 shall follow the outcome of the main suit.

I so order.



Jeanne Rwakakooko
JUDGE
29/07/2022

This Judgment was delivered on the 29th day of July, 2022.