THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE A.E.N. MPAGI BAHIGEINE, JA
HON. JUSTICE S.G. ENGWAU, JA
HON. JUSTICE A. TWINOMUJUNI, JA

CIVIL APPLICATION NO.44 OF 2008

GRACE BAMURANGYE BOROROZA &
53 Others……..…..APPLICANTS

V E R S U S

DR. KASIRIVU ATWOKI & 5 OTHERS ……..…..RESPONDENTS

[Arising from Civil Appeal No.45 of 2008 and H.C. Civil Application No.347/2007]

RULING OF THE COURT:

[A] INTRODUCTION

This is an application by Notice of Motion brought under Rules 2(2), 6(2), 42(2) and 43 of the Court of Appeal Rules, and article 126(2)(e) of the Constitution of Uganda 1995. It seeks the following orders:-

"1. The Court grants an order for a temporary injunction restraining the respondents or their agents or authorised servants or in any other way from evicting the appellants from their land and/or for the maintenance of the status quo in Buliisa until after the determination of the appeal of the ruling arising out of Civil Application No.347 of 2007.

2. Costs of this application abide the results of Appeal."

The application is accompanied and supported by an affidavit sworn by the 1st applicant one Grace Bororoza which gives the grounds of the application which are summarised in the Notice of Motion as follows:-

1. The applicants are bonafide and lawful occupants of land at Buliisa.

2. The respondents and or their agents attempted to unlawfully evict the applicants from their homes for purpose of re-allocating them to other places.

3. That the applicants challenged this decision in the High Court of Uganda and after obtaining leave to institute the action by way of Certiorari and Prohibition, their application was dismissed subsequently.

4. The applicants have since filed a Notice of Appeal in the High Court and this Honourable Court.

5. That the appellant has a strong likelihood of success on the appeal.
6. That as a result of that dismissal the 4the respondent has gone to various media houses and started mobilizing the local population to illegally evict the applicants.

7. It is just and equitable so as to safeguard the right of appeal and to safeguard the rights of the applicants that this application is granted.

The motion is opposed by the six respondents who each swore an affidavit denying involvement in any attempts to evict the applicants from Buliisa District. Ms Grace Bororoza filed two affidavits in reply to those filed by the respondents.

[B] BACKGROUND TO THE APPLICATION

The background to the application can be found in the affidavits filed by the applicants and the respondents whose gist reveals the following background:-

Between 2003 and 2007 people commonly referred to as BALAALO (pastoralists) arrived in Bulliisa District with their cows. The Balaalo claim that they individually

bought land from the Bagungu who are the native of the district with the knowledge of government and the authorities of the area.

In 2007 the 4th respondent who is the Member of Parliament of the area mobilised people to turn against the Balaalo, most of whom are said to belong to the Bahima tribe which is to be found in the former Ankole Kingdom. There were several clashes between the Bagungu and the Balaalo upon which the Uganda Government was forced to intervene. It was decided that the Balaalo be removed from the District and be temporarily transferred to Kyankwanzi in Kiboga District on a piece of land belonging to the National Army, the UPDF. A Committee led by the 1st respondent and composed of the other five respondents was mandated by the President of Uganda to carry out the government decision within four days from the 19th July 2007. When the team attempted to enforce the decision, they met resistance from the Balaalo who insisted that they had legally bought the land and they would not vacate it to go to another area which they did not know. When they were told that they had to vacate the area in just a few days time, they filed a Civil Application No.86 of 2007 at Masindi High Court seeking for leave to apply for Judicial Review of the governments order to vacate Buliisa and a consequential orders of injunction to restrain the respondents from carrying out the order until their application is finalised in court.

The application was granted by his Lordship Justice Kagaba (now retired) on 22nd June 2007.

On 4th July 2007 the applicants filed an originating motion in which they sought orders of prohibition and certiorari against the six respondents. They also applied to amend the summons to include the Attorney General as a respondent and to include a few other remedies. At the hearing of the motion to amend the originating summons, Mr. Ebert Byenkya, learned counsel of the 4th respondent objected to the application to amend on two grounds-

(a) The matter they sought to include in the amendment was not supported by evidence (affidavit).

(b) The originating motion would still be incompetent in as much as it sought to review a directive of the President which according to him could not be subjected to prerogative orders of the High Court. Hon. Justice Akiiki Kiiza, J who heard the motion upheld the submission and dismissed the motion with costs to the respondents. The applicants then appealed in Civil Appeal No.45 of 2008 of this court from which this application arises.

[C] ARGUMENTS OF COUNSEL

Mr. Mukasa-Lugalambi is the learned counsel who appeared for the applicants before us. He referred to the affidavits of Grace Bororoza to support his case. He argued that the purpose of this application was to obtain an order of injunction to restrain the respondents from evicting the applicants from Buliisa until their appeal, now pending in this court, is finalised. He submitted that in order for this application to succeed, three conditions must exist:-

(a) It must be established that the applicant's appeal has a prima facie case with a probability of success.

(b) It must be shown that evicting the applicants would cause irreparable damage if the order is not granted.

(c) If the order cannot be granted on these two grounds, the court can look at the balance of convenience between the parties.

Mr. Lugalambi submitted that all these conditions existed. In his view, the applicants were treated unfairly when their application was dismissed without giving them a hearing on its merits. They had acquired land in Buliisa in accordance with established laws. They had lived in the area between two to seven years and had possessed animals and homes in the area. The respondents are seeking to evict them without telling them why. They have not been given opportunity by the committee to explain how they came into the area. Nobody has sued them before any tribunal for trespass or unlawful grabbing of any lands. It is against the laws of natural justice to evict them without giving them a hearing. To the extent that Hon. Justice Akiiki Kiiza

dismissed their application without giving them a hearing, their appeal in this court has a very good chance of success. Therefore, the prima facie test is fulfilled.

On whether the applicants would suffer irreparable damage if an order of injunction is not granted, Mr. Lugalambi submitted that the applicants had no land or place anywhere else except in Buliisa. They were being evicted without being told where to go. The proposed temporary location of Kyankwanzi was land belonging to the army and was not a suitable substitute for their own land in Buliisa. Moreover when the Baganda heard the proposal to transfer them to Kyankwanzi, they moved and camped there in large numbers and fenced off the area to prevent the Balaalo from being brought in their lands. To evict them would cause serious irreparable damage to their property and to their livelihood.

Finally, Mr. Lugalambi submitted the trial judge was wrong to dismiss their application on the grounds that a Presidential order cannot be reviewed by the High Court. The respondents do not have any lawful order of a Court of Law to evict the applicants. Even the so called Presidential directive has never been shown to the applicants. The document attached to the affidavit of the 4th respondent which is said to contain the Presidential directive is not signed by the President and its origin is not known. It cannot be a valid basis to justify a court of law to review the illegal acts and intentions of the respondents. For that reason also, the appeal to this court has very good chance of success. He asked us to grant the injunction as it would not prejudice any of the respondents or public interest.

Mr. Ebert Byenkya, learned counsel for the 4th respondent, in reply submitted that the application had no merits at all and it should be dismissed. He advanced six reasons why, in his view, the applicants appeal has no chance of success:-

(a) The application for review of administrative actions cannot be made against individuals as is being requested in this case. It can only be made against a court decision, a tribunal or a decision of a statutory body. He relied on the case of King vs. Electricity Commissioners [1924] 1K.B.171.

(b) There are 54 applicants but only the identity of one of them i.e. Grace Bororoza, is known. The remaining 53 of them have not sworn any affidavits and their identities are not known. The court cannot grant remedies to non-existent entities.

(c) There is no evidence to support their contention that they have homes and properties in Buliisa District.

(d) The land in question is not described or defined. Any order of injunction granted by this court in those circumstances would be unenforceable.

(e) Since the applicants have not produced any evidence of ownership or possession of property in Buliisa District, their eviction from there cannot cause any irreparable damage to the applicants.

(f) Their presence in Buliisa has caused untold suffering to the Bagungu, the indigenous people of Buliisa District because their herds of cattle continuously damage their crops, whereas the area in which they are grazing is an agricultural area and not a grazing area. He relied on the affidavit of one Yokisani Kasangaki sworn and filed on 30th June 2008.

Mr. Oluka, a Senior State Attorney, and Mr. Martin Mwambusya, a State Attorney appeared before us. They are both employed by the Attorney General, who however, is not a party to this suit. There was an attempt by the applicant to join him as a party in the High Court, which the Attorney General vehemently resisted. It was in the process of hearing the application to join him as a respondent that the entire application for review was dismissed. The two State Attorneys explained to us that because all the respondents, except the 4th respondent, were senior government officials, they were instructed to represent them before us. As counsel for the applicants did not object to this, we allowed them to do so.

On their behalf, Mr. Mwambusya associated himself with arguments made by Mr. Ebert Byenkya on behalf of the 4th respondent. However, he made a few additional points of his own as follows:-

(a) That the application before us was incompetent because it was not first made in the High Court as the Rules of this Court require in rule 42(1). He relied on the case of J.W.R. Kazoora vs M.L.S. Rukuba Civil Application No.4 of 1991 (S.C.).

(b) That there is no prima facie case made out and the appeal to this court had no chance of success. He also relied on the submission of Mr. Byenkya on this point and also relied on the case of Reamaton Ltd vs. Uganda Corporation Creameries Ltd, Civil Application No.53/1997 (C.A).

In exercise of his right of reply, Mr. Mukasa-Lugalambi made a few points. He pointed out that this dispute was not about land or boundaries. It was about the right of the applicants to be protected from eviction without giving reasons why or giving them a hearing. He pointed out that the applicants were being treated as a generic entity as Balaalo or Bahima but they were individuals who had their rights under the constitution to be protected. He stated that the so called presidential eviction order did not mention the name of any one of the applicants as being liable to eviction. Moreover, in his view, the decision of the President reached without giving a hearing to those adversely affected was liable to be reviewed by the court and the respondents who were mandated to carry it out were liable to be called upon to answer in review.

Finally, Mr. Lugalambi submitted that Rule 42(2) of the Rules of this Court permitted the applicants to file an application in this court which had not yet been filed in the High Court. He requested us to allow this application with costs to the applicants.

[D] THE MERITS OF THE APPLICATION

We agree with Mr. Mukasa-Lugalambi, learned counsel for the applicants that in order for this application to succeed, it must be shown that:-

(a) There is a prima facie case in favour of the applicants. Put in other words, it must be shown that the appeal of the applicants, now pending in this court has a good chance of success.

(b) It must be shown that if this application for an order of injunction is not granted, then the applicants will suffer irreparable damage.

(c) Granting an order of injunction is an exercise of the courts discretion. If it is not granted because of failure to prove (a) and (b) above, the court will look at a balance of convenience to see whether other factors exist that would make it unjust not to grant the order prayed for.

Prima facie case.

In order to determine whether the appeal has any chance of success, we must look at the reasons why the learned trial judge dismissed the applicants' originating summons.

In doing so we are not at this stage required to consider the merits of the pending appeal but we must satisfy ourselves that there is something in the proceedings or the judgment of the High Court that is irregular and justifies consideration of an appeal court. In this case, the first reason why the trial judge dismissed the motion was that the originating summons had no supporting affidavit. In his own words, the learned trial judge stated:-

> "It is my considered view that, when a party is seeking to amend the application for review under the provision of Rule 4(6) and 7(3) of S.I. 75/03 as the case is here, and he files an application as he has done, and without prejudice to O.6 r 19 of Civil Procedure Rules, the application must be supported by evidence, which is normally in a form of a supporting affidavit, detailing why the applicant is seeking to amend his/her pleadings.
>
> In the instant case, there is no such affidavit deponed by the applicant in support of the originating motion seeking to amend the statement filed in support of the application for review. Ms. Bororoza's affidavit deponed on the 4th of July 2007, has nothing to do with the current application seeking to amend. In Para 17 of that affidavit, had the following to say:-
>
> > *'17: That, I therefore swear this affidavit in support of an application for prohibition and certiorari by this Honourable Court, and any other related orders that this Honourable Court must make to protect the applicants.'*
>
> It is clear in my view that, Mr. Bororoza's affidavit has nothing to do with the application to amend. In my considered view, the phrase in paragraph 17 of her affidavit that:-

> *'and any other related orders that this Honourable Court must make.'* Must be interpreted ejusdem generic, with the reliefs mentioned earlier on the affidavit, which do not include application to amend.

In the premises therefore the current originating motion has no supporting evidence and must fail."

We note that the originating motion was supported by the affidavit of Grace Bororoza, which affidavit had also been used to support the application for leave to review, which was successful. That affidavit gave a detailed account of how the applicants came to Buliisa District, how they acquired land and how the six respondents (Presidential Committee) were trying to evict them without reasons and without giving them a hearing. However, when the applicants tried to amend the originating summons to make the Attorney General a party and to include a few more remedies, they did not file an accompanying affidavit to support the proposed amendment. Therefore, in our view, this justified the learned trial judge to reject the amendment only leaving intact the originating summons which was supported by the affidavit of Grace Bororoza. The High Court should have only dismissed the amendment but proceed to hear the motion. We think this was an error upon which the Court of Appeal could rely to allow the appeal.

The second reasons given by the trial judge to dismiss the motion was that it was seeking to review a presidential order, which in his view was not issued by a statutory or judicial body and therefore certiorari and prohibition could not lie. This holding was supported by Mr. Byenkya for the respondents who argued that for an order to be a subject of certiorari or prohibition proceedings, it must have been issued by a judicial or statutory body. He relied on the case of The King vs. Electricity Commissioners (supra) to support his submissions. In that case on page 185 of the report the Court of Appeal observed:-

> "To found an application for a prohibition it must be shown that the persons sought to be prohibited are a body of persons who claim to exercise judicial powers and profess to do acts judicially determining rights or imposing obligations. The same applies to certiorari, with the addition that the body in question must have made an order.

> *'The writ of prohibition is a judicial writ, issuing out of a court of superior jurisdiction and directed to an inferior court for the purpose of preventing the inferior court from usurping a jurisdiction with which it is not legally vested or, in other words, to compel courts entrusted with judicial duties to keep within the limits of their jurisdiction."*

Subsequently, in the case of R vs. Manchester Legal Aid Committee [1931] 2 KB. 480 at page 487, the court elaborated on the meaning of the word "Court" as follows:-

> "The writ of Certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior court. There has been a great deal of discussion and a large number of cases extending the meaning of *'Court'*. It is not necessary that it should be a court in the sense in which this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari; and I do not discuss further the nature of the writ, because very elaborate discussions of it will be found in the recent cases of *R V Electricity Commissioners."*

In the same decision at page 489 the court elaborated further as follows:-

> "The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively. Where the decision is that of a court then, unless, as in the case, for instance, of justices granting exercise licenses, it is acting in a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if, in order to arrive at the decision, the body concerned has to consider proposals and objections and consider evidence, then there is the duty to act judicially in the course of that inquiry."

The record of these proceedings shows, through affidavits and newspaper reports annexed to them, that the President did constitute a committee chaired by the 1st respondent to evict the Balaalo after which it would establish who they were and how they came to Buliisa. That Committee was composed of the rest of the respondents. With respect, the natural procedure should have been to inquire how they had come to Buliisa and if they were found to have no rights there, to remove them and relocate

them after due hearings. There is no wonder that in the attempt to carry out that order without giving a hearing to those to be relocated, the Committee encountered resistance which resulted into these proceedings. In this context, the President's Committee had the duty to act judicially and since it did not, it became liable to proceedings in judicial review of Certiorari and Prohibitions. The decision by the trial court to dismiss the appellants application on this ground is questionable. For these reasons we would hold, without deciding the question, that the appellants appeal has merits and discloses a prima facie case.

Irreversibility of Damage:

In order for the applicants to succeed in this application, they must satisfy us that if the order of injunction they are seeking is not granted, then they will suffer irreversible damage that cannot be addressed by payment of monitory compensation. Mr. Mukasa Lugalambi referred to the affidavits of the 1st applicant in which she deponed that they acquired land in Buliisa in a lawful and transparent manner and that the applicants do not have land anywhere else in Uganda. She said that the applicants have their homes there and it is common ground that they have thousands of cattle with them. That's why they are called "Balaalo". Relocating them in a period of four days and without giving them a hearing would cause them not only to loose their land and properties but would render them homeless and destitute since no reasonable alternative is being offered.

On the other hand counsel for the respondents urged us to reject this application on that grounds that no irreparable damage would occur. They argued that the applicants had failed to prove that they had any property in Buliisa. The lands they claimed are not identified or identifiable and the other properties claimed are not quantified. It would be impossible to enforce any order of injunction to protect such property which is not defined.

Every citizen of Uganda has a constitutional right to acquire any property anywhere in Uganda as long as he/she does so lawfully in accordance with the laws and custom of the people of the area. In this case, the Balaalo claim to have lived in Buliisa for varying periods between 2 to 6 years. They claim to have properties there. Whether

these claims are correct or not is not for the Court of Appeal to determine at this stage. They filed their application for review to be able to establish that they were in Buliisa legally in accordance with the Constitution. It was the High Court which had the duty to hear them and determine their status. The Committee headed by the 1st respondent refused to hear them. The High Court dismissed their suit without giving them a hearing. The fact that they are not indigenous people of Buliisa does not perse give anyone a right to evict them without investigating their status. Suppose their claims turnout to be true, would it not be a terrible injustice to remove them without a hearing and without consideration of matters of alternative relocations and compensation? We must all be aware that article 42 of the Constitution provides:-

> "42. Right to just and fair treatment in administrative decisions.
> Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her"

We have already observed that the Committee chaired by the 1st respondent was a quasi-judicial body and has the duty to act in accordance with article 42 of the Constitution. It has so far failed to do so. The High Court had the duty to accord to the applicants the rights guaranteed by article 28 of the Constitution. It did not accord them any hearing at all. The right guaranteed by article 28 are stated to be non-derogable and inviolable under article 44 of the Constitution. Once they are violated, the damage cannot be reversible and cannot be addressed by payment of any amount of money. In our view, the second test of irreversibility of damage has been established beyond any doubt.

Balance of Convenience

Under this test, the court in a balancing act has to decide whether to issue a preliminary injunction stopping the defendant's allegedly infringing or unfair practices, weighting the benefit to the plaintiff and the public against the burden to the defendant(s).

- See the definition in Blacks Law Dictionary, 8th Edition at page 153.

From what we have endeavoured to explain in the above pages, we have no doubt that the odds are heavily in favour of the applicants. The respondents do not loose anything whatsoever or suffer any damage if the application for injunction is granted. On a balance of convenience, this application should succeed.

[E] CONCLUSION

Mr. Mwambusya, learned counsel for some of the respondents belatedly tried to state that the application was incompetent because it did not comply with Rule 42(1) of the Rules of this Court. However, we agree with Mr. Lugalambi that the rule does not apply by virtue of rule 42(2) where the applicants were seeking for an order of injunction after filing an appeal in this court under rule 6(2)(b) of this courts rules.

Mr. Mwambusya also complained that the applicants should have served the Attorney General as required by the rules governing applications for review in the High Court. We note however, that in fact the Attorney General was served and when an attempt was made to join him as a party he vehemently resisted it successfully. From then, the applicants had no more obligations to serve him since he was not a party to the proceedings by choice.

In the result, we find that the applicants have established good grounds to justify this court to grant them an order of temporary injunction on similar terms as those made by the High Court when it granted leave to apply for review by the order of Hon. Justice V.A.R. Rwamisazi Kagaba, J. dated 22nd June 2007, to remain in force till the appeal is determined.

Dated at Kampala this ……29th …day of …July……2008.

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Hon. Justice A.E.N. Mpagi-Bahigeine
JUSTICE OF APPEAL.

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Hon. Justice S.G. Engwau
JUSTICE OF APPEAL.

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Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL.