

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMAPALA

5

**CORAM: HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.K. BYAMUGISHA, JA
HON. JUSTICE S.B.K. KAVUMA, JA**

10

CIVIL APPEAL NO.87 OF 2008

BETWEEN

15

KASIRYE, BYARUHANGA & CO. ADVOCATES...APPELLANT

A N D

20

MUGERWA PIUS MUGALAASI.....RESPONDENT

25

**[Appeal from the orders of
the High Court of Uganda at Kampala (A. Singh Choudry, J)
dated 15th September 2008 in Misc. Appl. HCCS No.244 of 2008]**

30

JUDGMENT OF TWINOMUJUNI, JA

This is an appeal from the ruling of the High Court against an order for injunction to restrain the appellant and four others from dealing with the property known as Block 12 Plots 200,

208 and 2009 Nakivubo Kampala which are subject of HCCS No.224 of 2008 now pending in the High Court against the said appellant and the four others.

The background to this appeal is as follows:

5

On 14th August 2008, the respondent entered into a sale agreement with four people who are not parties to this appeal. The agreement was in respect of Block 12 Plots 206, 207 and 209 Nakivubo, Kampala. On 19th August 2008 before payment could be finalised, the sellers rescinded the sale agreement through the appellant firm of advocates who had acted as
10 lawyers for the four vendors in the sale transaction. The vendors refused to hand over title and to transfer documents of the land to the respondent.

On 26th August 2008, the respondent filed in the High Court Civil Suit No.224 of 2008 against the four vendors together with the appellant as the 5th defendant. The suit requested
15 court for declarations that;-

- (i) The defendants release Certificates of Title and Transfer Deeds to the plaintiff.
- (ii) Permanent injunction to restrain the defendants from engaging in any further dealings
in the suit property.
- 20 (iii) Costs of the suit.

On the same day, the respondent filed in the same court Misc. Appl. No.444 of 2008 against the defendants in the civil suit seeking an order of temporary injunction to restrain them from transferring the suit property into the names of any other person whatsoever until the civil
25 suit is disposed of. This application was fixed for hearing on 15th September 2008. On 27th August the respondent obtained a similar interim order of injunction from the registrar of the High Court restraining the defendants from transferring the suit land to any other person until Misc. Appl. No.444 is disposed of.

30 On 15th September 2008, the application came up for hearing before Hon. Justice Anup Singh Choudry in the Civil Division of the High Court. All the parties were represented. The record of proceedings shows that the court opened at 9.00 am and went on the whole morning. The record shows that there was, throughout the entire morning, a dialogue between the trial judge and the three counsel who represented the parties. The exchange

covers 23 pages of typed proceedings and ends with the following order of the learned trial judge:-

“ORDER

5 **Upon hearing counsel for the plaintiff, and for the first to fourth defendants and the fifth defendant, it is ordered that:**

- 10 1. **That the defendants be restrained from dealing with the property known as block 12 Plots 206, 208 and 209 Nakivubo Kampala, directly or indirectly through their agents, servants, or otherwise until the main suit is heard.**
2. **The copy of this order to be served on the 2nd Purchaser Ephraim Ntanganda.**
3. **Both parties to serve and file the documents which they intend to rely on by way of proper bundles by 30th September 2008 by 4.00 p.m.**
4. **Both parties to serve and file witness statements by 7th October 2008.**
- 15 5. **The 5th defendant to produce receipts showing monies received, had and paid out in respect of the sale and purchase of the property to both the purchasers. Receipts include voucher, bank statement, instruction, cash receipts, cheque studs, transfer form, bank acknowledgement and confirmation.**
6. **The original receipt book containing receipt No.3496 to be filed in the Court. Plaintiff may inspect the same in the Court.**
- 20 7. **The electronic file relating to the sale to both the purchaser by 5th defendant be served and filed in the court.**
8. **Both sides to file skeleton arguments by 30th October 2008.**
9. **Both sides include all the defendants.**
- 25 10. **Hearing to be fixed on 7th November at 9.00am.”**

The appellant, who was the respondent in the above application, being dissatisfied with the above order filed this appeal. The appeal has three grounds of appeal as follows:-

- 30 1. **The learned trial judge erred in law and fact, in that he wrongly granted the respondent a temporary injunction without any hearing at all and after verifying that the suit property had already been resold to a third party, and wrongly made orders relating to the main suit that was not before him at the material time.**

2. **The learned trial judge erred in law and fact, and denied the appellant a fair trial, when he wrongly omitted the mandatory Mediation and Scheduling Conference, ordered the filing of documents, “Witness Statements” and “Skeleton Arguments”, and then fixed a date for delivery of his “Judgment”.**

5 3. **The learned trial judge erred in law and fact and wrongly denied appellant a fair trial when he prejudged the case against the appellant by making conclusive pronouncements against the appellant on the main suit when the same was not before the leaned judge.**

10 At the hearing of this appeal, Mr. K.A. Tibaijuka represented the appellant and Mr. J.M. Musisi represented the respondent. Mr. Musisi, rightly in my view, declared that he conceded this appeal to the extent that the entire proceedings were irregular and the orders resulting therefrom were not valid. He only wished to be allowed to argue that despite that, the order of injunction granted by the trial judge is valid and should be upheld. When his request was
15 granted, he submitted that there was before the trial judge sufficient evidence to justify the grant of the injunction especially the affidavits of the respondent dated 26th August 2008 and that of One William Blick dated the 12th September 2008. He agreed that a retrial of Misc. Appl. No.444 of 2008 should be ordered before another judge but that the Order of Injunction should be maintained.

20

In conceding to the appeal Mr. Musisi was reacting to Mr. Tibaijuka’s submission that the proceedings were entirely invalid and had totally denied the appellant the right to be heard contrary to the constitutional provisions in article 28 and 44 of the Constitution. Mr.Tibaijuka also submitted that since the respondent never received a fair hearing, the order
25 of injunction made against him cannot, and should not be allowed to stand.

I have looked at the proceedings of the High Court in Misc. Appl. No.444/2008 dated 15th September 2008. The record reveals a procedure completely unknown and totally unacceptable in our jurisdiction. Though the proceedings were about an order of injunction,
30 the learned trial judge delved into too many extraneous matters including the merits of HCCS No.224 of 2008 and totally forgot to deal with the application before him. In the process, both parties were never allowed to address the court on the matter before it then. It was, to say, the least, an extraordinary court session, the likes of which I have not come across in the common law legal systems. Since Mr. Musisi, learned counsel for the respondent conceded

that the proceedings were irregular and could not have afforded the applicant a fair hearing, I would refrain from putting my learned brother to any further task and only observe that to the extent that the procedure denied the appellant a fair trial, it was invalid and no order made following the procedure should be allowed to see the light of any day. It follows that all
5 orders of the court made on 15th September 2008 in the said Miscellaneous Application are invalid and ought to be set aside, including the order of injunction made by the learned trial judge, to the extent that it applies to the appellant in this appeal.

On 27th August 2008, his Worship Henry Haduli, the Deputy Registrar of the High Court
10 made the following interim order:-

**“.....this court does issue an interim order of injunction to restrain the respondents, their agents or any one acting on their behalf from transferring property comprised in block 12 plots 206, 207, 208 and 209 into the names of any
15 other person until the hearing of the main application No.44 of 2008.”**

Since the order of this court on this appeal is to nullify the proceedings of the High Court in Misc. Appl. No.444 of 2008, this order of the Registrar will continue in force against the other parties who were not party to this appeal until a retrial of Misc. Appl. No.444 of 2008,
20 which is being ordered, is completed in the High Court.

In the result, I find merits in this appeal which is hereby allowed with the following orders.

- (a) The proceedings of the High Court and the orders made thereon on 15th August 2008 in Misc. Appl. No.444/2008 are hereby declared invalid.
- 25 (b) It is hereby ordered that Misc. Appl. No.444 of 2008 be remitted back to the High Court for re-trial before another competent judge of the High Court.
- (c) The order of Interim Injunction made by the Deputy Registrar of the High Court on 27th August 2008 shall remain in force against the four respondents who were not parties to this appeal until the re-trial just ordered in this appeal
30 is completed
- (d) The costs of this appeal shall be in the cause.

Since my sister and brother their Lordships Justice C.K. Byamugisha, J.A. and Justice S.B.K. Kavuma, JA agree, it is accordingly ordered.

Dated at Kampala this...04thday of...June.....2009.

.....

5 Hon. Justice Amos Twinomujuni

JUSTICE OF APPEAL.

JUDGMENT OF BYAMUGISHA JA

I concur.

10

Dated at Kampala this 4th day of **June**, 2009.

.....

15 C.K.Byamugisha

Justice of Appeal

JUDGEMENT OF S.B.K KAVUMA

20

I have read in draft the judgement prepared by my brother Amos Twinomujuni JA. While I agree with most of the reasoning and the orders contained therein, I have a different view in one or two areas of the judgement as I will show here below.

I agree with the introduction, the background to the appeal, the representation of the parties and the submissions of counsel for the parties. I also agree with my brother's reasoning in that part of the judgement dealing with the way the proceedings at the High court on the 15th September 2008 before Justice Anaup Singh Choudry when the judge heard Miscellaneous Application No. 444 of 2008 went and most of my brother's orders in relation thereto especially when Twinomujuni JA states:-

30

“I would refrain from putting my learned brother to any further task and only observe that to the extent that the procedure denied the appellant a fair trial, it was invalid and no order made following the procedure should be allowed to see the light of any

day. It follows that all orders of the court made on the 15th September 2008 in the said Miscellaneous Application are invalid and ought to be set aside, including the order of injunction made by the learned a trial judge.....”

5

I agree with my brother's orders under paragraphs (a) (b) and (d) of the judgement. I, however, find difficulty in going along with my brother in respect of the order under paragraph (c) which states as follows:-

“(c) The order of Interim Injunction made by the Deputy Registrar of the High Court on 27th August 2008 shall remain in force against the four respondents who were not parties to this appeal until the re-trial just ordered in this appeal is completed”.

10

The order of Interim Injunction referred to in the above quotation is couched in the following terms.

15

“.....this court does issue an Interim Order of injunction to restrain the respondents, their agents or any one acting on their behalf from transferring property comprised in block 12 plots 206, 207, 208 and 209 into the names of any other person until the hearing of the main application No. 44 of 2008” (sic)

20

In my view, the above interim order of injunction clearly had a life span or a time frame. It would last until the hearing of Miscellaneous Application No. 444 of 2008.

25

On the 15th September, Justice Anup Singh Choudry heard that application, though in a most strange manner. The judge indeed issued a temporary injunction in favour of the applicants. That is the injunction which is the subject of this appeal which, in my view, remains the only court order of a temporary injunction on record until it is vacated or nullified by court. By that development alone, the interim order of injunction of the 27th August 2008 ceased to exist. It lapsed. There is, therefore, in my view, nothing of it to be revived or continued.

30

Any attempt to continue or revive that interim order would, in my view, pose serious problems.

In the first place, it would have the effect of sustaining the argument by counsel for the respondent that the proceedings of the 15th September 2008 before Justice Anoop Singh Choudry could be found irregular but the injunction the judge issued could be maintained. This would run contrary to the holding of my brother Twinomujuni JA that “ *It follows that all orders.....are invalid and ought to be set aside, including the order of injunction made by the learned judge.....*”.

I accept the submissions of counsel for the appellant when he stated:-

10

“since the respondent never received a fair hearing the order of injunction made against him cannot and should not be allowed to stand.”

I would re-echo the words of my brother Twinomujuni JA that “.....none of such orders should be allowed to see the light of any day.” This is so because they were given in contravention of the all important principle of natural justice of the right to a fair hearing as enshrined in our Constitution **Article 28(1)**. This article is non-derogable under **Article 44 (c)** of the constitution. The article is sacrosanct. It is my view that the article must be strictly adhered to both in letter and spirit. It is a non derogable constitutional provision which supersedes any other law of the land.

20

I find the unquestionably authoritative case of **De Souza vs Tanga Town Council [19617] E.A 377 (CAA) at page 388, F-G.** very pertinent to the (CA) matter now before court. In that case, Sir Kenneth O’connor P, as he then was, had this to say:-

25

“I would respectfully adopt the words of LORD WRIGHT in General Medical Council vs Spackman (10) at pg 644”

30

“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision.”

In my view, such declaration must be in line with both the letter and the spirit of that decision and indeed the Constitution and should cover all aspects of the impugned decision.

In the second place, any attempt to continue or revive the High Court Deputy Registrar's interim order of injunction would have the effect of this court, as an appellate court, reviving or continuing an expired order which, even the High court itself which issued the interim order, could not do for, in my view, the Deputy Registrar was functus officio with regard to that interim order. Not even s.11 of the Judicature Act can be properly called into play.

Thirdly, it is important and necessary to remember that the court of appeal does not, in this matter, have any application before it for a temporary injunction. It is a cardinal principle of our law and our judicial system that, as Prof. Dr. George W. Kanyeihamba JSC observed in his book entitled **Kanyeihamba's Commentaries on Law, Politics and Governance** at page 42,

“A court cannot raise a matter for litigation or its own volition and then adjudicate on it. In each case, it is for the individual or group of them to raise the subject matter of litigation, whether civil or criminal as an issue for adjudication....”(sic)

This court, therefore, in my view, must resist the temptation to appear to be imposing on the parties here and in the High Court its own unsolicited and uncanvassed order.

For the reasons given above, I respectfully differ from some of the views, orders and decisions of my brother in the areas of the judgement prepared by him in this appeal as indicated but I am in agreement with him that, subject to what I have just stated, this appeal has merit and should be allowed.

I would, therefore, allow the appeal and propose the following orders

(a) The proceedings of the High Court and the orders made thereon on 15th August 2008 in Misc. Appl. No.444/2008 are hereby declared invalid.

(b) It is hereby ordered that Misc. Appl. No. 444 of 2008 be remitted back to the High Court for re-trial before another competent judge of the High Court.

(c) The costs of this appeal shall be in the cause.

Dated at Kampala this...4th ...day of...June..2009

.....

S.B.K Kavuma

Justice of Appeal

5