

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSOLIDATED MISCELLANEOUS APPLICATIONS No.31/2011 & 32/2011

(ARISING FROM CONSTITUTIONAL PETITION No.37 OF 2011)

FRANCIS DRAKE LUBEGA:..... APPLICANT/PETITIONER

VERSUS

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|--|---|--------------------|
| 1) ATTORNEY GENERAL | } | RESPONDENTS |
| 2) THE COMMISSIONER FOR LAND REGISTRATION | | |
| 3) HORIZON COACHES LTD | | |

CORAM: HON. MR. JUSTICE REMMY KASULE JA/CC

HON. LADY JUSTICE FAITH E.K. MWONDHA JA/CC

HON. MR. RICHARD BUTEERA JA/CC

THE RULING OF COURT

This application is brought under Rules 1 and 2 of this Court's Rules, SS.98 of the Civil Procedure Act, Cap 71, SS.55 and 38 (3) of the Judicature Act, CAP 13. It seeks for the following orders:

- i) A temporary injunction restraining, prohibiting, forbidding and preventing the respondents jointly and or severally, those deriving authority from them, their agents, servants, workmen, and/or proxies from carrying out the following:
- a) Enforcing and implementing the directive, order and or instruction contained in the letter of 20th July 2011 by way of cancelling the petitioner's certificate of title, evicting or otherwise dealing with the property comprised in leasehold register volume 3958 Folio 10 plot 50-52, Nakivubo Road, Kampala, pending the hearing and final disposal of Constitutional Petition No.37 of 2011.
 - b) Enforcing and implementing the recommendation-cum-decision of the Report, dated January 2011, of the Committee of Inquiry into the Baganda Bus Park land dispute about the land comprised in leasehold register volume 3958 Folio 10 plot 50-52 Nakivubo Road, Kampala, measuring approximately 0.518 hectares.
 - c) Generally interfering with the proprietary rights of the petitioner in the land comprised in leasehold Register volume 3958 Folio 10 Plot 50-52 Nakivubo Road, Kampala.
- (ii) Costs of this application to be provided for.

The application was supported by detailed grounds contained in the supporting affidavits of the applicant Francis Drake Lubega. Briefly the grounds are that:

- (i) There is a pending Constitutional Petition No.37 of 2011 between the applicant and the respondents, the subject matter of which relates to the interpretation of the Constitution in respect of a directive, order and or instruction contained in the letter of 20th July 2011 and the Report of the Committee of Inquiry into the Baganda Bus Park land dispute dated January 2011 relating to the land comprised in leasehold Register volume 3958 Folio 10 Plot 50-52 Nakivubo Road, Kampala, measuring approximately 0.518 hectares belonging to the applicant.
- (ii) The applicant has a prima facie case with a high probability of success in Constitutional Petition No.37 of 2011.
- (iii) That as the registered proprietor and owner of the land comprised in leasehold Register volume 3958 Folio 10 Plot 50-52 Nakivubo Road, the applicant has duly complied with all the development covenants and conditions of the lease agreement and currently he has an investment thereon valued at over USD 25million. Copies of the Certificates of Title, lease Agreement,

occupation permit and photographs of developments were attached to the applicant's affidavit dated 11th August 2011 as annexures A, B, C and D respectively.

- (iv) That the third respondent in a bid to circumvent the courts and get preferential treatment complained to H.E. the President that he, the third respondent had been unfairly deprived of the same suit land and the President directed the Minister of Lands, Housing and Urban Development, to investigate the complaint. The letter dated 10th August 2010 was annexed as annexure "F" to the applicant's said affidavit.
- (v) That the committee was established and a Report was made upon which H.E. the President issued the letter of 20th July 2011. Copies of the Report and the letter were annexed and marked G and H respectively to the stated affidavit.
- (vi) That the committee proceeded to investigate and conduct a hearing and made its recommendations on matters that were sub-judice as the same were still pending hearing before court.
- (vii) That the applicant had been advised by his lawyers that the directive to investigate and the establishment of a committee alongside court to investigate matters to do with his ownership of the suit land, which matters were pending Court adjudication amounts to:

- a) Denying him the right of being equal before and under the law and enjoyment of equal protection of the law.
 - b) Giving the third respondent preferential treatment in the pursuit of his rights including using mechanisms outside the law.
 - c) Circumventing and suspending his right to a fair hearing before an impartial court established by law for the determination of civil rights for all the people.
- viii) That unless the respondents are restrained by this court they shall enforce and implement the directive, order and or instruction contained in the letter of 20/07/11 and the Report of the Committee of Inquiry in a manner prejudicial to the applicant's interests rendering the petition before this court nugatory as his title to the land will be cancelled and he will be evicted.
- ix) That if a temporary injunction is not granted the applicant shall suffer more inconvenience than the respondents whose acts are being challenged as unconstitutional.
- x) That it will be in the interest of justice for the application to be granted.

Later, the applicant filed a supplementary affidavit deponed as follows:

- 1) That following the event of his illegal eviction from the suit land by the third respondent with the help of police on the advice of the Solicitor General, Justice Benjamin Kabiito delivered a ruling quashing the mediation Report of Rtd. Justice Anna Magezi in respect of the suit land in High Court Miscellaneous Application No.157 of 2012.
- 2) That on 16th September 2013 the applicant's lawyers wrote to the Attorney General about resolving the matter.
- 3) The Attorney General after perusing all the correspondences on the dispute and various Court Rulings and Judgment wrote a comprehensive letter to the Inspector General of Police recalling the earlier letters of the Solicitor General and advised that the applicant was the rightful owner of the suit land which advice was followed by police on 15th March 2014 and the applicant was reinstated on the suit land and the third respondent was evicted.
- 4) That as a result of the said eviction the 3rd respondent on 24th March 2014 wrote to the Inspector General of Police claiming he had an order from court maintaining him on the land at the time of the eviction.

The 3rd respondent filed an affidavit in reply through one Charles Muhangi managing director of the 3rd respondent

and a further affirmation in reply through Besiime Mohammad general manager of the 3rd respondent. The affidavit in reply by Charles Muhangi stated as hereunder, among others:-

- 1) That the 3rd respondent is the lawful assignee and or purchaser of the suit land which is the subject of contention comprised in LRV 2808 Folio 21 Plot 43-47 now converted into FRV 442 Folio 19 measuring approximately 0.075 hectares.
- 2) The registration of the applicant as the registered proprietor of the suit land was tainted with a lot of malafides and irregularities to the extent that long before the directive and investigations complained about in the petition and this application, the 2nd respondent had already issued a notice to the applicant on the 19th January 2007 to have his title cancelled. This was before the Committee of Inquiry and the President's letter dated 20th/7/2011 and was after the land dispute cases now pending in the High Court had been filed by various people including the 3rd respondent.
- 3) That the applicant thereafter filed a suit by originating summons and an application for interim order before the High Court, which application was granted in error and as such the applicant took advantage of the order granted in error to fraudulently subdivide the land and

secure the transfer of the current title into his names. Therefore if this application is granted, the applicant shall have unfettered discretion to affect the current status quo of the disputed land to the detriment of the 3rd respondent.

- 4) That the applicant's suit filed by originating summons challenging the actions of the 2nd respondent was dismissed for want of prosecution and there has been no application to set aside the order of dismissal. It was therefore the applicant who was circumventing the ordinary courts of law by bringing this petition, among others.
- 5) That it is speculative as to whether the 2nd respondent is going to implement the directive complained of as it is still unclear as to whether the 2nd respondent, who has powers in law to cancel a person's certificate of title, will implement the recommendations and instructions complained about in the application.
- 6) The applicant alleged that his investments on the disputed land is valued at USD 25million and therefore having quantified his alleged investment in terms of money it can't be said that he will suffer irreparable damage if the injunction is not granted.
- 7) That the several suits referred to by the applicant in paragraph 6 of his affidavit were not all filed by the 3rd

respondent as alleged. They were all stayed by the Principal Judge with a view of referring them to an arbitrator or expert, in a bid to resolve the said dispute.

- 8) That if the application is granted the 3rd respondent shall suffer more inconvenience than the applicant whose action has proved to be fraudulent.
- 9) That the application is misconceived, premature and speculative and should be dismissed with costs.

The affidavit deposed to by Besiime Mohammad was in support of the 3rd respondent and it stated as follows:-

- 1) That the applicant filed Miscellaneous Application No.32 of 2011 arising from this present application of temporary injunction which was successfully prosecuted. This court issued an interim injunctive order on 31st May 2013 to maintain the status quo in respect of the premises comprised in LRV 3958 Folio 10 Plot 50-52 also known as Buganda Bus Park.
- 2) The order was extended by Court on the 5th June 2013, 17th June 2013 and 3rd March 2014 and remains in force.
- 3) At the time of receiving the interim order, the 3rd respondent was in effective possession of the premises and operated thereon a Bus Park and its possession and operations constituted the status quo.

- 4) That despite the existence of the interim injunctive order, on the 15th March 2014, while he was at Nalukolongo, he was informed that the Bus Park has been overrun by goons and armed policemen demanding the management and staff of the 3rd respondent to immediately vacate the Bus Park.
- 5) That he came to the scene with the interim order of 31st May 2013 and showed it to the District Police Commander and explained its purpose. The District Police Commander told him that they were implementing orders contained in the letter written by the Inspector General of Police dated 28th February 2014 pursuant to another letter of the Hon. Attorney General dated 20th February 2014.
- 6) That the staff and management of the 3rd respondent were evicted from the premises (suit land) upon orders of the police who proceeded to hand over the Bus Park to the applicant's agents and goons thereby changing the status quo.
- 7) The conduct of the applicant of causing the eviction of the 3rd respondent from the premises and taking over possession and operations was a blatant abuse and contemptuous of the interim injunctive order of this court.

- 8) That the conduct of the applicant of abusing the interim injunctive order is a basis for this court to order a mandatory injunction to evict the applicant from the Bus Park and reinstate the status quo, to remain as it was until disposal of the Constitutional Petition No.37 of 2011 and the Cross Petition.
- 9) That unless the applicant is restrained from defying a court order by inter alia, vacating the suit premises, the 3rd respondent is likely to suffer irreparable injury as it risks being permanently removed from the Bus Park and collapsing as a business outfit, thereby causing a total miscarriage of justice and rendering the cross petition nugatory.

Background:

The applicant filed Constitutional Petition No.37 of 2011 against the 3rd respondent challenging the directives and instruction contained in a letter dated 20th July 2011 which he alleged was inconsistent with and in contravention of Articles 8A, 21,26,28,42,126 and 128 of the Constitution in as far as it amounted to:

- 1) Deprivation of property contrary to Article 26 of the Constitution.
- 2) Violating and infringing the petitioner's rights, freedoms and guarantees under Article 28 of the constitution, among others.
- 3) The report of the Committee of Inquiry into the Baganda Bus Park land dispute dated January 2011, including the establishment, proceedings, findings, recommendations, decisions and orders are inconsistent with and in contravention of Articles 8A, 21, 26, 28, 126 and 128 of the Constitution.

The applicant alleged that he was the registered owner/proprietor of the suit land and he had complied with the development requirements, among others. He prayed for declarations and orders and reliefs as follows:

- 1) That the directive, order and or instruction contained in the letter of 20th July 2011 is unconstitutional.
- 2) The report of the Committee of Inquiry into the Baganda Bus Park land dispute dated 11th January 2011 including its establishment, proceedings, findings, recommendations, and decisions and or orders, are unconstitutional.
- 3) Redress by way of orders of:

(a) A permanent injunction against the respondents, their officials or servants restraining and preventing them from interfering with the petitioner's property rights and interests in Leasehold Register Volume 3958 Folio 10 Plot 50-52 Nakivubo Road, Kampala, measuring approximately 0.518 hectares.

The third respondent filed a reply to the Constitutional Petition and filed a Cross Petition as well. Before the filing of the Constitutional Petition by the applicant there were various disputes/cases filed in the High Court in the Civil, Commercial and Land Divisions by various persons as far back as 2006 concerning the suit land.

The applicant and the 3rd respondent were parties to some of these cases.

In Miscellaneous Application No.498 of 2007 the parties were UBOA Investments and Another v. Drake Lubega, in Civil Suit No.142 of 2008, the parties were Uganda Operators Investment Ltd v. Francis Lubega, while 17 out of the 38 other cases were filed by the 3rd respondent against different defendants and respondents.

The 3rd respondent alleges that he is the lawful assignee/purchaser of the suit land and that before the

filing of the Constitutional Petition, he was in possession and use of the suit land.

He had filed Civil Suits in the Court as early as 2006 and all those suits were stayed by the Principal Judge so that they could be mediated. The mediation took place but its report was quashed in the High Court and the Suits are still pending in the High Court.

H.E. the President directed by his letter dated 20th July 2011 that the Ministry of Lands, Housing and Urban Development take steps to rectify what had gone wrong and what had given rise to the disputes. H.E the President had also advised cancellation of the certificates of title found to have been acquired fraudulently in respect of the suit land.

Subsequent to receipt of the said letter of H.E the President, the applicant filed Constitutional Petition 37 of 2011 as well as Application No.31 of 2011 for a temporary injunction and Application No.32 of 2011 for the interim injunctive Order.

Applications No.31 and 32 were consolidated on the 31st May 2013 by this Court (Kavuma, Nshimye and Kasule, JA/CC).

Their Lordships also issued an interim order to preserve the status quo on the suit land pending disposal of the Consolidated Applications and/or the Constitutional Petition No.37 of 2011. The same was subsequently extended on 5th June 2013, then 17th June 2013 and then 3rd March 2014, when it was extended for 30 days or until further orders of the Court.

There was mediation conducted before Hon. Lady Justice Anna Magezi (Rtd) but the mediation outcome Report was successfully challenged by the Applicant by Judicial Review in 2012 in the High Court.

Meanwhile the suits which had been stayed by the Principal Judge remained and still remain pending in High Court to date. Nothing was said about them by the Judge who handled the judicial review.

The applicant through his lawyers wrote to the Attorney General who in turn, wrote to the Inspector General of Police on 20th February 2014 stating among others, that the status quo articulated in his opinion dated 19th June 2013 was in accordance with the interim Court Order issued on 31st May 2013. Thereafter the applicant proceeded to occupy and use the suit land.

LEGAL REPRESENTATION:

At the hearing, Counsel Kirumira Adam and Hamza Sebutta represented the Applicant, while learned counsel Alfred Okello Oryem represented the 1st and 2nd respondents and Galisonga Julius and Mudoola Chris represented the 3rd respondent.

There was only one issue to be determined "***whether the applicant is entitled to be granted a temporary injunction pending determination of Constitutional Petition No.37 of 2011***"

Both Counsel for the applicant and the respondents made oral submissions.

Counsel for the applicant submitted that the circumstances in which such an application would be granted were long settled as follows:

1(a) the Court has to be satisfied that the applicant has a prima facie case with a probability of success.

(b) That the applicant will suffer irreparable loss or injury which cannot be adequately compensated for by an award of damages

(2) If Court is in doubt, as to (a) and (b) above, it will decide the application on a balance of convenience. He referred to the case of ***Hassan Basajjabalaba and Basajjabalaba Muzamiru v. Attorney General: Constitutional Application No.9 of 2011***, where the court held that no amount of monetary compensation can be accorded to a person whose rights under Article 28 have been violated, the right to a fair hearing being an underogable right under Article 44(C) of the Constitution. He also relied on the authority of ***Humphrey Nzeyi v. Bank of Uganda and the Attorney General: Constitutional Application No.01 of 2013***.

He submitted that the court held in that case that where a prima facie case is made out by the applicant, that the Constitutional non derogable right, which is so basic to the applicant as an individual and also to the Constitutional Order in the whole society, like the right to a fair hearing is being violated, no one should be let to violate such basic right just because the violator has capacity to pay damages to the victim of such a violation.

Counsel further submitted that the 3rd respondent with the help of police had illegally and in contempt of a court order evicted the applicant from part of the suit land. This was an illegality which a Court of Law cannot over look. He relied

on the case of ***Makula International Ltd V. His Eminence Cardinal Nsubuga and another, (1982) HCB 15.***

Counsel for the 1st and 2nd respondents submitted that: they had instructions from the Attorney General not to oppose the application save for the costs which the applicant was seeking. They submitted no order should be made as to costs.

Counsel for the 3rd respondent opposed the application. He submitted that the status quo on the suit land had changed. Counsel for the applicant had conceded that much.

According to the affidavit of Mohammad Besiime general manager of the 3rd respondent, the status quo before 15th March 2014 was that the 3rd respondent was in possession of the suit land and operating there as a Bus Park.

The applicant however, had after 15th March 2014 thrown the 3rd respondent off the suit land in contempt of the Court Order of this Court to maintain the status quo pending determination of this substantive application.

The applicant by persuing this Application seeks to maintain a status quo that has been created by the applicant being

contemptuous of the Court. This ought not to be allowed by this Court.

Consideration of the issue

We have carefully considered the lengthy submissions of all Counsel as well as the affidavits for and against the application.

It is trite law that in order for an application of this nature to succeed, the Court must be satisfied that the applicant has made up a prima facie case of likelihood of success and will suffer irreparable injury which cannot be compensated for by damages. If the court is in doubt, it will decide the issue on a balance of convenience. The burden is upon the applicant to so satisfy Court.

In the *Humphrey Nzeyi V. Bank of Uganda and the Attorney General (Supra)*, this court stated that "***the court has to exercise its discretion by considering all the relevant facts of the case, but in doing so, it has to restrain itself from attempting to resolve complex issues of disputed facts or those of law at this stage, and leave the same to be resolved in the substantive main cause or suit. The court however is not precluded from considering the strength or weakness of each party's case, but may do so only where it is apparent***

from the affidavit evidence and any exhibited documents. (See Devani v. Bhadresa and Another [1972] E.A 22...)”

A temporary injunction is an order to maintain the status quo and it is intended to prevent harm or preserve the existing conditions so that a party's position is not prejudiced in the meantime until the resolution by court of the issues in dispute.

What the Court has to consider in deciding whether to issue an interlocutory order to preserve the status, is whether the applicant's case is so clear and free from objection on equitable grounds that court ought to interfere to preserve the property or the state of affairs without waiting for the right to be finally established.

The Court does not grant such order to preserve the status quo as a matter of course ***(Halsbury's Laws of England, 3rd Edition, vol.21 pages 343, 346 and 366).***

The case of the applicant that he has a prima facie case is based on the fact that he was at the material time the registered proprietor of the suit land. He contends that the recommendations in the report of the committee of inquiry dated January, 2011 established by the Minister for Lands, Housing and Urban Development coupled with advise of

H.E. the President that the certificates of title fraudulently acquired in respect of the suit land should be cancelled were not only unconstitutional but will also subject him to irreparable loss and deprivation of the suit land.

It was not in dispute that immediately after he filed the petition, the applicant also filed Miscellaneous Application No.32 of 2011 arising from Miscellaneous Application No.31 of 2011 seeking for an interim order to preserve the status quo. The two applications were consolidated on 31.05.2013 and this Court issued an interim order to preserve the status quo as to occupation and use of the suit land.

The evidence is that as at that time of 31.05.2013, the 3rd respondent was in possession and occupation of the suit property. The interim order was granted on 31/05/2013 and the same was extended several times until the 3rd March 2014 when it was extended for 30 days or until further orders of the Court.

It follows therefore that by 15th March 2014 when the applicant took possession of the suit land and evicted the 3rd respondent from the same, the interim order to maintain the status quo on the suit land issued by this Court on 31st May 2013 and extended from time to time up

to the time of the hearing of this application (02.04.2014) was still in force. The applicant acted in violation of the same.

The applicant's supplementary affidavit clearly states that after Justice Kabito's quashing of the mediation report the lawyers of the applicant wrote to the Attorney General putting up the applicant's case before him. Thereafter the Attorney General wrote to the Inspector General of Police a letter dated 28th February 2014 and the police and the applicant's people moved to the suit land and evicted the 3rd respondent and handed over the suit premises to the applicant. The Attorney General's letter and the Inspector General of Police could not override the Court order of 31.05.2013.

It is apparent that the interim order maintaining the status quo was still in existence as there was no evidence in the affidavits of the applicant that it had ever been set aside by this Court or any competent court as per the extension court order of 3rd March 2014.

It is clear to us that the applicant was guilty of changing the status quo which had been ordered to be maintained upon the suit land by this Court thus it is the applicant who

acted in total contempt of an order of this Court. It is strange that the applicant is now requesting this Court to legalize the illegal eviction and taking over of the suit land pending determination of the petition where he himself reversed the status quo through disregarding the order of this Court to maintain the said status quo.

The status quo in issue here is the status quo that existed before the petition and Applications number 32 of 2011 and 31 of 2011 were filed in this Court. Status quo means **“the existing state of affairs or circumstances during the period immediately preceding the application for an interlocutory injunction (see Humphrey Nzeyi’s case (Supra))”**

In Court of Appeal Miscellaneous Application No.158 of 2010: HOUSING FINANCE BANK Ltd and Another Vs. Edward Musisi, this Court stated:

“The principle of law is that the whole purpose of litigation as a process of judicial administration is lost if orders issued by Court through the set judicial process, in the normal functioning of the Courts are not complied with in full by those targeted and/or called upon to give due compliance.

A party who knows of an order regardless of whether in the view of that party the order is null or valid, regular or irregular cannot be permitted to disobey it, by reason of

what that party regards the order to be. It is not for that party to choose whether or not to comply with such an order. The order must be complied with in totality in all circumstances by the party concerned, subject to that party's right to challenge the order in issue, in such a lawful way as the law permits. This may be by way of Revision, Review or by Appeal. See CHUCK V. CREMER (1 Corp Jemp 342)".

We find what this Court stated above in that cause relevant and applicable to the facts before us in these two consolidated applications. In spite of the fact that the applicant was aware of the existence of the order of this Court to maintain the status quo on the suit land issued on 31.05.2013, the applicant proceeded to act in total disregard of that order by taking possession of the suit land and evicting the 3rd respondent therefrom. The applicant thus acted in contempt of this Court and the applicant's hands became unclean in the eyes of this Court. This is contrary to the principle:

"He who seeks equity must have clean hands".

The applicant through these consolidated applications Nos. 31 of 2011 and 32 of 2011, is with his unclean hands as we have shown above, praying this Court to exercise its

discretion in the applicant's favour by granting him the prayers he has set out in the Consolidated applications.

This Court, on principle cannot exercise its discretion in favour of the applicant. The applicant having acted in contempt of this Court by disobeying this Court's order of 31.05.2013 cannot be heard now in these consolidated applications which are related to the same subject matter unless and until the applicant has purged himself of the contempt. See: **HADKINSON V. HADKINSON (1952) 2 ALL ER 575**; See also: **Court of Appeal/Constitutional Court of Uganda Application No.19 of 2011: MUSISI and ANOTHER V. NAMUGENYI MARGARET** unreported.

We are aware that an injunction as a remedy is no stranger to the law of this land. In the case of **Nasser Kiingi v. Kampala Capital City Authority and Attorney General: Constitutional Application No. 291 of 2011**, this Court issued an injunction to the applicant to restore the peaceable status quo that existed before it had been upset by the respondents and their agents.

The facts in the instant application are spot on in enjoining this Court to ensure that the status quo as at the time application Nos.31 and 32 of 2011 were filed in this Court

has to be restored as had been ordered by this Court through the interim order of 31.05.2013.

Accordingly, we find that the applicant has failed to satisfy this Court that he has a prima facie case that if the temporary injunction is not granted he will suffer irreparable injury.

He also failed to satisfy Court that on a balance of convenience, he will be more inconvenienced than the 3rd respondent.

We also find as already pointed out above that this Court cannot order preservation of a status quo created by the applicant on the suit property in total violation and contempt of an order of this Court of 31.05.2013 that ordered preservation of the status quo on the suit land that was there as at the time this application was lodged in this Court.

We accordingly order that an injunction be issued and it is hereby issued against the applicant to restore the peaceable status quo that had existed immediately before the Constitutional Petition and these consolidated applications were filed in this Court. The eviction of the 3rd respondent on the 15th March 2014 on advice or orders of the Attorney General, but in contempt of the said order of this Court stands quashed as having been totally illegal. The application of the applicant is hereby dismissed.

The applicant is to pay the costs of this application to the 3rd respondent. Each party is to bear its own costs as between the Applicant and the 1st and 2nd respondents.

The Registrar of this Court is to take immediate steps to cause list for hearing Constitutional Petition No.37 of 2011.

Dated at Kampala this 29th day of April 2015

Signed:



Hon. Mr. Justice Remmy Kasule JA/CC

Mwondha

Hon. Lady Justice Faith E.K. Mwondha JA/CC



Hon. Mr. Justice Richard Buteera JA/CC