

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION No.404 OF 2014
(ARISING FROM CIVIL MISC. APPLICATION No.481 OF
2014 AND HIGH COURT CIVIL SUIT No.315 OF 2014)

PETROL CITY ENTERPRISES (U) LTD :::::::::::::::APPLICANT

VERSUS

MICHAEL OKWARE AND 70 OTHERS:::::::::::::RESPONDENTS

CORAM:

HON. LADY JUSTICE FAITH E.K. MWONDHA JA

RULING OF COURT

This application was brought by Notice of Motion under Rules 1 (3) 5 and 42 of the Court of Appeal Rules Directions 1996.

It sought orders that:

1. An interim order be granted to restrain the respondent from evicting the applicant from the land comprised in Block 221, plot 2142 at Naalya or tampering with the

status quo pending the hearing and final disposal of the application for a temporary injunction.

2. Costs of the application be provided for.

The grounds of the application are contained in the affidavit of Margaret Tukahirwa legal officer of the applicant but briefly they are as follows:

- a) The applicant is aggrieved with the Ruling and decision of Hon. Lady Justice Mugambe in Misc. Application No.190 of 2014 arising from HCCS No.315 of 2014 delivered on the 28th day of Nov. 2014 and intends to appeal against the said decision and has already filed notice of appeal and has filed an application for a temporary injunction which is not yet fixed for hearing.
- b) That if the application for the interim order is not granted the main application for a temporary injunction filed in court shall be rendered nugatory.
- c) That is just, fair and equitable that the interim order restraining the Respondents from evicting the applicant from the land be granted.
- d) That the intended appeal shall be rendered nugatory if this application is not granted

§

The respondents filed a reply deponed by one of the respondents Michael Okware C/O Ms. Mugenyi & Co.. Advocates. He stated that:

- a) The respondents filed Civil Suit No.315 of 2014 regarding environmental concerns and an Environment Impact Assessment issued to the applicant to build a petrol station near residences, a market and school. That the petrol station was not built in conformity with the National Physical Standards and Guidelines and was not in line with the Environment Impact Assessment issues. It infringed on their Constitutional rights to clean and healthy environment. The respondent also filed Misc. Application No.481 of 2014 where the High Court issued an injunction. That at the time of filing the suit the petrol station was not complete nor was it operational.
- b) That the terms of the injunction order stated in Annexure "A" of the affidavit of Margaret Tukahirwa there is no eviction order issued. The status quo was to be maintained. An eviction would change the status quo. The respondents do not have any intention nor were they empowered by the court to evict the appellant.
- c) That in defiance and in Contempt of the Court decision the respondent started operating the petrol station after the court had issued the order. The applicants are affected by the operation of the said Petrol Station. A copy of the report of the National Environment Management Act is attached hereto and marked "A"

- d) That the applicants filed Misc. Application No.21 of 2015 against the applicant for contempt of Court order.
- e) That he verily believes that the intention of the applicant filing this application is for it to get the order from Court of Appeal to legalize their illegal acts in contempt of the Lower Court order/decision

Representation

Counsel Kandebe Ntabirweki was for the applicant

Counsel Assa Mugenyi was for the respondents

Both Counsel made oral submissions

Counsel Kandebe for the respondents submitted that this application was filed on 2/12/2014. That the order to maintain the status quo was signed on 28/11/2014 and yet the status quo to be maintained was that as for 23rd September 2014. The respondent in Misc. Application No.481 of 2014 filed a reply and then a rejoinder on 27th October 2014 Annexure "F" in which he attached the photographs which show that the construction had been completed and people are taking fuel. That there are boda bodas taking fuel too. That the status quo in the order should be in line with what was existing at the time of the order. He relied on the authorities of **Kiyimba Kagwa V. Katende (1985) HCB 3** & the case of **Giella V. Cassman Brown & Co. LTD Civil Appeal No.51 of (1973) E A. 358**

He submitted that since contempt proceedings have been filed by the respondent, the properties would be demolished and the status quo would be interfered with. That the affidavit in reply by the respondents is not telling the truth.

Counsel Mugenyi for the respondents opposed the application. He pointed out that it had been brought under Court Rules 1 (3) (5) and 42 of the Court Rules 1996. That he looked at them but they don't empower this Court to grant the order.

He further submitted that the grant would result in abuse of Court process of the highest order since there was no rebuttal of what was deposed in the affidavit in reply. There was no rejoinder either. That paragraph 3 in particular was not denied. The petrol station at the time of filing the suit had not been completed. That it was out of disobedience that the applicant continued to build & that's why contempt proceedings were filed. He submitted that the photographs which are attached were never before the lower Court Judge and they are new. Further that the order doesn't include eviction & that is why the lower Court proceedings were not attached by the applicant. He submitted that the applicant wants to get an order from the Court of Appeal to pervert the course of justice. He said that if the applicant was really aggrieved the remedy would be for him to attach the proceedings and file a memorandum of Appeal not to just say that the lower court ignored the evidence of photographs. He argued that the solution was not to get another order to pervert the course of

justice and it would not be proper. That once an illegality is brought to the attention of Court it takes priority over other matters. He submitted that the applicant is operating illegally and wants Court to legitimize what is illegal. Whether an order is irregular or not it has to be respected. The fear of eviction is a speculation.

He submitted that the Ruling & proceedings are not attached on record so this Court can't decide whether the lower court properly exercised its discretion. That the commencement of the status quo is a question to be determined on appeal.

Counsel submitted further that the respondent attached a Report dated 7th January 2015 long after the Ruling and at page 4 of the inspection report, there is nothing to show that the applicant complied with the Environment Impact Assessment. That the photographs which were attached on the application were smuggled in Court. He prayed that the application is dismissed.

Counsel Kandebe in a short reply said that the photographs were on the lower court record attached on the affidavit filed in Court on 28th October 2014 and that they were filed with leave of Court. He argued that counsel for the respondent didn't oppose them then and he could not oppose them now.

JS

As for the Report of NEMA, it was not signed and it is not known how the respondent got in possession of the document. That as to the completion of the petrol station, the affidavit in rejoinder

filed on 28th October 2014, showed that the petrol station was completed and its ready for business and counsel could not rebut it by evidence from the bar.

That the report doesn't show that the applicant was there when inspection was being done. He submitted that if the application is not granted, the contempt proceedings will be left to take course. The fact that by the time the interim order was granted the construction had been completed and it granted the status quo as at 23rd/09/2014 the respondent didn't know how the status quo would be preserved by him hence this application. That it was in the interest of justice that the interim order to preserve the current status quo be maintained. The respondents had failed to secure the interim order earlier as there were many adjournments.

Consideration of the Application

It was apparent that counsel for the applicant brought this Application under the Court of Appeal Rules 1996- Legal Notice No.11 of 1996 Rules 1 (3) 5 and 42 of the Court of Appeal Rules 1996.

It was wrong since currently the Rules applicable are Judicature (Court of Appeal Rules) Directions, Statutory Instrument 13-10.

On perusal of the Court of Appeal Rules of 1996 the substance of Rules 1(3) is the same as Rules 1&2(2) of the current Court of Appeal Rules. Rule 5 of 1996 is same in substance as rule 6(b) of

the current Rules. Rule 42 of the 1996 Court of Appeal Rules is the same in substance as Rule 76 of the current rules.

It was wrong to cite those Rules but could not prejudice the application in my view as the substance is the same.

The record was brought on the 24th March 2015 after this Court had requested for it. It was delivered to me through the Registry (it was still in hand written form)

I carefully perused the pleadings and considered submissions of both counsel for and against the application. I also carefully perused the lower court record of proceedings brief Ruling which led to the granting of the order.

After careful perusal of the record of the lower Court proceedings and careful consideration of both counsel submissions, I found the following:

- 1) That the respondents filed HCC Suit No.315 of 2014 regarding environmental concerns and an Environmental Impact Assessment issued to the applicant to build a petrol station near residences, a market and a school. They filed also Misc. Application No.481 of 2014.

- 2) Misc. Application No.481 of 2014 was disposed of by the grant of the temporary injunction to preserve the status quo as at 23/9/2014, the time the injunction Application & the Suit were filed. The brief Ruling and order were read and granted on 28/11/2014

- 3) The Misc. Application No.481 of 2014 was seeking for a grant of temporary injunction to restrain the respondents (now applicants) in this instant application and its agents from constructing and operating a petrol station in the Suit premises comprised in Block 221 Plot 2142 Naalya, Kyaliwajjala Rd until the suit is heard and determined
- 4) The order as signed by the trial Judge doesn't show that the order carries with it an order for eviction (annexure "A" attached on the application)
- 5) The application before court by notice of motion was seeking for orders that:
 - 1) an interim order be granted to restrain the Respondent from evicting the Applicant from the land comprised in Block 221, Plot 2142 at Naalya or tempering with the status quo pending the hearing and final disposal of the Application for a temporary injunction.
 - 2) Costs to be provided for
- 6) The brief Ruling on the temporary injunction was delivered on 28th November 2014 and it stated that the detailed reasoning will be on notice or will form part of her final Ruling/judgment in the head suit. This was after both parties had filed written submissions in respect of the application for a temporary injunction.

7) It is apparent that this kind of application can't be tainable in law. It sought an order pending determination of the injunction before this Court. This Court is not seized with such original jurisdiction.

In the detailed grounds of the affidavit supporting the application deponed by Margaret Tuhakirwa in paragraph 5, it was clear that the applicant was merely speculating about eviction when she stated that the orders made on 28/11/2014 in essence infer eviction.

Definitely status quo and eviction or demolition of the suit property are parallel, they can't mean the same thing or go together.

Eviction is a process of execution in my view when matters have been disposed of by Court in finality if it was prayed for. It can't happen before the main suit is determined.

In paragraph 6 of the said affidavit, the deponent after creating the inference of eviction or demolition imagines an immediate threat emanating from inference which is largely speculation. There is hardly any evidence which infer eviction on record.

Counsel for the applicant attempted to bring in the fear of the contempt of Court proceedings; which are not before this Court but are before the High Court.

I accept counsel for the respondents' submissions that the applicant wants to get an order from this Court to pervert the course of justice. If the applicant was aggrieved by the decision and order of the lower Court, the way forward or remedy would have been for him to attach the lower court proceedings, file memorandum of appeal so that it is determined as quickly as possible. Filing the instant application to restrain the respondents from evicting him or tampering with the status quo was diversionary.

The law is very clear, the applicant has an automatic right of Appeal under order 44(1) which provides; "An appeal shall lie as of right from the following orders under S.76 of the Act, (q) an order under rule 1, 2, 4 or 8 of order 41". The application for temporary injunction in the High Court was squarely under order 41(1) of the Civil Procedure Rules so there was no justification for the applicant not to proceed with the appeal straight away.

I am convinced that this interlocutory application was not brought in good faith.

I find the cases cited by counsel for the applicant not useful considering the circumstances of this application. The cases of **American Cyanamid Co. V. Ethicon (1975) IALL E R. 504**

Kiyimba Kagwa V. Katende (1985) HCB 43 and Giella V. Cassman Brown & Co. Ltd Civil Appeal No.51 of (1973) EA S58

It was clear that the Ruling granting the injunction was made though the reasons as the trial judge indicated were to form part of the final Ruling/judgment on notice when the suit is determined finally. So in my view this was a time wasting application which contributes a lot to the backlog both in this Court and the High Court.

I am unable to exercise my inherent power as provided in rule 2 of the Judicature (Court of Appeal) Rules, doing it will be an abuse of process of this court.

In the circumstances, the only choice I have is to dismiss the application with costs.

Dated at Kampala this 31st day of March 2015

Signed: Faith E. K. Mwendha

Hon. Lady Justice Faith E. K. Mwendha JA