

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO.150 OF 2021

(Arising out of Miscellaneous Application No. 149 of 2021)

(Arising from Civil Appeal No.135 of 2020)

10 *(Also arising out of MA No. 1082 OF 2019 & Civil Suit No.454 of 2004)*

FAUSTINO NTAMBARA:.....APPLICANT

VERSUS

JACK KITYO SEGAWOLE:.....RESPONDENT

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

15 **(SINGLE JUSTICE)**

RULING

The applicant filed this application under Rules 1, 2(2), 6 (2) (b) and 43 of the Rules of this Court seeking for an interim order of injunction restraining the respondent, his agents, employees and persons acting on his behalf or
20 instructions from interfering with the applicant's quiet enjoyment of the suit property or in any way altering the status quo of the suit land until the hearing and final determination of the main application for a temporary injunction which is pending hearing before this Court. The application also seeks provision of costs.

5 The brief background to the application is that the respondent filed Civil Suit No.454 of 2004 in the High Court at Kampala against the applicant seeking for rescission of a contract, restoration/ delivery of land described as Bululi LRV 1211 Folio 4, Plots 33, 34 and 35 and Block 29 Plots 5, 10, 23, 24, 25 and 38 hereinafter referred to as the suit land, eviction order, costs of the suit
10 or in the alternative payment of UGX 50,000,000/= plus special and general damages for breach of contract.

Civil Suit No.454 of 2004 was determined in favour of the respondent in the absence of the applicant. The applicant filed an appeal vide Civil Appeal No.25 of 2010 which was dismissed with costs to the respondent and this Court
15 advised the applicant that the proper procedure was to file an application to set aside the order to proceed ex parte. The applicant filed Misc. Application No.1082 of 2018 in the High Court seeking to set aside the order to proceed ex parte. Misc. Application No. 1082 of 2019 was dismissed and the applicant dissatisfied with the ruling, filed Civil Appeal No.135 of 2020 which is pending
20 determination before this Court. In order to protect his interest in the suit land, the applicant filed an application for temporary injunction vide Misc. Application No.149 of 2021.

The applicant has also filed the instant application seeking an interim order of injunction restraining the respondent, his agents, employees and persons
25 acting on his behalf or instructions from interfering with the applicant's quiet enjoyment of the suit property or in any way altering the status quo of the suit land until the hearing and final determination of the main application for a temporary injunction which is pending hearing before this Court.

5 The grounds upon which the application is premised are set out in the motion as follows;

1. *That the applicant has filed an application for temporary injunction and this application is pending hearing before this honourable Court.*
2. *That the respondent and his agents, employees or persons acting on his behalf and instructions have invaded the suit land, uprooted fences and threatened to evict people occupying the suit land and claiming an interest thereon under the applicant.*
3. *The respondents are in the process of disposing off the suit land and creating third parties interests on the suit land to the detriment of the applicant.*
4. *That the applicant filed an appeal vide Civil Appeal No. 135 of 2020 in this Court on 14th August 2020 which appeal is pending hearing before this Court.*
5. *That the applicant filed a substantive application for an order of stay of execution vide Miscellaneous Application No. 149 of 2021 and it is pending hearing before this Court.*
6. *That the applicant's appeal and main application have high chances of success and shall be rendered nugatory if this application for an interim order is not granted.*
7. *That the applicant will suffer substantial loss if this application is not granted.*

- 5 8. *That it is in the interest of justice that this application be granted to maintain the status quo of the suit land until the main application is disposed of.*

The motion is supported by an undated affidavit of the applicant, Faustino Ntambara. The said affidavit repeats and expounds on the notice of motion. I
10 find no reason to reproduce its contents here.

On the other hand, the respondent opposed the application and filed an affidavit in reply dated 8th October, 2021 sworn by David Semakula Mukiibi, an advocate practicing with MMAKS Advocates. The grounds in opposition were;

- 15 i. *That the respondent filed a suit against the applicant vide HCCS No.454 of 2004, Jack Kityo Segawole V Faustino Ntambara and judgment was entered against the applicant who elected not to defend the suit.*
- ii. *That the applicant later appealed the decision in the above suit in this Court which dismissed the appeal with costs.*
- 20 iii. *That the applicant later filed an application vide Misc. Application No.1082 of 2019, Faustino Ntambara V Jack Kityo challenging the orders of the trial Judge in HCCS No.454 of 2004.*
- iv. *That the said application was also dismissed with costs to the respondent and the applicant appealed the decision dismissing the*
25 *application in this Court.*
- v. *That the applicant's appeal is fatally flawed as the appeal was filed out of time and the applicant failed to take necessary steps within the statutory time frames.*

- 5 vi. *That the applicant did not make any application for an injunction at the High Court and that such applications are barred by the Rules of this Court.*
- vii. *That the applicant has to date not fixed the substantive application in this matter.*
- 10 viii. *That the applicant's appeal has no merit at all and stands no chance of success. This application and appeal are an abuse of Court process.*
- ix. *That this application has no legal basis as there is no valid appeal before this Court.*
- x. *That it is in the interest of justice that this application is dismissed with*
15 *costs to the respondent.*

At the hearing of this application, Mr. Kaganzi Leister appeared for the applicant. The respondent was unrepresented and there was no proof of service on the Court record. Court directed that the respondent be served and parties to file written submissions.

- 20 Counsel for the applicant submitted that the requirements for granting an interim order are that there is a substantive application and a serious threat of upsetting the status quo before hearing the substantive application. He added that the rationale is that an interim injunction is a discretionary order issued by Court for a short time, and usually to a particular date pending the
- 25 determination of the main application. He submitted that there is a substantive application for temporary injunction filed in this Court vide Miscellaneous Application No.149 of 2021 and an appeal referenced as Civil

5 Appeal No.135 of 2020. He relied on ***Alcon International Ltd V New Vision & Another, Supreme Court Civil Application No.04 of 2010.***

On whether there is a serious threat of execution, counsel submitted that after Miscellaneous Application No.1082 of 2019 was delivered on 17th June, 2020, the respondents started creating third party interests on the land by
10 way of renting out, selling large portions of the unit land, grading and cutting trees despite pendency of Civil Appeal No.135 of 2020. According to counsel, the respondent's actions, his agents and those acting on his behalf show a grave threat of upsetting the status quo of the suit land before the determination of the substantive application which is pending before this
15 Court. Counsel further submitted that if the said actions of the respondent were not stopped by way of an interim order to maintain the status quo, the land would be disposed of or alienated to the detriment of the applicant. He prayed that the application be granted and costs awarded against the respondent.

20 Counsel for the respondent opposed the application and raised 2 preliminary objections; first that the application does not set out any property that is sought to be enjoined. That no interim order can issue against the respondent for property that is not stated in the application and for the said reason the application was fatally defective and ought to be struck out with
25 costs to the respondent.

Secondly, that there was nothing to stay or enjoin from the orders of the trial Judge in Miscellaneous Application No.1082 of 2019, Faustino Ntambara V Jack Kityo Segawole because that application was dismissed by the trial

5 Judge and there was no positive order issued which would require a stay. In
counsel's view, there was no basis for seeking an interim order of injunction
against the respondent because Miscellaneous Application No.1082 of 2019
that was dismissed had nothing to do with any suit property. It was an
application to set aside a judgement and to seek an injunction on property
10 that was not the subject matter of the suit. The appeal was about abuse of
Court process. He relied on ***Republic V Kenya Revenue Authority, Judicial
Review No.1 of 2018 (unreported)***.

Counsel further submitted that the order sought in the application is an
interim order restraining the respondent from interfering with the applicant's
15 quiet enjoyment of what is referred to as the "suit property". According to
counsel, there is no reference to any specific property with a proper
description in the application. That an interim order serves the purpose of
maintaining a status quo and there is no evidence in the affidavit in support
of the application that the applicant is in possession of any specific property
20 that is sought not to be interfered with.

Counsel submitted that the applicant's suit was filed in 2004 and the appeal
filed against the judgment dismissed. That the rights of the parties in the
property that related to that suit have since been determined and the status
quo altered. In the absence of proof that the applicant is in possession of any
25 specific property and seeks protection from altering the status quo in such
property, no interim order can issue in his favour. He prayed that the
application be dismissed.

5 I have carefully considered the Notice of Motion, the affidavit in support, the annexures thereto as well as the law and authorities relied upon. I have also considered the submissions of counsel on either side.

The jurisdiction of this Court to grant interim orders is set out in Rule 6(2) (b) and Rule 2(2) of the Rules of this Court. The said rules state thus;

10 **Rule 6(2) (b)** provides that:

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay execution but the Court may in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction, or a
15 *stay of proceedings on such terms as the court may think just”.*

Rule 2 (2) of the Rules of this Court provide thus:

“Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of
20 *the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay”.*

Counsel for the respondent raised two preliminary points of law; first that the
25 application does not set out any property that is sought to be enjoined. He added that no interim order can issue against the respondent for property

5 that is not stated in the application and for that reason the application was fatally defective and ought to be struck out with costs.

O.7 Rule 3 of the Civil Procedure Rules provides that;

“3. Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it.”

10 In the present application, the applicant seeks an interim order of injunction restraining the respondent, his agents, employees and persons acting on his behalf or instructions from interfering with the applicant’s quiet enjoyment of the suit property or in any way altering the status quo of the suit land until the hearing and final determination of the main application for a temporary
15 injunction which is pending hearing before this Court.

I have carefully perused the applicant’s pleadings and I note that throughout his pleadings, the property which is the subject matter of this application has not been properly described in order for it to be sufficiently identified to give effect to the interim order of injunction sought. The applicant merely mentions
20 the “suit property” throughout. He has not in any way helped Court in identifying the “suit property” being referred to.

There is a risk of granting this application to preserve the status quo in respect of the “Suit land” whose description has not been provided to Court because the resultant orders could be used against properties that are not
25 intended.

The second preliminary objection raised by the respondent was that there was nothing to stay or injunct from the orders of the trial Judge in Miscellaneous

5 Application No.1082 of 2019, *Faustino Ntambara V Jack Kityo Segawole* because that application was dismissed by the trial Judge and there was no positive order issued by Court.

The applicant filed an appeal in this Court; Civil Appeal No.0025 of 2010 challenging the trial Judge's decision of allowing the respondent to proceed
10 ex-parte in HCCS No.454 of 2004. *See annexure "B" attached to the applicant's affidavit.* The said appeal was dismissed with costs to the respondent on procedural grounds. The applicant was advised by Court to file an application in the High Court to set aside the ex-parte judgment and he filed Miscellaneous Application No.1082 of 2019.

15 I have looked at annexure "C", the ruling in Miscellaneous Application No.1082 of 2019 (arising out of Civil Suit No.454 of 2004) attached to the applicant's affidavit. The said application was for setting aside the orders allowing the respondent to proceed with the hearing of Civil Suit No.454 of 2004 in the absence of the applicant. The learned trial Judge dismissed the
20 application with costs to the respondent and maintained the ex-parte judgment of the High Court in Civil Suit No.454 of 2004.

I therefore agree with counsel for the respondent that there was no basis for seeking an interim order of injunction because Miscellaneous Application No.1082 of 2019 was an application for setting aside the ex-parte judgment.
25 The applicant cannot therefore seek an interim order of injunction on property which was not the subject matter in Miscellaneous Application No.1082 of 2019.

5 In ***Republic V Kenya Revenue Authority, Judicial Review No.1 of 2018 (unreported)***, the applicant filed an application for judicial review against the respondent and the application was dismissed. The applicant subsequently filed an appeal to injunct collection of taxes. Court had this to say regarding applications such as the present;

10 “Similarly, in *Cooperative Bank Limited V Banking Insurance & Finance Union Kenya (Nairobi App. No.133 of 2017)*, the Court of Appeal (Kantai JA) held that: An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance
15 presupposed the existence of a situation to stay- called a “positive order”- either an order that has not been complied with or has partly been complied with..... The Court has identified negative orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order.....”

20 I therefore uphold the respondent’s preliminary objections and find no reason to delve into the merits of this application.

In the result, I decline to grant the interim order of injunction sought by the applicant.

The application is dismissed and costs shall abide the cause.

25 Dated at Kampala this.....^{27th} day of ^{Jan}..... 2022.


Cheborion Barishaki
JUSTICE OF APPEAL