

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)**

**HCT-00-CC-MA-0244-2007
(Arising from Civil Suit No. 152 of 2007)**

BANK OF AFRICA UGANDA LTD :::::::::::::::::::: APPLICANT

VERSUS

- 1. CLIVE MUTISO**
- 2. CENTRE HOTELS LTD**
- 3. SIR HENRY MORGAN & ASSOCIATES LTD**
- 4. ORGANIC FOREST HONEY LTD**

:::::::::::::::::::: RESPONDENTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING:

This application was brought by way of Chamber Summons under 0.41 rr 1, 2, 3 and 9 of the Civil Procedure Rules and other enabling laws. It seeks an order of a temporary injunction to restrain the respondents, their agents or persons claiming under them from wasting, damaging or alienating, removing or disposing of their properties comprised in Singo Block 293 Plot 47 Land at Myanzi and Land comprised in Block 491 Plot 2 at Kiziba, Kyaggwe pending disposal of the main suit. It is also prayed that costs of the application be provided for.

The application is supported by the affidavit of one Stephen Kasenge, the Audit and Compliance Manager of the applicant Bank. The respondents also filed affidavits through Clive Mutiso, the 1st respondent herein and Richard John Lynton Tucker, a Director in the 3rd respondent.

Representations:

Mr. Faisal Mukasa for the applicant.

Mr. Augustine Kibuuka-Musoke for the respondents.

The grounds on which the application is based, according to the affidavit of Stephen Kasenge, are that the respondents intend to remove or dispose of the properties listed herein with a view to defraud the applicant from whom the first and second respondents fraudulently obtained advance payments against uncleared effects. The deponent states that the applicant will suffer irreparable injury if the land is alienated, transferred or disposed of. Before the hearing date, I went through the pleadings. When the application came up for hearing, the applicant sought to apply for adjournment to file a rejoinder to the affidavit in reply.

I was of the view that this application could be disposed of on the basis of the available pleadings. Accordingly, I adjourned the application for a ruling on the matter. Hence this ruling.

In paragraph 9 of Mr. Kasenge's affidavit, he avers:

“9. THAT the properties mentioned above are the only properties known to belong to the first respondent in Uganda and I was informed by the first respondent whom I know to be a foreign national that he intends to sell all his land in Uganda (which includes the Land described in paragraph 6 above).”

Mr. Mutiso has had opportunity to file a reply to Mr. Kasenge's affidavit. In paragraph 10 of his affidavit, he avers:

“10. THAT in reply to paragraph 9 of the affidavit I state that the properties mentioned in 9 above are not my properties and I do not have any interest in them.”

It is noteworthy that although Mr. Kasenge avers that Mr. Mutiso informed him that he, Mr. Mutiso, intends to sell all his Land in Uganda, including the suit property, all that Mr. Mutiso states in reply is that the property sought to be preserved is not his. He does not deny or admit giving information to Mr. Kasenge about the intended sale or how he came to be linked with it.

I consider this to be a material omission in Mr. Mutiso's affidavit, presumably deliberate.

The genesis of the applicant's concerns about the suit Lands can be gauged from the plaintiff's pleadings (plaint), para 8 thereof. Under para 8 (vi), the plaintiff avers that upon insistence on documentary proof of the source of funds by the plaintiff, the first defendant presented to the plaintiff a document that purported to be a lease agreement between the 2nd defendant and one Blue Field Associates for land comprised in Block 491, Plot 2 at Kiziba, Kyaggwe. It is averred that the document was executed by the 1st defendant on behalf of the 2nd defendant on one hand and the 5th defendant as an agent of Blue Field Associates on the other hand. The lease agreement is attached to the plaint.

It is noteworthy again that the plaintiff's case against the defendants is that the 1st defendant banked a forged bank draft in favour of the 2nd defendant with the plaintiff/applicant for USD 400.000 and that upon trusting the documents that the first defendant produced before the plaintiff to prove the source of funds, the plaintiff paid the 1st and 2nd defendants USD 385,914.61. The plaintiff's case is that the draft bounced after the defendants had taken the money on it. Trusting as I do that the question whether or not a plaint discloses a cause of action must be determined upon perusal of the plaint alone and anything attached as to form part of it, it is clear to me that the plaintiff's pleadings do sufficiently link the 1st defendant with the bank draft that bounced and the suit property herein. For this reason alone, I would think that the plaintiff is entitled to an order that would preserve the suit property pending determination of the main suit. In an application under 0.41 r. 1, it must essentially be shown that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit. It would appear to me that such party need not be the registered owner thereof to be prevented from disposing of it during the pendency of the suit. In my view, if an order such as the one sought herein is granted and the real owner shows up and wants to dispose of the suit property in exercise of his rights as owner, whether or not such owner is party to the proceedings, he can still be heard by Court in the matter with a view to discharging the property from the order. In the circumstances of this case, I see no reason to deny granting the order sought herein.

I note that grant of a temporary injunction is a matter within the discretion of Court. The discretion must of course be exercised judicially. The applicant must show that he/she has a prima facie case with a probability of success; and that the applicant might otherwise suffer irreparable damage which would not be adequately compensated in damages.

If the Court is in doubt on any of the above two issues, it will decide the application on a balance of convenience. The purpose of an application for a temporary injunction should in the first instance be to preserve the status quo.

Applying the above principles to the instant case, especially as to whether or not the applicant has a prima facie case with a probability of success; Court is not concerned with whether or not the claim is frivolous or vexatious. That, I think, can await the hearing of the suit. The Court's concern at this stage is whether or not there is a serious question to be tried. From the pleadings, such a question exists.

As to whether the applicant might suffer irreparable damage which would not be adequately compensated in damages, Court is in some doubt. There is no evidence of how much property, if any, the defendants own in Uganda. However, Court has been told that the 1st defendant, thought to be the brain behind the alleged fraud, is a foreigner. It has not been denied that he, the first defendant, has intimated to Mr. Kasenge the plans to sell the suit property. 1st defendant has denied ownership of the property, implying that he personally does not stand to lose anything or suffer any inconvenience in the event that any intended sale or alienation is put on hold pending determination of the suit. The balance of convenience is therefore in favour of granting the order sought. I hasten to add that one property, Block 491 Plot 2 at Kiziba, Kyaggwe, is stated in the plaint as linked to the alleged fraudulent deal. However, sufficient ground has been given in this application to warrant encumbering Singo Block 293 Plot 47 Land at Myanzi as well. The same shall be included in the order herein.

In the final result, Court is satisfied that the purpose of this application is to maintain the status quo pending determination of the suit. On perusal of all available records, I have come to the conclusion that the applicant has brought itself within the scope of the law under which applications for temporary injunctions are granted. I allow the application and grant the order sought. Costs herein shall abide the outcome of the main suit.

Yorokamu Bamwine

J U D G E

18/06/2007

