

**THE REPUBLIC OF UGANDA**

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

**HCT-00-CC-MA-0104 -2009  
(Arising out of HCT-00-CC-CS-070-2009)**

Paulo Makumbi and 3 others ..... Applicants

Versus

Louis Ntale and 3 Others ..... Respondents

Before: Hon Mr. Justice Lameck N. Mukasa

**Ruling**

THIS is an application by way of Chamber Summons under Order 41 Rules I(a); 2(I); (2) and 9 of the Civil Procedure Rules, Section 98 of the Civil Procedure Act whereby the applicants, Paul Makumbi, Richard Kyabaggu, Norah Makumbi, and Sam Kirabira, seek orders that:-

- (a) A temporary injunction doth issue against the first, second and third Respondents, their agents, servants or those claiming under them, jointly and or severally, restraining them from disposing off, alienating, charging or in any way dealing with land comprised in

Kibuga Block 20 Plot 862 Nateete, Kibuga Block 20 Plot 914 LRV 2209, Folio 12 Plot 5 Lower Naguru until the determination of the main suit.

- (b) Provision be made for the costs of this application.

The grounds for the application are briefly:

1. The Applicants have filed an action in Court, HCCS No 70 of 2009 against the Respondents jointly and/or severally seeking among others remedies for specific performance, restitution, declaratory orders, injunctive remedies, cancellation of entries, made on the land in question and the same suit is yet to be disposed of.
2. The suit in question is brought as a derivative action for the benefit of the fourth Respondent, the company and to safeguard and protect the interests of the Applicants as monitory shareholders.
3. The first and second Respondents in concert with the third Respondent worked to undermine and are in contempt of the Consent Judgment in HCCS No. 826 of 2007 and have denied the Applicants and Company title in the subject property by selling, buying and /or creating charges, securities upon them from financial institutions.
4. The property in question owing to the nature of the borrowing and charges/ securities created thereon before is likely to be alienated, disposed of, charged further or sold in foreclosure to a third party or dealt with in a manner prejudicial to the interests of the Applicants and the company.
5. That during the pendency of the suit there is a real danger of irreparable damage, loss and injury being occasioned to the Applicants and the company which cannot be atoned for in damages.
6. The balance of convenience is in favour of maintaining the status quo and granting the prayers sought.

Representation was Mr. Mulema Mukasa and Richard Obonyo for the Applicant. Mr. Paul Kutesa for 1<sup>st</sup> Respondent, Mr. Frank Kanduko for 2<sup>nd</sup> Respondent, Mr. Wilfred Mulemba for the 3<sup>rd</sup> Respondent and Mr. Henry Mwebe for the 4<sup>th</sup> Respondent.

The application is supported by an affidavit deponed to by the 1<sup>st</sup> Applicant, Paul Makumbi for himself and for the other three Applicants. The 1<sup>st</sup> Respondent Louis Ntale filed an affidavit in reply deponed to by himself. The 2<sup>nd</sup> Respondent, Lonaco Limited, filed an affidavit in reply deponed to by its Director Denis Babigumire. The 3<sup>rd</sup> Respondent, Agaba Services Ltd, filed an affidavit in reply deponed to by its Managing Director Peter Nuwagaba. The 4<sup>th</sup> Respondent, M/s Natete Bus Terminal Co, Ltd, filed an affidavit in reply deponed to by Peter Tumuramy, an advocate of C/o Mwebe, Ssebagala & Co Advocates. The Applicants filed three affidavits in rejoinder. Two deponed to by the first Applicant, Paul Makumbi, and the third deponed to by Richard Kyabaggu, the 2<sup>nd</sup> Applicant.

The brief facts are that the four Applicants and the 2<sup>nd</sup> Respondent, Lonaco Ltd agreed to incorporate Nateete Bus Terminal Co Ltd, which was incorporated on 29<sup>th</sup> March 2007. The 2<sup>nd</sup> Respondent was to own 70% and the Applicants, collectively, to own 30% of the shares. The 2<sup>nd</sup> Respondent was to provide land at Block 20 Plot 751, Plot 826 and Plot 985, Block 18 Plot 1025 Nateete for the purposes of setting up a bus terminal, shopping arcades and other facilities incidental thereto. The Applicants were to inject Shs410,000,000/= as capital towards the cost of setting up and operating the terminal. It was further agreed that ownership of the above described land was to be transferred into the names of the 4<sup>th</sup> Respondent. In the plaint, the Applicants contend that the 1<sup>st</sup> Respondent is the secretary of the 4<sup>th</sup> Respondent having control as Managing Director and shareholder of the 2<sup>nd</sup> Respondent Company which has majority shares in the 4<sup>th</sup> Respondent Company. The Applicants claim that in breach of the Joint Venture Agreement the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not transfer title of the land to the 4<sup>th</sup> Respondent. Thus HCCS No 826 of 2007, Nateete Bus Terminal Co Ltd & 4 others (being the Applicants) Vs Lonaco Ltd (2<sup>nd</sup> Respondent) and Barclays Bank Ltd. A consent judgment was entered in the above suit whereby the 2<sup>nd</sup> Respondent agreed to settle its indebtedness to M/s Barclays Bank Ltd for the release of

mortgages or securities thereon and thereafter hand over the suit properties, titles to the Applicants and the 4<sup>th</sup> Respondent Company. The Applicants further claim that contrary to the terms of the Consent Judgment the 1<sup>st</sup> and 2<sup>nd</sup> Respondents transferred the land to the 3<sup>rd</sup> Respondent, Agaba Services Ltd, who thereafter mortgaged the same to M/s Stanbic Bank (U) Ltd. They contend that the transfer to the 3<sup>rd</sup> Respondent was fraudulent and malafide and that the 3<sup>rd</sup> Respondent was always aware of the fraud and malafides of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. In the plaint the Applicants, inter alia, seek declaration Orders that:

- (a) The sale, purchase, creation of mortgage/securities and/or any dealing in the suit land subsequent to the consent judgment was fraudulent, null and void.
- (b) Cancellation of entries upon the suit land and entering the 4<sup>th</sup> Respondent Company as registered proprietor thereof.
- (c) Permanent injunction against the Respondents from interfering in the quiet enjoyment and property rights for the 4<sup>th</sup> Respondent in the suit land.

In his submission Counsel for the 1<sup>st</sup> Respondent raised a point of law which I must dispose of before considering the merits of the application. Mr. Kuteesa observed that the Applicant's affidavit in support was not dated. He cited section 6 of the Oaths Act, which provides:

“Every Commissioner for oath or notary public before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”

Section 5 of the Commissioner for Oaths (Advocates) Act provides similarly. Counsel argued that the requirement is mandatory and submitted that an affidavit which does not disclose the date in the jurat must be struck out.

Article 126 (2) (e) of the Constitution reads:

“(2) In adjudicating cases of both a civil and criminal nature, the courts shall subject to the law apply the following principle ....

(d) Substantive justice shall be administered without undue regard to technicalities”

It has been held in a number of cases that the blunders of an advocate should not be visited upon a litigant – see Banco Arabe Espanol Vs Bank of Uganda S.C. C.A. No 8 of 1998. In Mpawulo Anthony Vs Standard Chartered Bank (U) Ltd. Justice Arach – Amoko stated:

“--- I do not think that failure to include the place in which the affidavit was sworn is fatal. It is a procedural irregularity which does not go to the root of the affidavit and is curable under Article 126 (2) (e) of the Constitution, since it does not in my view occasion any injustice. What is important is that the affidavit is properly commissioned by the Commissioner of Oaths, --.”

In Suggan Vs Roadmaster Cycles (U) Ltd (2002) IEA 25 Justice Mpagi - Bahigeine, JA held that it is trite that defects in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (2) (e) of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities. That a Judge has power to order an undated affidavit be dated in court or that the affidavit be resworn before putting it on record and may penalize the offending party in costs.

However, the Oaths Act imposes the duty to state the place and date on the Commissioner before whom an affidavit is taken and not the deponent or litigant,. The Commissioner’s failure or omission cannot be visited on the deponent, litigant or his Counsel. I therefore find this a proper case for the invocation of the provisions of Article 126 (2) (e) of the Constitution without any conditions attached.

The grant of a temporary injunction is primarily to preserve the status quo pending the disposal of the main suit. The land which is the subject matter of this application is described in Paul Makumbi's affidavit in support as Kibuga Block 20 Plot 826 Nateete, Kibuga Block 18 Plot 1025 Nateete, Kyadondo Block 20 Plot 757 Nateete, Kibuga block 20 Plot 914 –LRV 2209. Folio 12 Plot 5 Lower Naguru. In paragraph 9 Paul Makumbi avers that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent disposed of the suit land to the 3<sup>rd</sup> Respondent. In his affidavit Louis Ntale avers that the 3<sup>rd</sup> Respondent is currently the registered proprietor of the suit properties. Also Peter Nuwagaba in the 3<sup>rd</sup> Respondent's affidavit in reply avers that the 3<sup>rd</sup> Respondent is the registered proprietor of the suit lands. I accordingly find that the status quo is that the suit land is currently registered under the proprietorship of the 3<sup>rd</sup> Respondent, Agaba Services Ltd.

A temporary injunction is a remedy within the discretion of Court which must be exercised judiciously. Whether or not to grant a temporary injunction Court must consider whether the Applicant has raised a prima facie triable issue in its pleadings in the main suit which is not frivolous, vexatious or illegal. Secondly, whether the Applicant has shown that he would suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if court is in doubt on any of the above two, consider whether the balance of convenience is in favour of the Applicant. See Kiyimba-Kagwa Vs Hajji Abdu Nassar Katende (1985) HCB 43, Nitco Limited Vs Nyakairu (1992-1993) HCB 135, Cut Tobacco (K) Ltd VS British American Tobacco (K) Ltd (2001) IEA 24

In their pleadings the Applicants claim that they on one side, and the 2<sup>nd</sup> Respondent, acting through the 1<sup>st</sup> Respondent, on the other part, entered into a Memorandum of Understanding on 5<sup>th</sup> April 2007. That in breach of the said Memorandum of Understanding the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to transfer the suit properties to 4<sup>th</sup> Respondent company. This gave rise to *HCT-00-CC-CS-826-2007 Nateete Bus Terminal Co Ltd (4<sup>th</sup> Respondent), Paul Makumbi, Richard Kyabaggu, Norah Makumbi & Sam Kirabira (Applicants) Vs Lonaco Ltd (2<sup>nd</sup> Respondent) and Barclays Bank Ltd*. The above suit was disposed of by way of a consent judgment dated 28<sup>th</sup> July 2008 whereby, inter alia, the 2<sup>nd</sup> Respondent was to service any loans obtained on account of the suit property and handover the certificates of title thereto to the Applicants and 4<sup>th</sup> Respondent. The Applicants and 4<sup>th</sup> Respondent were to take immediate

possession of the suit property. The Applicants claim that in contempt of the Consent Judgment the 1<sup>st</sup> and 2<sup>nd</sup> Respondents transferred the suit land to the 3<sup>rd</sup> Respondents Company. That the 3<sup>rd</sup> Respondent dealt with the 1<sup>st</sup> and 2<sup>nd</sup> Respondent while aware of the Consent Judgment. Finally that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondent had acted fraudulently and malafidely to deny the Applicants and the 4<sup>th</sup> Respondent Company interest in the suit properties.

In his affidavit in reply the 1<sup>st</sup> Respondent, Louis Ntale, contends that he is not a party to the Memorandum of Understanding, that he had signed the Memorandum only for and on behalf of the 2<sup>nd</sup> Respondent as its authorized officer. The Memorandum of Understanding is indicated as:

“Signed and Delivered by the said LOUIS NTALE for and on behalf of LONACO CO LTD.”

Further that he was not a party to Civil Suit No 826 of 2007 and thus not bound by the Consent Order. Mr. Kutesa for the 1<sup>st</sup> Respondent argued that since the Memorandum of Understanding was the foundation of the Applicants’ main suit yet the 1<sup>st</sup> Respondent was not a party to the Memorandum of Understanding and not a party to the consent judgment the Applicants had not disclosed a cause of action against him. He submitted that there was not prima facie case disclosed against the 1<sup>st</sup> Respondent.

True the 1<sup>st</sup> Respondent is neither a party to the Memorandum of Understanding nor a party to the Consent Judgment in Civil Suit No. 826 of 2007. He signed the Memorandum of Understanding for and on behalf of the 2<sup>nd</sup> Respondent, a limited liability company. The most outstanding feature of an incorporated company is its corporate personality. It is a separate legal entity from its directors, shareholders and other members. The Applicants cannot maintain a claim against the 1<sup>st</sup> Respondent on the basis of his actions or decisions taken as shareholder, director or other officer of the 2<sup>nd</sup> Respondent. However, corporate personality cannot be allowed to be blatantly used as a cloak for the fraudulent or improper conduct of the company’s members. In the plaint the Applicants allege fraud against the 1<sup>st</sup> Respondent. Though corporate bodies act through their officers fraud is personal to the guilty party. Whether the 1<sup>st</sup> Respondent committed the alleged fraudulent acts or omissions is a matter for court’s determination. I

therefore find that the Applicants have raised a prima facie triable issue against the 1<sup>st</sup> Respondent.

In its affidavit in reply the 2<sup>nd</sup> Respondent Company does not dispute being a party to the Memorandum of Understanding dated 11<sup>th</sup> April 2007. However, the deponent thereto contends that the 4<sup>th</sup> Respondent was not the company envisaged to be incorporated pursuant to the Memorandum of Understanding since the 4<sup>th</sup> Respondent had already been incorporated on 29<sup>th</sup> March 2007. By the Memorandum of Understanding made on 11<sup>th</sup> April 2007 (Annexure) B1) the 2<sup>nd</sup> Respondent and the Applicants agreed “to incorporate a company to be known as NATEETE BUS TERMINAL CO LTD”. Annexure A1 and A2 are respectively, the Certificate of Incorporation and Memorandum and Articles of Association of Natete Bus Terminal Co Ltd. Both indicate that the 4<sup>th</sup> Respondent Company was incorporated on 29<sup>th</sup> March 2007. Therefore the Memorandum of Understanding executed on 11<sup>th</sup> April 2007 was post incorporation of the 4<sup>th</sup> Respondent Company.

The deponent to the 2<sup>nd</sup> Respondents affidavits in reply further avers that the extraordinary resolution of the 4<sup>th</sup> Respondent (Annexure P4 to the Applicant’s affidavit in support) was, in addition to the Applicants, done in respect of another party called Kateregga Najja Ruth, yet she was not a signatory to the Memorandum and Articles of Association of the 4<sup>th</sup> Respondent. Further the deponent points out that the 4<sup>th</sup> Respondent has a share capital of Ugshs1,000,000/= only yet the company contemplated under the Memorandum of Understanding was meant to have a share capital whose 30% equivalent stood at shs410,000,000/= Further that the objects of the contemplated company were exclusively for a bus operation business at Nateete.

On the basis of the above Mr. Frank Kanduho, Counsel for the 2<sup>nd</sup> Respondent, argued that the 4<sup>th</sup> Respondent, was not the company envisaged by the Applicants and the 2<sup>nd</sup> Respondent to be incorporated pursuant to the Memorandum of Understanding executed on 11<sup>th</sup> April 2007 and on which this application and the main suit is founded.

I have carefully studied and considered the affidavits of the parties, the annexures thereto and the submissions of counsel for the parties and I wonder whether the Applicants and the 2<sup>nd</sup>



Respondent having floated and incorporated the 4<sup>th</sup> Respondent company on 29<sup>th</sup> March 2007 intended after the execution of the Memorandum of Understanding dated 11<sup>th</sup> April 2007, to float and incorporate yet another company with similar names as the 4<sup>th</sup> Respondent!! This calls for an investigation of the intention of the parties which cannot be done on the affidavit evidence before me at this stage. It can only be upon the full hearing of the parties' evidence in the main suit.

In paragraph 5 of its affidavit the 2<sup>nd</sup> Respondent argues that the application involves land which falls outside the Memorandum of Understanding on which the Applicants are suing. The Memorandum of Understand relates only to land at Block 20 Plot 751, Plot 826 and Plot 985 and Block 18 Plot 1025 at Nateete Kampala. Yet the application also includes land at Kyadondo Block 20 Plot 757 Nateete, Kibuga Block 20 Folio 12 Plot 5 Lower Naguru. However, all the above described pieces of land were the subject of Civil Suit No 826 of 2007 as can be seen from paragraph 3 of the plaint and thus the suit properties therein. The consent judgment therein, inter alia, provided:

- “2. The 1<sup>st</sup> Defendant undertakes to service any loans obtained on account of the suit property and hand over the certificates of titles to the plaintiff.
3. The plaintiffs shall take immediate possession of the suit property.”

The Applicants' claim in the instant suit is also founded on the consent judgment which brings in property which was otherwise not covered by the Memorandum of Understanding.

However, it is stated in paragraphs 7 and 9 of the 2<sup>nd</sup> Respondent's affidavit in reply that by the time HCCS No 826 of 2007 was filed and the consent judgment therein signed the 1<sup>st</sup> Respondent had long been relieved of his directorship in the 2<sup>nd</sup> Respondent Company. Thus had no mandate to sign the consent for and bind the 2<sup>nd</sup> Respondent. Annexed to the affidavit is a resolution of the 2<sup>nd</sup> Respondent Company. The Resolution provides that it was resolved on 10<sup>th</sup> October 2007, inter alia, that:

“(a) Mr. Louis Ntale be and is hereby forthwith replaced with /by Mr. Denis Babigumira in the position of Chairman/managing Director of the company

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(d)The rest of the subscribers to the Memorandum and Articles of Association be and are hereby removed from the Directorship of the Company with immediate effect.

2. The trio, namely Denis Babigumira, Chairman, Managing Director, Rebecca Ntale Director and M/s Mwesigwa-Rukutana & Co Advocates, Secretary be and are hereby appointed and shall with immediate effect constitute the Board of Directors.”

The Resolution is dated the 10<sup>th</sup> day of October, 2007. In his affidavit in rejoinder to the 2<sup>nd</sup> Respondent’s affidavit, the 2<sup>nd</sup> Applicant, Richard Kyabaggu disputes the directorship of Denis Babigumira in the 2<sup>nd</sup> Respondent Company. He further contends that Louis Ntale has continued to act as Managing Director/Chairman of the 2<sup>nd</sup> Respondent. Annexed to his affidavit are two resolutions of the 2<sup>nd</sup> Respondent company, annexures B1 and B2, both signed by Louis Ntale as Chairman/Managing Director and Ntale Kenneth as secretary dated 6<sup>th</sup> January 2009 and 7<sup>th</sup> January 2009 respectively.

The consent judgment in Civil Suit No 826 of 2007 was executed on 28<sup>th</sup> January of 2008. It was signed by Ntale Louise, 1<sup>st</sup> Defendant, managing Director (i.e. 2<sup>nd</sup> Respondent Managing Director). The issue arises whether as of then Ntale Louis was a director of the 1<sup>st</sup> Respondent with the mandate to sign the consent judgment on its behalf and if so whether the 2<sup>nd</sup> Respondent’s acts are in contempt thereof. I must at this stage warn myself against making a ruling which might have the consequence of setting aside the consent judgment.

A consent judgment once sealed by court, as was the case in Civil Suit No 826 of 2002, becomes the judgment of court binding on all the parties. It is trite that a consent judgment cannot be varied or discharged unless obtained by fraud or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the Court to set aside an agreement. That is not the subject of this Court's investigation in the instant application.

It is an undisputed fact that the suit properties are currently registered under the proprietorship of the 3<sup>rd</sup> Respondent, Agaba Service Ltd. In the 3<sup>rd</sup> Respondent's Affidavit in reply it is averred that it had in 2007 purchased LRV 2880 Folio 20 Plot 1025 from the 2<sup>nd</sup> Respondent, LRV Folio 1 Plot 985 from the 1<sup>st</sup> Respondent and on 17<sup>th</sup> January 2008 became the Registered proprietor. That when the 3<sup>rd</sup> Respondent brought the land there was no registered encumbrance prohibiting any transaction on the land., the consent judgment had not been executed yet, the pendency of HCCS No 826 of 2007 was not known to the 3<sup>rd</sup> Respondent and the memorandum of understanding had not been brought to the knowledge of the 3<sup>rd</sup> Respondent. Further that the 4<sup>th</sup> Respondent Company, for whose benefit these proceedings were commenced, at all times had no proprietary interest in the suit land. The consent judgment was filed on 28<sup>th</sup> January 2008, about ten days after the 3<sup>rd</sup> Respondent had been registered as proprietor.

In their pleadings the Applicants claim that the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had fraudulently dealt with the suit land. In paragraph 7(iv) they particularly claim:-

“The third Defendant using the self-same advocates retained by the plaintiffs and the company to enter into negotiations for the sale of the land and securing a loan facility from M/s Stanbic Bank (U) Ltd and to release the securities created thereon by M/s Barclays Bank.”

That they were acting in concert to defeat the interests of the Applicants and the 4<sup>th</sup> Respondent Company. In paragraph 4 of his affidavit in rejoinder to the 3<sup>rd</sup> respondent's affidavit in reply the 1<sup>st</sup> Applicant avers that the 3<sup>rd</sup> Respondent was always aware of the Applicants and the 4<sup>th</sup>

Respondent interest in the suit property before it purchased or dealt with it. In paragraph 4 (c) he avers:

- (e) That the Third Respondent was always aware of the issues and concerns in HCCS No 826 of 2007 because they instructed the same advocate Mr. Michael Akampulira of M/s Akampulira & Partners who was also acting for the Applicants, first and second Respondents and the fourth Respondents (see annexure “R1” to “R10”).

From the annexures it is apparent that in purchasing the suit property the 3<sup>rd</sup> Respondent financed the satisfaction of the consent judgment with regard to the interests of Barclays Bank Ltd (2<sup>nd</sup> Defendant in CS No. 826 of 2007). The bonafideness of the 3<sup>rd</sup> Respondents purchase of the suit land is put in issue by the Applicants. Issues of fraud and of bonafide purchaser cannot be adequately dealt with on evidence by way of affidavits. See (*Sanyu Lwanga Musoke Vs Yakobo Mayanja Ntate SCCA No 59 of 1995*)

Considering all the above I find that the Applicants have shown triable issues against the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to be investigated at the hearing of the main suit.

The object of a temporary injunction is to protect the Applicant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. See *American Cyramid Co Vs Ethicon Ltd (1995) All ER 504, Kiyimba Kaggwa Vs Hajji Naser Katende (1988) HCB 43*.

In the application the Applicants state that the suit in question is brought as a derivative action for the benefit of the 4<sup>th</sup> Respondent Company and to safeguard and protect the interests of the Applicants as monitory shareholders of the 4<sup>th</sup> Respondent. The Applicants, in total hold 30% of the shares in the 4<sup>th</sup> Respondent Company, while the 2<sup>nd</sup> Respondent Company holds 70%. Circumstances under which minority shareholders can bring a derivative action as parties themselves were discussed in detail by Hon Justice James Ogoola in *Allied Bank International Ltd Vs Sandru Kera & Abdul Kera HCT-00-CC-SC-o191-2002* See also *Joel Odong, Amen & Another Vs Dr Ocen Andrew & Anor HCT-00-CC—CS-062 -2004, Eng Yeshuat Supra & Anor*

*Vs Sam Ngude Odaka & Anor HCT-00-CC-CS-365-2007 and, Wallerstainer Vs Moir No2 (1975) I All ER 849.*

I have carefully considered the Applicants' pleadings in this application and in the main suit and the annexures relating to the 4<sup>th</sup> Respondent Company and I have found that the Applicants have satisfied the conditions for them to have instituted this suit on their own behalf with the 4<sup>th</sup> Respondent Company as a nominal defendant.

Paul Makumbi, in his affidavit in support of the application, avers that the Applicants had brought the action in the main suit to safeguard, protect the interests of the 4<sup>th</sup> Respondent in the suit land. That the Applicants had entered into a Memorandum of Understanding with the 2<sup>nd</sup> Respondent Company to set up a joint venture company being the 4<sup>th</sup> Respondent. The Agreement, annexure P1, shows that the 2<sup>nd</sup> Respondent was the registered proprietor of land described as Block 20 Plot 751, Plot 826, Plot 985, Block 18 Plot 1025 Nateete. The 2<sup>nd</sup> Respondent was to provide and transfer ownership of the above described land and all developments thereon into the names of the 4<sup>th</sup> Respondent Company and for that hold 70% of the business. The Applicants were collectively to contribute Shs410,000,000/= as capital towards the cost of setting up the business and for that hold 30% of the business. Also in the Consent Judgment in CS No. 826 of 2007 the 2<sup>nd</sup> Respondent undertook to handover the certificates of title and possession of the suit property (which also included the property described in the Memorandum of Understanding) to the Applicants and the 4<sup>th</sup> Respondent. The Applicants' case is that in breach of the Memorandum of Understanding and in contempt of the Counsel Judgment the first and the 2<sup>nd</sup> Respondent have not delivered nor transferred the title to the 4<sup>th</sup> Respondent but had fraudulently in concert with the 3<sup>rd</sup> Respondent transferred the suit land to the 3<sup>rd</sup> Respondent. The Applicants contend that the property is likely to be further alienated, disposed of, charged further or sold to a third party or dealt with in a manner prejudicial to the interests of the Applicants and the 4<sup>th</sup> Respondent Company. They further content that there is a real danger of irreparable damage, loss and injury being occasioned to the Applicants and the 4<sup>th</sup> Respondent Company which cannot be atoned for in damages.

The 1<sup>st</sup> Respondent in his affidavit in reply avers that land comprised on Block 20 Plot 914 Nateete and LRV 2209 Folio 12 Lower Naguru were at all material times owned and registered in his names and were never part of the Memorandum of Understanding. He therefore contends that the Applicants have no claim against it.

As already stated herein above the basic objective of a temporary injunction is to protect the Applicants against injury by violation of their right for which they could not be adequately compensated in damages. The evidence before me clearly shows that the Applicants' claim of right or interest in the suit properties is founded on the Memorandum of Understanding and it follows from there into the consent judgment. They have no rights or claim on land outside the Memorandum of Understanding. Therefore the Applicants and the 4<sup>th</sup> Respondent have no protectable rights in the land comprised in Block 20 Plot 914 Nateete and LRV 2209 Folio 12 Lower Naguru.

This application is in respect of land comprised in Kibuga Block 20 Plot 826, Nateete, Kibuga Block 18 Plot 1025 Nateete, Kyadondo Block 20 Plot 757, Nateete, Kibuga Block 20 plot 914, and LRV 2209, Folio 12 Plot 5 Lower Naguru. Of these the only land which is the subject of the Memorandum of Understanding is Block 20 Plots 751, Plot 826 and Plot 985 Nateete and Block 18 Plot 1025 Nateete. The Applicants' and the 4<sup>th</sup> Respondent's claim of interest as delivered from the Memorandum of Understanding is limited to only the land described above. I must also point out that of the land which is the subject of the Memorandum of Understanding the land known as Block 20 Plot 751 and Plot 985 Nateete is not subject of this application. I am however ready to regard or consider Plot 757 in the application as an error or misprint for Plot 751. This leaves Plot 985 Nateete outside the scope of this application.

The Memorandum of Understanding shows that the land to be provided and transferred to the 4<sup>th</sup> Respondent by the 2<sup>nd</sup> Respondent was "for purposes of setting up a bus terminal, shopping arcades and other facilities incidental thereto." The Applicants seek several remedies in the main suit, which include general damages and the following:

- A declaration that the sale of the suit properties is null and void.
- Declaration that the defendants were fraudulent in dealing with the suit properties.

- An order directing the Chief Registrar of Titles to cancel entries upon all the suit properties and to enter the 4<sup>th</sup> Respondent Company's names as registered proprietor; and
- Delivery up all the duplicate certificates of Titles to the 4<sup>th</sup> Respondent.

The above prayers cannot be quantified into monetary terms so as to be adequately compensated by an award of damages. The land, the subject of the Memorandum of Understanding, was for a particular purpose. In *Betuco (U) Ltd and Anor VS Barclays Bank (U) Ltd and Others HCT-00-CC-MA-070-2008*, this court held that location of land is of prime importance. That a Commercial developer has a number of facts peculiar to himself considered before making his choice of location within which to carry out a development. Any developer has non-monetary, sentimental attachments to the property he/she develops. In *Shin Construction Co Ltd Vs Endesha Enterprises Ltd SCCA No 34 of 1992 (1994) IV KALR 54*, Justice Platt held that in a case of disputes over land damages are not usually sufficient as compensation.

The Applicant's interest is not only in the sum of Shs. 410,000,000/= contributed towards the capital of the 4<sup>th</sup> Respondent Company but also the purpose as provided in the Memorandum of Understanding. This was to incorporate the 4<sup>th</sup> Respondent Company and that company to set up and operate a bus terminal at the land described in the Memorandum of Understanding as Block 20 Plot 751, Pot 826 and Plot 985, Block 18 1025 Nateete. The 4<sup>th</sup> Respondent Company was also to be incorporated to acquire ownership of the said land and operate at that location. Failure to achieve that purpose cannot be adequately compensated for in damages.

Considering all the above I find that the Applicants have satisfied the condition of irreparable damage with respect to the land which is the subject of the Memorandum of Understanding.

As to the balance of convenience Court should consider the interest of the respective parties. The 3<sup>rd</sup> Respondent claims to have bought all the properties which are the subject of this application from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Further that it is currently the registered proprietor thereof, a fact not disputed by any of the other parties. Therefore the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot be inconvenienced if a temporary injunction was to issue and they succeed in the main suit. As between the Applicants and the 3<sup>rd</sup> Respondent a temporary injunction will only temporarily restrict the 3<sup>rd</sup> Respondent's disposal, alienation, charging or dealing with the land.

As to 4<sup>th</sup> Respondent Company there is the risk of transfer of the land to another party who might enjoy the protection available to an innocent purchaser for value. In such eventuality and the Applicants happen to succeed in the main suit the Applicants and the 4<sup>th</sup> Respondent stand to have already lost the objective of the venture under the Memorandum of understanding. In the circumstances I find the balance of convenience in favour of the Applicants.

In light of all the above this application is granted and it is hereby ordered that a temporary injunction doth issue against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents, their agents, servants or those claiming under them, jointly and severally restraining them from disposing of, alienating, charging or in any way dealing with land comprised in Block 20 Plot 751 and 826 Nateete and Block 18 Plot 1025 Nateete until the determination of Civil Suit No. 70 of 2009. The order as to costs in the main suit shall bind the costs of this application.

Hon. Mr. Justice Lameck N. Mukasa

**Judge**

Commercial Court Division

30<sup>th</sup> October, 2009