

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

HCT-00-CC-CS-0714-2012

PETER BABIGAMBA .....PLAINTIFF

**VERSUS**

KAPKWATA WOOD WORKS LIMITED ..... DEFENDANT

BEFORE HON. MR. JUSTICE MASALU W. MUSENE

**RULING:**

The Applicant, Peter Bibangana brought this application by chamber summons under 0.41 rules 1, 2 and 9 of the Civil Procedure rules seeking for an order of temporary injunction. The Respondent is Kapkwata Wood Works Ltd.

At the hearing, the Applicant was represented by Mr. Ojambo, while Mr. Paul Kutesa represented the respondent. The Order of temporary injunction sought arises from Civil Suit No 0467 of 2012, whereby the Applicant has sued the Respondent, Kapkwata Wood Works Ltd and two others, Stanbic Bank Ltd. and Armstrong auctioneers and Court Bailiffs. The Temporary injunction is to issue against the Respondent, its agents, servants and / or any person acting for and on behalf of the Respondent or in its name, prohibiting and or restraining the Respondents, its agents servants or any other persons acting on its behalf from selling, alienating transferring ownership and further charging or mortgaging the property comprised in Kyadondo Block 245 Plot no 70 and 3789 till the hearing and determination of Civil Suit No 467 of 2012.

Six grounds are listed in the Notice of motion but elaborated in the affidavit of Peter Babigambi, the Applicant. The Respondent also filed an affidavit in reply sworn by Mr. Kwizera Jimmy, its managing director/Chief Executive. The brief submissions by Mr Ojambo for the Applicant were that the applicant is the immediate previous Registered Proprietor of the suit property, having purchased the same from Mersas Till Party Development Ltd.

He added that the Applicant has filed **Civil Suit No 267 of 2012** referred to above, challenging the sale of the land in question by Stanbic Bank to the Respondent Kapkwata Wood Works Ltd. Mr. Ojambo made reference to paragraphs (2) – (9) of the affidavit of the applicant and further paragraph (12) that the sale of the property by Stanbic Bank to the respondent is void as the interim Order issued by the court of Appeal was still in force. Mr. Ojambo further submitted that both Stanbic Bank the seller and the Respondent who bought the disputed property were aware of the risks involved and they knew the sale would be challenged.

Counsel for the applicant referred this court annexure “J” to the supporting affidavit which was to the effect that in case of Frustration of the sale to the respondent, the Bank would refund the total Sale amount. He therefore submitted that the Respondent was not a bonafide purchaser and that those facts were not rebutted by the affidavit in reply. Counsel for the Applicant further quoted the case of **Shiv Construction Co. Ltd. Vs Endesha Enterprises Ltd, Supreme Court Civil Appeal No 34 of 1992**, and submitted that damages are not usually sufficient in land case for purposed of compensation, and that the applicant will suffer irreparable damages, hence the need to grant the Temporary Injunction.

He added that the applicant was informed that the property was up for sale. Counsel for the Applicant cited paragraph (15) of the affidavit in support which stated as follows:

**“15. That I have been contacted and advised by one Robert Kalanzi, a Property Broker who is personally known to me that the property is up for sale.”**

Mr. Ojambo for the Applicant concluded that this was a proper case for grant to an injunction since the main suit is pending before this court and is challenging the title of the Respondent.

In reply, Mr. Kuteesa for the Respondent opposed the application and referred this court to the affidavit in reply sworn by the managing director of the Respondent on 7<sup>th</sup> January 2013. Counsel for the Respondent submitted that the purpose of an injunction is to preserve the status quo till the case is finally determined. He added that Applicant’s Counsel had not shown the status quo to be preserved as the circumstances of the case are not of the case are not threatening to change the status quo. He challenged the submission of counsel for the Applicant as merely speculative and based on conjecture.

Mr. Kuteesa further submitted that the current position of the property in dispute is that the respondent is the registered proprietor as per Annexure “B” and “C” to the affidavit in reply. He added that there was nothing in the Application or in the supporting affidavit to show the intention of creation of a further charge or security apart from paragraph (15) of the supporting affidavit where it is stated they have heard from one Robert Kalanzi, a property broker.

Counsel for the Respondent submitted that was hearsay evidence as the alleged Robert Kalanzi had not sworn an affidavit even to the effect that he is a property broker. He therefore challenged the statements of the Applicant as hearsay and inadmissible. Counsel for the Respondent further submitted that even between 3<sup>rd</sup>. August 2012 to 28/11/2012 when the interim order was issued by the Registrar, the Respondent could have disposed off the property, in question as he is the registered proprietor but he did not.

Mr. Kuteesa for the Respondent further submitted that no prima facie case had been disclosed to warrant the grant of temporary injunction as the Respondent is a Bona Fide Purchaser for value of the suit property. And that in the absence of Fraud on the part of the Respondent, the Respondent is protected under **S.176 of the Registration of Titles Act.**

Counsel for the Respondent challenged annextures “I” and “J” to the supporting affidavit by the Applicant as they did not show that the Respondent was aware of any imperfection in the sale for the disputed property to him. And that Respondent was not a party to the alleged orders made by the court of appeal. He submitted that annexure “H” does not stop a sale at all.

It was also the submission of counsel for the Respondent that the Applicant has not proved that if the Order is not granted , he will suffer irreparable damage or injury as a mere allegation in paragraph (17) of the affidavit in support was not enough. Mr Kutesa further added that since the market value of the property is known and can easily be ascertained at whatever point in time, then the Applicant can be compensated in damages in the event he succeeded. He also submitted that even in

the main suit pending before this court, the Applicant has sought in the alternative the remedy of compensation, and has therefore failed to prove that he would suffer irreparable damage.

Counsel for the Respondent concluded that even the balance of the convenience followed the Respondent who is the Registered proprietor, after having purchased the suit property in an auction.

Having considered the submissions on both sides as summaries above, I now proceed to consider and determine whether this is a proper application for grant of a temporary injunction. As correctly submitted by both Advocates on either side, it is now settled principle of law that the purpose of a temporary injunction is to preserve the status quo with the question to be investigated in the suit are finally disposed off. See. **Kiyimba Kagwa Vs Abdu Nasser Katende (1995) HCB 43.**

As far as this application is concerned, the status quo of the property in dispute is that the Respondent is the Registered proprietor. And as averred in paragraph (13) of the affidavit in reply, there is mortgage on the same. For avoidance of doubt, paragraph (13) of the affidavit in reply by Kwizera Jimmy states:-

**“13 that the sum of Ushs1,320,000,00 Uganda shilling three billion three hundred twenty million only) paid by the Respondent for which was used to purchase the property was obtained by way of a loan facility form Crane Bank Uganda Limited”**

So the fact that the Respondent is the Registered proprietor of the disputed property which is conceded to by Counsel for the applicant, is the current status to

be maintained. Secondly, and as averred in paragraph (14) of the affidavit in reply, since there is a mortgage on the suit property which is registered on the certificate of Title, that is the status quo which cannot change till the loan is cleared. There is no way one can sell or transfer or alienate property where there is an encumbrance. I therefore reject the submissions by Counsel for the Applicant that the threat to sell or alienate the property is inherent.

The other principles for grant of a temporary injunction summarised in the case of **Kiyimba Kagwa Vs Katende (supra)** are that the Applicant must show a prima facie case with a probability of success. In the case of **American Cynamid Company Ltd Vs Ethicon (1975) All E.R. 504**, Lord Diplock stated that all the plaintiff need to show by his action is that there are serious questions to be tried and that the action is not Frivolous or vexatious.

I have read through the pleadings on record, and particularly paragraphs (5), (6) and (7) of the plaint, and the replies there to in the Written Statement of Defence, paragraphs 4, 5, 7, and 8. I find no difficulty in holding that triable issues are disclosed, hence a Prima Facie case. However, the other test to consider is whether the Applicant will suffer irreparable damages if the injunction is not granted. As already noted, Mr. Paul Kuteesa for the respondent's submissions are that the Applicant has not proved or demonstrated that he will suffer irreparable damage if the Order of injunction is not granted. This Court is persuaded by that argument of counsel for the Respondent because a mere averment that one will suffer irreparable damage as stated in paragraph (17) of the supporting affidavit is not enough.

Secondly, whereas the suit is for cancellation of the Respondent's title and reinstate the plaintiff/applicant names, the plaintiff has under paragraph (8) of the plaint in the alternative prayed for payment of 3,000,000,000/= (three billion) shillings on account of the illegal/unlawful sale of the suit property.

So where the Applicant has prayed for an alternative remedy of compensation, and even stated the amount in figures, the same Applicant cannot turn round to argue that he will suffer irreparable damage. In my humble view, that is demonstration of double standards which this court cannot allow. In fact Applications for Temporary injunctions should not be sought as a matter of course but the applicant must demonstrate that it is necessary to grant the same.

Before I take leave of this point, I refer to the case of **Maithya Vs Housing Finance Co. Of Kenya & another** (2003) I.E.A. 133, where it was held that before lending, many lenders, Banks, and mortgage houses insists on valuations being done so as to establish, forced sale values and market values of the properties to constitute the securities for the borrowing or credit facilities. And that the lending is in most cases given on the basis of the commercial value of the securities or as a percentage of the value. So I entirely agree with that holding of the Kenya High Court and add that such commercial values are established by qualified valuers on the instructions of borrowers or the banks. There is no doubt therefore that before Crane Bank Uganda Limited gave out the sum of 1,320,000,000/= to the Respondent for purposes of purchasing the disputed property, valuation of the same was or must have been done. In such circumstances, this court is inclined to hold that damages can be adequate remedy, hence no irreparable damage. And Counsel for the Applicant has not suggested that the Respondent cannot pay

damages if it becomes necessary and if it is so ordered by court at the conclusion of this case.

Finally, and in view of what I have outlined above, I find and hold that the balance of convenience does tilt very heavily in favour of the Respondent. The Applicant will stand to lose nothing if the temporary injunction is not granted since the property in question is under mortgage of a huge sum of money (1,320,000,000/=) which will take time to be cleared. And by then the substantive suit will have been heard. In fact a hearing date for the substantive suit is going to be given. Secondly, and as already stated above it has not been shown that the Applicant will suffer irreparable damages, on the contrary, the applicant can be paid compensation which he himself has prayed for in the alternative in the plaint.

In conclusion therefore, and in view of the reasons set out above, the Application is hereby dismissed. And since the substantive suit is to be set down for hearing immediately, then I order that costs of this application be in the cause.

JUDGE

25.1.2013

Mr. Ojambo Robert for the Applicant present

Mr. Paul Kuteesa for the Respondent present

Managing Director of Respondent

Ojambo, Court Clerk present

Court ruling read out in chambers



25/01/2013

M. W. Musene  
JUDGE