

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**  
**AT KAMPALA**  
**(COMMERCIAL COURT DIVISION)**  
**CIVIL APPEAL NO.18 OF 2013**

*(Arising from Miscellaneous Application No.490 of 2013)*

*(Arising from Civil Suit No. 210 of 2012)*

**KCB BANK UGANDA LIMITED:.....APPELLANT**

**VERSUS**

1. **PEARL IMPEX (U) LIMITED**
2. **PEARL MIXED FARM UGANDA LIMITED**
3. **MUBANGIZI EDISON KWESIGA:.....RESPONDENTS**

**JUDGMENT**

This appeal was brought under section 98 of the Civil Procedure Act (CPA) and Order 50 r 7 of the Civil Procedure Rules (CPR) against the decision of the learned registrar to issue an interim order in Misc. Application No. 490 of 2013. The appellants now seek orders of this court to set aside that interim order and to provide for costs of the appeal.

There were five grounds of appeal set out in the Notice of Motion and expounded in the affidavit in support of Patrick Anok, the appellant's Legal Manager. The grounds are:

1. That the learned registrar erred in law when he entertained Misc. Application No. 490 of 2013 for an interim order when there was no pending main application for a temporary injunction.
2. That the learned registrar erred in law and in fact when he failed/refused to make a ruling on the preliminary objection raised by counsel for the appellant as to the competence of Misc. Application No. 490 of 2013 before determining the application on its merits.
3. That the learned registrar erred in law and in fact when he proceeded to grant an interim order in Misc. Application No. 490 of 2013 without hearing counsel for the appellant/respondent on the merits of the application.
4. That the learned registrar erred in law and in fact when he granted an interim order that lasts until the main suit HCCS No. 210 OF 2012 is disposed of.
5. That it is just and equitable that this appeal be allowed.

The background to this appeal is that on the 31<sup>st</sup> of May 2012 the respondents filed Civil Suit No. 210 of 2012 against the appellant wherein they sought declarations *inter alia*, that the intended sale by public auction of among other properties, the 2<sup>nd</sup> respondent's properties comprised in LRV 4038 Folio 16 Ranch No. 9B3 Masaka Ranching Scheme and LRV 2584 Folio 25 Plot 5 Kabula Rakai (herein after referred to as "the suit properties") is unconscionable, irregular and illegal as it is being done in flagrant breach of the law and it is tainted with fraud.

The Civil Suit was fixed for hearing but did not take off as the trial judge was out of the station. At the time of filing of the suit the respondents also filed Misc. Application No. 298 of 2012 for an interim order and Misc. Application No. 297 of 2012 for a temporary injunction to restrain the appellant from disposing off among others the suit properties.

When the application for interim order came up for hearing on the 5<sup>th</sup> June 2012, the appellant and respondents recorded before the learned registrar a partial consent to clear the 2<sup>nd</sup> respondent's outstanding interest arrears at that time amounting to Ug. Shs. 180,000,000/= by selling off some of the securities mortgaged by the 1<sup>st</sup> respondent, which was done.

Efforts towards mediation of the suit were unsuccessful upon which the suit was fixed for hearing. When the suit was still pending hearing the appellant advertised the suit property described herein above for sale in the New Vision newspaper of Tuesday the 21<sup>st</sup> of May 2013 indicating that the sale would be conducted on the 21<sup>st</sup> of June 2013 at 10:00am.

The above sequence of events prompted the respondent to file Misc. Application No. 490 of 2013 on 18<sup>th</sup> June 2013 seeking that the Court invokes its inherent powers to prevent abuse of court process which the appellant was doing by advertising the sale of suit properties which were the subject of the main suit. The registrar in his ruling dated the 20<sup>th</sup> of June 2013 issued an interim order staying the sale of the suit properties until final disposal of Civil Suit No. 210 of 2012 or until the trial judge directs otherwise and hence this appeal.

When this appeal came up for hearing the appellant was represented by Mr. Richard Obonyo while the respondents were represented by Mr. Moses Byaruhanga who was holding brief for Mr. Emoru Emmanuel. Both counsel agreed to file written submissions which they did and have been considered in this judgment.

In his written submission with regard to the first ground of appeal, counsel for the appellant argued that interim orders or injunctions should arise from or be anchored on a subsisting application for a temporary injunction which in turn is anchored on a subsisting suit but this was not the case in this matter. He referred to the ruling of this Court in the case of ***Soroti Municipal Council vs Pal Agencies (U) Ltd Misc. Application No. 181 of 2012 (Arising from Misc. Application No. 326 of 2009, all arising from Civil Suit No. 221 of 2008)*** wherein it was held that an interim injunction is discretionary order issued by Court for a short time, and usually to a particular date pending the determination of the main application.

As far as the second ground of appeal is concerned, counsel for the appellant argued that other than the preliminary objections raised before the learned registrar the appellant did not address court on the merits of the application and yet the learned registrar in his ruling disposed of the matters rather than disposing of only the preliminary objection raised by the appellant. Counsel for the appellant cited the case of ***Assumpta Sebunya vs Kyomukama James Misc Cause No. 55 of 2012***

for the position that once a preliminary point of law is raised by a party, the Court has to resolve that point of law first in a ruling or judgment.

On the third ground of appeal, counsel for the appellant argued that by granting the interim order in Misc. Application No. 490 of 2013 without hearing counsel for the appellant on the merits of that application, the appellant's right to a hearing was breached, contrary to the well known principles of natural justice that were expounded in cases such as ***Rose Mary Nalwadda vs Uganda Aids Commission, Misc. Cause No. 45 of 2010; Charles H. Twagira vs Uganda SC Criminal Appeal No. 27 of 2003; Ridge vs Baldwin & Other [1964] ac 40 AND Eng. Pascal R. Gakyaro vs Civil Aviation Authority CACA No. 60 of 2006.***

In his argument on the fourth ground of appeal, counsel for the appellant submitted that the learned registrar erred in granting an interim order to last until the disposal of the main suit contrary to the principles of law governing interim orders as upheld in the case of ***Soroti Municipal Council vs Pal Agencies (U) Ltd (supra)***.

Lastly, it was the contention of the appellant that it is just and equitable for the appeal to be allowed because the appellant was not heard on merits of the application leading to the impugned interim order and secondly that the interim order has an unreasonable long life span having been granted until disposal of the main suit.

In reply counsel for the respondents argued grounds 1, 2, 3 and 4 jointly and submitted that Order 50 rule 3 of the CPR empowers the learned registrar to hear interlocutory applications such as Misc. Application No. 490 of 2013. He submitted that the learned registrar exercised the inherent powers vested upon him by section 98 of the CPA and section 33 of the Judicature Act judiciously and as such did not err in law and in fact as alleged.

It was further argued for the respondents that the entire CPA and CPR do not support the proposition by the appellant that for one to file an application for interim order there must be a substantive application. Counsel for the respondent contended that the authority of ***Soroti Municipal Council vs Pal Agencies (U) Ltd (supra)*** relied upon by the appellants was cited out of context since the application

arose out of a main suit which was properly before the Court rather than arising out of a main application that had not been signed, sealed and dated.

Additionally, it was submitted for the respondents that there were no allegations that the registrar did not exercise his powers judiciously and yet discretionary power can only be challenged when they are not exercised judiciously as was held in the case of ***Commodity Export International & Anor vs MKM Trading Company Ltd & Anor CACA No. 96 of 2005.***

Furthermore, it was the contention of the respondents that the court ruled on both the preliminary objection and the merits by granting the interim order. As such the respondent argued that the case of ***Assumpta Sebunya vs Kyomukama James (Supra)*** relied on by the appellant was cited out of context.

Counsel for the respondents also submitted that the appellant was given a right to a fair hearing as it was duly served with the application in Misc. Application No. 490 of 2013; it filed an affidavit in reply on 19<sup>th</sup> June 2013 and was represented by counsel during the hearing of the application. He contended that there is no allegation that the Court was partial or lacked independence. According to the respondent there is no allegation that the appellant wanted to cross examine witnesses and was denied or that he was denied the chance to call witnesses and therefore the tenets of a fair hearing were all met in the Court of first instance.

It was noted that the import of the registrar's ruling was that the interim order lasts until disposal of the main suit or until the trial judge directs otherwise and therefore the existence of the interim order could be brought to the attention of the trial judge at any time for her to make appropriate directions on the same.

It was the respondent's submission that it is not just and equitable that the appeal succeeds since the appellant acted in utter abuse of court process when it advertised the suit properties for sale before determination of the main suit which prompted the issuance of the interim order. While relying on ***D.J Bakibinga's Book titled "Equity and Trusts in Uganda"*** the respondent argued that the applicant did not come to court with clean hands since it behaved dishonestly and unfairly with regard to advertising property that was subject of the main suit.

In rejoinder, counsel for the appellant reiterated his earlier submissions but added that inherent powers of Court cannot be used in violation of the law even as he conceded that there is no law in the current CPR providing for interim orders. He contended that the respondent's counsel did not cite how the appellant acted dishonestly or unfairly.

I have carefully considered the submissions of both counsel as well as the provisions of the laws referred to together with the authorities relied upon. As regards the 1<sup>st</sup> ground of the appeal, Misc. Application No. 490 of 2013 was brought under Section 98 of the CPA as well section 33 of the Judicature Act. Section 98 of the CPA preserves the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Meanwhile section 33 of the Judicature Act gives the High Court power to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.

Misc. Application No. 490 of 2013 was brought to invoke the inherent powers of court to prevent abuse of the court process. It is indeed true that there is no provision for interim order under our CPA and CPR but the court now only invokes its inherent power to issue the same in serious and deserving cases for the ends of justice. Case law has also clarified that for an application for an interim order to be valid there must be a main application for a temporary injunction which has been signed by the judge or such officer as he or she appoints and sealed with the seal of the court within the meaning of Order 5 rule 1 (5) of the CPR. See *Hussein Badda v Iganga District Land Board and Others Misc. Applic. No. 479 of 2011*, *Nakito Brothers Ltd v Katumba [1983] HCB 70* and *Soroti Municipal Council vs Pal Agencies (U) Ltd (supra)*.

The rationale for that position as stated by Arach-Amoko, JA in *Hon. Anifa Bangirana Kawooya v Attorney General & another Misc. Applic. No. 46 of 2010 [2010] UGCC 8*, is that an interim injunction is a discretionary order issued by

court for a short time, and usually to a particular date pending the determination of the main application.

In the instant case there was no main application for a temporary injunction and that is the reason why at the hearing of application No. 490 of 2013 counsel for the appellant raised a preliminary objection on its competence. The registrar heard the arguments of both counsel and stated as follows in his ruling:

*“I have listened to both counsels on the Preliminary Objection raised by counsel for the Respondent. It is not denied by counsel for Respondent that the property advertised for sale on the new vision newspaper published on the 21<sup>st</sup>/05/2013 is part of the suit property. The sale according to the advert is due tomorrow 21/06/2013....It is the duty of this court to prevent miscarriage of justice at any one time as the suit is pending hearing. **I see there is eminent danger of the suit being rendered nugatory if part of the suit property is sold tomorrow. “Invoking inherent powers of this court, an order is issued preventing the sale and or any transaction that shall affect the property comprised in LRV 4038, Folio 16 9B3 – Masaka Ranching scheme and LRV 2584 Folio 25 Plot 5 Kabula Rakai due tomorrow the 21/06/2013 till disposal of Civil Suit No. 210/12 or until the trial judge directs otherwise...”** (Emphasis added)*

From the ruling it is clear that the registrar considered the preliminary objection that there was no main application for a temporary injunction but went ahead to issue an interim order with a view of preserving the status quo. Under the normal circumstances that would be irregular because an application for an interim order must be anchored on a valid main application for a temporary injunction. The applicants in that application have not explained why they did not apply for a temporary injunction in addition to the interim order.

Be that as it may, I must point out that the requirement for a valid application for a temporary injunction does not take away the inherent power of Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the

process of the court. Each case should be determined according to its own facts and circumstances. In the case of *National Union of Clerical, Commercial and Technical Employees vs National Insurance Corp. CA No. 17 of 1993 (Supreme Court)* it was held that the question whether the Court should invoke its inherent powers in any given case is a matter of the Court's discretion to be exercised judicially and the availability of an alternative remedy or specific provisions is only one of the factors to be taken into account but does not limit or remove the Court's jurisdiction.

In the instant case the registrar in granting the interim order was persuaded by the fact that the property was due to be sold the following day and court needed to do something about it for the ends of substantive justice to be met. I believe any other court would have been inclined to do so in the peculiar circumstances of the case. I therefore find that much as there was no pending main application the registrar judiciously exercised his discretion under section 98 of the CPA for the ends of justice. It would have been unfortunate if Court had merely folded its hands and allowed the sale to proceed on the ground that its hands were tied by the requirement for an application for a temporary injunction. I must however, hasten to add that this matter should be treated as an exception to the general rule and not a departure from the established practice. For the above reasons, the 1<sup>st</sup> ground of this appeal must fail.

As regards the 2<sup>nd</sup> ground of appeal, it is my finding that discerning from the ruling the registrar overruled the preliminary objection by implication when he granted the interim order. I therefore find no merit on this ground of appeal and it must also fail.

On the 3<sup>rd</sup> ground of appeal, it was the duty of counsel for the applicant to argue his client's case in the alternative but without prejudice to the preliminary objection he had raised especially after counsel for the applicant submitted on the merits of the application. Since he opted not to do so he only has himself to blame. In any event, I do not think his argument on the merits of the application would have changed the findings and conclusion of the registrar in view of the fact that the affidavit in reply on record had clearly stated the grounds for objecting the application given that the arguments of counsel would have been based on those very grounds. What



persuaded the registrar to grant the interim order was the eminent danger of the suit being rendered nugatory if part of the suit property was sold the following day as stated in his ruling. I cannot therefore fault the registrar because it was the choice of counsel for the applicant not to argue the merits of the application. This ground of appeal also fails.

The 4<sup>th</sup> ground of appeal faults the registrar for granting an interim order which lasts until the disposal of the main suit contrary to the principles of law governing interim orders. The ruling of the registrar quoted above gave two options, namely; (1) till disposal of Civil Suit No. 210/12 or (2) until the trial judge directs otherwise. It was therefore the duty of counsel for the parties and more especially counsel for the aggrieved party to seek the direction of this Court on the interim order instead of bringing this appeal. I believe the matter would have been dealt with more expeditiously that way and multiplicity of proceedings avoided. Besides, the hearing of the main suit would have progressed by now. While it would be wrong to issue an interim order till the main suit is disposed of, I find that in this case there was an option to seek direction from Court which the parties failed to exercise. For that reason I also do not find merit in the 4<sup>th</sup> ground of appeal.

Finally on the last ground of appeal which simply states that it is just and equitable that this appeal be allowed, it is my firm view based on the above findings on grounds 1-4 that this appeal should not be allowed because the decision of the registrar was judiciously made in the circumstances of this case and in exercise of the inherent power of court under section 98 of the CPA.

In the result, all the grounds of this appeal must fail and the appeal is accordingly dismissed with no order as to costs because if the respondents had followed the established practice of filing an application for a temporary injunction together with the one for interim order this appeal would have been avoided.

Before I take leave of this matter and for avoidance of any doubt, I direct that the status quo be maintained until the main suit is heard and determined.

I so order.

Dated this 25<sup>th</sup> day of June 2014.

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 3.00pm in the presence of Mr. Richard Obonyo for the appellant whose Company Secretary Mr. Patrick Anok was present and Mr. Emoru Emmanuel for the respondent.

**JUDGE**

25/06/14