THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF KAMPALA

[COMMERCIAL DIVISION]

TEMPORARY INJUNCTION APPEAL NO. 452 OF 2021

(ARISING FROM M.A No. 1100 of 2020)

(ARISING FROM CIVIL SUIT No. 984 OF 2020)

SETTABA FULUGENSIO:::APPELLANT

VERSUS

1. **KIZITO MUSOKE**
2. **HAJJI KASULE ZUBAYIRI::RESPONDENTS**

BEFORE: HON. JUSTICE DUNCAN GASWAGA

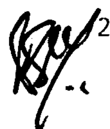
RULING

[1] This is a ruling on an application brought under Order 50 rule 8 for orders that; the learned Deputy Registrar erred in law and fact when she did not make a finding on the appellant's preliminary objection; that the respondent's affidavits are null and void or defective for lack of a proper jurat, thus occasioning miscarriage of justice to the appellant; the learned Deputy Registrar erred in law and fact when she held that there was no prayer for a permanent injunction in the appellant's main suit and dismissed the appellant's application for temporary injunction; the learned Deputy Registrar erred in law and fact when she held that the appellant's prayers in the main suit are compensatory in nature. Furthermore, that this court be pleased to (a)

strike out the respondent's affidavits;(b) find that the appellant substantiated all grounds for a temporary injunction and thus set aside the orders of the learned Deputy Registrar and grant the temporary injunction and (c) costs of the temporary injunction application be provided for.

[2] The grounds for this application were expounded on in the affidavit of **Settaba Fulugensio** filed in support of the application and these are that; the appellant filed Civil Suit No. 984 of 2020 against the Respondents in this court; thereafter, the appellant filed an application for a temporary injunction vide M.A No. 1100 of 2020 which was dismissed by the Deputy Registrar on a preliminary objection that there is no prayer for a permanent injunction in the main suit on the 29/03/2021;the learned Registrar further held that the appellant's prayers in the main suit are compensatory in nature; the appellant contends that there is a prayer for a permanent injunction in the main suit under prayer (b); the appellant further contends that the learned Deputy Registrar did not make a finding on the appellant's preliminary objection that the respondent's affidavits are null and void or defective for lack of a jurat or proper jurat; the appellant contends that he substantiated all grounds for grant of a temporary injunction and that this appeal is brought in the interest of justice.

[3] The respondent opposed this application and stated that the present application is wrongly before this court; that prayer for a permanent injunction in the plaint is a deliberate falsehood and should be struck out and/or treated with the contempt it deserves; that the prayers sought in the plaint are strictly an order for compensation; that the



learned Registrar omitted to rule on the preliminary objection because it was inconsequential because the Registrar had already resolved to dismiss the application based on the respondent's preliminary objection and that with or without an affidavit in reply, matters of law can be raised before court.

[4] The following grounds of appeal were to be determined;

(a) The learned Deputy Registrar erred in law and fact when she did not make a finding on the appellant's preliminary objection that the respondent's affidavits are null and void or defective for lack of a proper jurat, thus occasioning miscarriage of justice

(b) The learned Deputy Registrar erred in law and fact when she held that there was no prayer for a permanent injunction in the appellant's main suit and dismissed the applicant's application for a temporary injunction

(c) The learned Deputy Registrar erred in law and fact when she held that the appellant's prayers in the main suit are compensatory in nature.

[5] The parties proceeded by way of written submissions. The respondent raised two preliminary objections which I find prudent to start with.

[6] It was submitted for the respondent that the Civil Suit from which M.A No.1100 of 2020 and this instant appeal arise abated in accordance with Order 11A rule 1(2) CPR as amended since the plaintiff did not take out summons for directions within twenty eight days as required.

See also **Carlton Douglas Kasirye Vs Sheena Ahumuza Bageine a.k.a Tasha HCMA No. 150 of 2020.** That it is approximately five months since the date the defendant filed the written statement of defence and the plaintiff has still not taken out summons for direction.

[7] In response thereof, the appellant submitted that the last reply in this suit which is the written statement of defence is not complete because the respondent's written statement of defence and counterclaim filed on 09/12/2020 was never served on the appellant. Counsel relied also on **Carlton Douglas Kasirye Vs Sheena Ahumuza Bageine a.k.a Tasha** (supra). That as such the respondent's preliminary objection cannot stand as there is no proper written statement of defence of the defendants on court record since they did not complete the process of filing the same within 15 days from the date the summons to file a defence were served on them.

[8] In order for us to understand this matter better, I find it imperative to bring into purview all the relevant legal provisions:

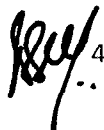
[9] **Order 11 (A) 1(2) CPR** is to the effect that;

> *"Where a suit has been instituted by way of a plaint, the plaintiff shall take out summons for direction within 28 days from the date of the last reply or rejoinder referred to in rule 18(5) of Order VIII of these rules."*

Order 11(A) 1 (6) CPR is to the effect that;

> *"If the plaintiff does not take out a summons for directions in accordance with sub rules (2) or (6), the suit shall abate."*

[10] Order 8 Rule 1 (2) of the CPR provides that –



Where a defendant has been served with a summons in the form provided by rule 1(1)(a) of Order V of these Rules, he or she shall, unless some other or further order is made by the court, file his or her defence within fifteen days after service of the summons.

[11] Order 8 Rule 19 of the CPR provides –

Filing of defence

Subject to rule 8 of this Order, a defendant shall file his or her defence and either party shall file any pleading subsequent to the filing of the defence by delivering the defence or other pleading to the court for placing upon the record and by delivering a duplicate of the defence or other pleading at the address for service of the opposite party

[12] Order 9 Rule 1 (1) of the CPR provides that;

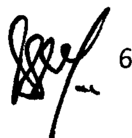
Mode of filing defence

"A defendant on or before the day fixed in the summons for him or her to file a defence shall file the defence by delivering to the proper officer a defence in writing dated on the day of its filing, and containing the name of the defendant's advocate, or stating that the defendant defends in person and also the defendant's address for service. In such case he or she shall at the same time deliver to the officer a copy of the defence, which the officer shall seal with the official seal, showing the date on which it is sealed, and then return it to the person filing the defence, and the copy of the defence so sealed shall be a certificate that the defence was filed on the day indicated by the seal."

[13] The process of filing a defence has further been discussed in a number of decisions. In **<u>Simon Tendo Kabenge Vs Barclays Bank (U) Ltd and Anor SCCA No. 17 of 2015</u>** it was held by the Supreme Court that;

"... the law requires that a defendant files his/her defence within 15 days from the date of receipt of summons by delivering copies of the WSD to a proper officer of court who shall then sign and affix an official seal on the documents. After the seal is fixed, a copy of the WSD shall be served onto the opposite party. It therefore follows that filing involves two steps which are placing the WSD on court record and further serving the same to the opposite party."

[14] In the instant case, the appellant states that the respondent did not fully complete the process for filing a defence and this explains the reason as to why summons for directions were not extracted. This answers to the preliminary objection raised by the appellant however the same was not in any way contested by the respondent. In the circumstances therefore, in the absence of any evidence contradicting the appellant's reply, I am inclined to agree with the appellant considering that the extraction of the summons for directions was supposed to follow proper service of the written statement of defence which wasn't done by the respondent. This is what was also stated by the court in Carlton Douglas (Supra). In the same case, the court went on to observe, and I believe rightly so, that the Amendment Rules referred to are still relatively new and that they had introduced radical positions that would require a reasonable period of transition. That where a breach or an omission based on their application is not of utmost substance, as I feel is the situation herein where the case has even proceeded beyond the filing of pleadings without any injustice being caused, so to speak, the court should be hesitant to apply them with full force. This preliminary objection is hereby overruled.



Second Preliminary Objection

[15] It was submitted for the respondent that the affidavit in support of the application is fatally defective for offending the **Illiterates Protection Act, Cap 78.** That Section 2 and 3 of the above mentioned Act require in mandatory terms that any person writing a document on behalf of or in the name of any illiterate should state his/her true and full address and further that Section 4 thereof creates a strict liability offence and penalty against a person who refuses to comply. See **Stanbic Bank (U) Ltd Vs Ssenyonjo Moses CACA No. 147 of 2015.** That the affidavit in support of the appeal was sworn by Settaba Fulugensio who is apparently illiterate in the English language but the jurat offends the Act for absence of the address of the translator. See **Mohammed Majambere Vs Bakhresa Khalil HCMA No.727 of 2011.**

[16] In response thereof it was submitted by the appellant that the jurat has the full address of the translator to wit; LUHOM Advocates, 6th Floor King Fahd, Plot 52 Kampala Road, P.O Box 26687, Kampala, luhomadvocates@gmail,com , tel 0707-463012. That the case of **Stanbic Bank (U) Ltd Vs Ssenyonjo Moses** (supra) is distinguishable since in the said case there was no certificate of translation attached to the contract. Further that the case of **Mohammed Majambere** (supra) is inapplicable in the circumstances of this case.

[17] The form of the jurat is shown in the Oaths Act, cap 19.

Form of jurat (where the commissioner has read the affidavit to deponent)

Sworn at _______________ in the district of _____________________________ this ____________ day of _______________, 20_____________, before me, I having first truly, distinctly and audibly read over the contents of this affidavit to the deponent he (or she) being blind or illiterate and explained the nature and contents of the exhibits referred to in the affidavit in the _______________ language. The deponent appeared perfectly to understand the same and made his (or her) mark (or signature) thereto in my presence.

Commissioner for Oaths

[18] I have perused the record and it is clear that at the end of the affidavit deponed by the appellant, the translator stated that she had read out the contents of the affidavit in support of the appeal to the appellant who had understood it and thereafter appended his signature thereon. Immediately after this, the address is indicated. From the format in which the document was made, it is evident that the translation was done from the same place where the affidavit was drawn. In fact that address is very apparent on the face of the document in question and a mere glance at it would leave no one in doubt that the translator's address was properly stated. As such, I am satisfied that the address stated therein is the address of the person who translated the affidavit to the appellant, who is illiterate in the English language. In the circumstances therefore, this preliminary objection is also overruled.

[19] I shall now turn to the merits of the appeal. The order of submission was as follows; the appellant started with ground 2, followed by ground 1 and concluded with a submission on ground 3. I shall follow the same order while resolving the issues or grounds.

Ground two: The learned Registrar erred in law and fact when she held that there was no prayer for a permanent injunction in the appellant's main suit and dismissed the appellant's application for a temporary injunction.

[20] It was submitted for the appellant that the Learned Registrar misapplied the principle that a temporary injunction cannot be granted to a party who has not sought a permanent injunction in the main suit. Basing on the case of **Miao Huxian Vs Crane Bank Ltd and Anor HCMA NO. 76 OF 2016**,it was submitted that since the appellant's application for a temporary injunction was brought under Order 41 rule (1) CPR, the requirement for a prayer for permanent injunction in the main suit is immaterial as the prayers sought in the main suit are injunctive unlike the cases relied on by the Learned Deputy Registrar to wit; **Nyarukanga Vs Esso Ltd(1992) 1 KARL;UMSC Vs Sheikh Mulumba (1980) HCB 110**; **Twaha Luyimbazi Katongole Vs The Liquidator of Greenland Bank HCMA 1117 of 2000** which were brought under Order 41 rule 2 CPR thus being distinguishable with the applicant's application for a temporary application. It was prayed that court finds for the appellant on this ground.

[21] The respondent submitted that prayer (b) in the main suit (plaint) cannot be said to be a prayer for a permanent injunction. That prayer (b) is an alternative prayer for a license for five years to continue in occupation of the 2nd respondent's land and recover the monies invested. That the appellant's averment in paragraph 5 of his affidavit in support of the appeal that there is a prayer for a permanent injunction in the main suit is a deliberate falsehood and the same should be struck out with costs.

[22] The law on granting of temporary injunctions in Uganda was well settled in the classic case of **E.L.T Kiyimba Kaggwa Versus Haji Abdu Nasser Katende [1985] HCB 43** where **Odoki J** (as he then was) laid down the rules for granting a temporary Injunction; thus:-

> *"The granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of. The conditions for the grant of the interlocutory injunction are; firstly that, the applicant must show a prima facie case with a probability of success. Secondly, such injunction* ***will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.*** *Thirdly, if the Court is in doubt, it would decide an application on the balance of convenience"*

[23] From the above authority, and also a litany of many other decisions, it is apparent that the reason for a temporary injunction is maintaining the status qou until the question in the main suit is finally investigated and determined and the granting of the same is at the discretion of court. On the record it is evident that the application for a temporary injunction was dismissed because there was no prayer for a permanent injunction in the plaint.

[24] I have indeed taken time to carefully study the entire record and the submissions by the Counsel. Basically, the applicant wants a temporary injunction to resist or forestall an eviction that is imminent so that he can continue to occupy the land for another five years and be able to realize his monies invested. (see prayer b of the plaint). Most importantly to note in this whole case is that a temporary

injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. I am of the considered view that the injury the applicant is likely to suffer herein, if at all, is not one that can be termed as irreparable. Indeed the applicant has already computed his loss and put it at Ugx 125,000,000/= (see prayer (a) in the plaint) which he believes could be recovered in five years if he were to continue operating his business in the suit premises. The said loss, damage or injury if suffered can well, properly and adequately be compensated in monetary terms. Besides, some of the structures erected by the appellant seem to have already been destroyed as indicated in photos (annexture c) attached to the appellant's affidavit in rejoinder (para 9). So, even if the temporary injunction were to be granted, it would be an exercise in futility for the appellant to operate in such demolished structures without first having to spend more money on refurbishing them.

[25] The status quo has changed. Moreover, practically the environment under which the business was being operated is now hostile as the relationship between the parties has badly broken down. In short, the appellant has failed to demonstrate that if the temporary injunction is granted he would suffer irreparable loss or damage or injury. As such, the remedy of a temporary injunction would not be available to him. It is however advisable that the appellant better pursues his claim for compensation (main suit) other than seeking to continue holding onto the premises (land) which is admittedly not his and try to recover the money allegedly invested. This ground should therefore fail.

Ground 1: The learned Registrar erred in law and fact when she did not make a finding on the appellant's preliminary objection that the respondent's affidavits are null and void or defective for lack of a proper jurat thus occasioning miscarriage of justice to the appellant.

[26] It was submitted for the appellant that this was a ground the learned Registrar ought to have pronounced herself on in accordance with Order 15 rule 2 CPR by rejecting the respondent's affidavits for lack of a proper jurat. See also Section 3 of the Illiterates Protection Act Cap 78. That both affidavits in reply to the appellant's application for a temporary injunction possess a resemblance of a jurat but the said jurats do not state the name and address of the translators. See **Nakiwala & 2Ors Vs Rwekibira & Anor Civil Suit No. 280 of 2006** pages 14, 15 and 16.

[27] It was submitted for the respondent that the background of this appeal is that on the authority of **Nyarukanga Vs Esso (U) Ltd** the learned Registrar had resolved to dismiss the appellant's application for a temporary injunction for lack of a prayer for a permanent injunction in the main suit. That the respondent had not even filed an affidavit in reply but raised a preliminary objection at the hearing of the application upon which the application was dismissed. That therefore it would be moot and inconsequential to delve into the merits of the application and the propriety of the respondent's pleadings.

[28] **Order 6 rule 28 of the Civil Procedure Rules** is to the effect that;

"Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed off at any time before the hearing."

[29] A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and if which argued as a preliminary point may dispose of the suit. See **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696**. It is further important to note that when a party raises a point of law it is their intention that certain irregularities be heard and consequently straightened out by court. It would therefore be proper that whenever a preliminary objection is raised the court hears and makes a determination on it immediately, or in any case, before proceeding with the matter at hand. However, it is also open to the court, in its wisdom and good sense of judgment, to hear the preliminary objection immediately and reserve its decision thereon until after the hearing of the main matter or during the delivery of the final judgment. (See Order 6 rule 28 (supra). One of the main reasons for hearing the preliminary objection before continuing with the main matter is that the preliminary objection if properly raised and has merit, may have the effect of disposing of the entire main suit without resorting to a full hearing or full-blown trial. This in turn, saves the precious judicial time and other resources.

[30] Be that as it may, in the instant case, it would have been irregular for the learned Registrar to ignore and or abandon the preliminary point of law that had been raised by the appellant without giving reasons if

only the matter had proceeded to trial or hearing proper. Instead, the facts indicate that immediately at the start of the hearing before the learned Registrar a preliminary objection was raised which was upheld by the court. That preliminary objection alone had led to the collapse of the entire application. It was still open to the court to continue with the hearing of any other matters raised only that the outcome of such matters would remain moot or inconsequential with no effect at all on the dismissal order of the application. In other words, even if the court were to hear those other matters raised and decide them in favour of the appellant (as is the case in respect of the affidavits), such decisions or orders would not have the force to resurrect the already dismissed application. As such, the learned Registrar could not be faulted for the decision she took on the matter. This ground too must fail.

Ground 3: the learned Registrar erred in law and fact when she held that the appellant's prayers in the main suit are compensatory in nature.

[31] It was submitted that the appellant is seeking for a restraint order from this court against the threatened eviction by the respondents or that in the alternative he be compensated before the alleged eviction. See paragraph 3 and prayers (a) and (b) of the plaint. (Annexture "A") to the appeal. That the appellant's prayers are merely compensatory and court should hold thus.

[32] In reply thereof it was submitted for the respondent that the reliefs sought are indeed compensatory and an award of damages would suffice in lieu of the said reliefs. That the learned Registrar was alive

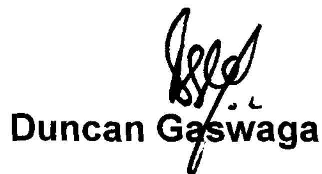
to the fact that since all orders sought by the appellant in the main suit were compensatory in nature, the argument that he had to be compensated while on the 2nd respondent's land was illogical and devoid of any merit.

[33] As earlier stated in resolution of ground two, it would definitely defeat the purpose if a temporary injunction were to be issued on the basis of the prayers made in the main suit. It is the opinion of court that this ground does not require any further discussion as the discourse in ground 2 above satisfactorily resolves it. In short, I find no merit in the ground and shall accordingly dismiss it.

[34] Although the appeal has wholly failed, I shall not make any orders as to costs given the unique facts and circumstances of this case.

I so order

Dated, signed and delivered at Kampala this 24th day of January 2022



Duncan Gaswaga

JUDGE