THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCLDCA NO. 18 OF 2006

RATIBU SHABAN :::::::::::::::::::::::::: APPELLANT

VERSUS

LUCY MIWANDA :::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE MARY I.D.E. MAITUM

JUDGMENT

This is an Appeal from a ruling of the Land Tribunal Misc. Application No. 116/05(Arising from Claim No. 117 of 2005) regarding customary Kibanja at Kasenke III, Naguru, Nakawa Division, Kampala District.

The Appellant had applied for a temporary injunction to the Land Tribunal in Kampala. The land tribunal held that the Appellant had not made a prima facie case. Warranting the grant of a Temporary injunction hence this appeal.

Briefly the facts are that the Appellant claimed to be a customary tenant on land in Nakawa. He deponed that he was given that portion he was occupying by one, Abdul Kedir who had lived on that land for the 50 years prior to 1996. He had acquired another portion from Christine Namutebi in May 2003. He prayed Court to restrain the Respondent from trespassing on the approximately 128 Sq. Metres of his land.

The Respondent's case was that she had successfully applied for a lease of the late Crainimar Miwanda in 1994 and is the registered proprietor of Plot 2E Nyonyintono LRV 3126 Folio 19 and that when she acquired the land there were no squatters.

The tribunal stated in its ruling that the Appellant had not established a prima facie case against the Respondent and that the portion of land claimed by him could adequately be compensated for by the Respondent. The Tribunal further held that the balance of convenience was weighed in favour of the Respondent who was the registered proprietor.

The Appellant appealed to the High Court in accordance with Rule 56 of the Land Tribunal (Procedure) Rule 5.

S.l No33/02.

The grounds of the Appeal are:

1. The Land Tribunal erred in law and fact in failing to evaluate the evidence before it and thereby arrived at a wrong decision.

2. The tribunal erred in law by failing to apply the correct principles of granting a temporary injunction and thereby arrived at a wrong decision.

3. The tribunal erred in law by dismissing the Appellant/s application for a Temporary injunction thereby enabling the Respondent to

continue construction on the Appellant/s Kibanja to the detriment of the Appellant.

I shall first state the ground or the principles on which a court or a Tribunal ought to rely in considering an application for a Temporary Injunction. They are:-

1. Maintaining the status quo

2. The pendency of a suit with a proof of prima facie case with a likelihood of success.

3. The Applicant must prove by affidavit that non-grant of a Temporary injunction would result in him/her suffering an irreparable damage not capable of atonement by compensation.

4. If the court is not sure of the 2 and 3 then it ought to rule on the balance of convenience Le. which of the parties would be most inconvenienced by the grant of a temporary injunction.

Mr. Anguria for the Appellant citing **Mutina Uganda &. ors v. Roliat Estate Agency Ltd Misc. Application 81.02** submitted that there was no rule, as was held in the above case, that a prima facie case should be established before a court could grant a Temporary Injunction.

He submitted that the Tribunal should not have come to that conclusion

without hearing the evidence in the main suit.

He further submitted that, since the Respondent had averred in her affidavit that she had commenced construction on the suit land the tribunal should have known that a Construction on a contested piece of Land would cause irreparable damage to the Applicant.

He further submitted that the tribunal should have decided the matter on the balance of convenience if it had been in doubt.

Mr. Matovu for the Respondent submitted that since the hearing was by affidavits the Tribunal had clearly evaluated the evidence and came to the right conclusion. He contended that the Tribunal had taken into consideration the size of the land under contention and decided that 129 sq. metres of land could adequately be compensated for.

Learned Counsel Matovu further argued that whereas the Respondent had produced a plan for the construction of a building on the suit property, the Appellant had not done the same. He contended that the balance of convenience was in favour of the Respondent.

Under O. 37 r (1) (a) CPR a temporary injunction may be granted in any suit where it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or sold in execution of a decree.

"A suit" implies a suit pending before Court *MI5* Muwayire Nakona & Co. Advocates vs. D.A.P Custodian Board (1987) HCB 91.
In the instant case there was claim 117/05 pending before the Tribunal.

In paragraphs 2-6 of his affidavit the Appellant affirmed that he was a customary owner or kibanja holder of land situate in Kasenke 111, Naguru, Nakawa Division, Kampala District. He further affirmed that he had two houses in the said kibanja.

In paragraph 8 he affirmed that when, on 13/8/2003, the Respondent trespassed on 128 sq. metres of his land he lodged a complaint before the Area LC1 Council which after hearing the matter between him and the Respondent ruled in his favour and he erected poles around the contested 128 sq. metres of his land.

On paragraph 10 the Appellant had affirmed that in the process of having two kibanja surveyed, for the purpose of obtaining a certificate of Title, he discovered that part of his customary kibanja, measuring approximately 128 sq metre had been included in the certificate of title of the Respondent, comprised in plot 15 Naguru Avenue, 2E Nyonyintono LRV 3126 Folio 19.

The Tribunal stated the above facts in its ruling and came to the conclusion that ***"The Applicant had not shown a prima facie case and since he has***

not shown a prima facie case, he has not show that he is in physical possession of the property or that the Respondent is occupying it unlawfully''.

With due respect to the Tribunal the Appellant/Applicant had affirmed in paragraph 6 of his affidavit that he had two houses on the kibanja of which the 128 sq metres formed apart.

When the Appellant/Applicant filed Claim No. 117/05 there was a Suit pending before the Tribunal and the Appellant had affirmed that he was the owner of the 128 Sq Metres erroneously included in the Respondent's certificate of Title. Since both parties were claiming the same piece of land there were issues which justified the case to be heard on merit.

The Appellant had proved by affidavit that he had a prima facie case against the Respondent with a likelihood of success. This is because he had already been buttressed by the ruling of the LC1 Council that the disputed piece of land belonged to him.

Consequently I hold that the Tribunal neglected to take into consideration the content of the affidavit affirmed by the Appellant.

Moreover establishing "a *prime facie case"* does not mean proof beyond reasonable doubt or on the balance of probability. It means that the Applicant has raised triable issues for determination by a court of law. Unless otherwise provided for in a legal document, the question of

ownership of a contested property cannot be determined by affidavits without evidence provided by both parties in a court of law and each side subjected to cross examination.

One cannot by merely reading affidavits decide that one side has proved its case and the other had not.

By coming to the conclusion cited above, the Tribunal determined the outcome of claim 117/05 without trying the issues in the case.

Concerning proof of irreparable injury, the Tribunal ruled:-

"In the event that the suit is decided in the Claimant's favour any construction on the Suit land which measures approximately* 128 *sq metres can be adequately compensated for by award of damages"

"Irreparable injury" is relative. 128 sq. metre of land appropriate by someone else may cause irreparable injury to another person. To some one who own lots of square miles of land it might be compensatable to another with a small piece of land the compensation; much as it may be may not be satisfactory. One might even say that there is no adequate compensation for the loss of land.

In E.L.T. **Kijumba-Kaggwa -y- Haii Abdu Nasser Katende: (1985) H.C.B 43,** Justice Odoki, as he then was, held as follows:-

> *"1rreparable injury does not mean that there must not be Physical possibility of repairing injury, but means that the Injury must be a substantial or a material one, that is, one that cannot be adequately compensated for in damages"*
>
> *"There was a serious question of ownership of land in question".*

Losing 128 sq Metres of land may be a serious matter, to the Plaintiff, which compensation may not be able to atone. Dispossession of land owners from their land have led to tragic consequences.

On the balance of convenience the Tribunal ruled:-

> *"In view of the Respondents registered interest in the land and the construction taking place therein the amount of inconvenience that she might be put into if the injunction was granted would be greater than any inconvenience the Applicant might suffer, since his only stake in the land is the kibanja interest. The balance of convenience is in favour of the Respondent'~*

In the 1st place this was an application for a **TEMPORARY INJUNCTION.** This means that any inconveniences caused to both parties would be temporary until the main suit would be disposed of.

The tribunal was of the view that a registered interest in the land would be superior to that of a kibanja interest. However the question here was that the Respondent had included 128 sq. metres of the Appellant land in her Title Deed.

Art 237 (8) of the Constitution stated that *“The lawful or bona fida occupants of mailo land, freehold or leasehold land shall enjoy security of tenure"*

Section 31 (1) of the Land Act 1998 Cap 227 states that *"A tenant by occupancy on registered land shall enjoy security of occupancy on the*

land.”

According to the affidavit affirmed by the Appellant, Applicant, the person from whom he inherited the land had been in occupation for 50 years previously. He deponed that the Respondent's land was acquired after his occupation and that it was adjacent to his own kibanja. On the balance of convenience the person who was on the land before the advent of the Respondent is the one who would be inconvenient if he is evicted from the land.

The Appellant did not dispute the ownership of the rest of the land, he disputed the inclusion of his 128 sq metres into the Respondent's Certificate of Title. The Respondent should have involved all the neighbours during the survey of her land. Then the alleged disputed inclusion of the Appellant's 128 sq metres might not have arisen, and would have been resolved.

For the reasons discussed above, this Appeal is allowed on all grounds.

The ruling of the Tribunal is hereby set aside.

A temporary injunction is hereby issued restraining the Respondent, her agents, servants and anyone acting under her authority, from doing anything inimical to the Appellant's claim to the 128 sq metres of Land, until the disposal of the dispute between the parties

Claim No. 117 of 2005 should be converted into a suit before the Chief Magistrates Court, so that the real issues are determined in one way or the other. Costs shall abide the out come of the suit to claim 117/05 between the parties.

Mary I.D.E. Maitum

JUDGE 20/3/2007

20/3/2007:-

Anguria holding brief for George Omunyokol, Counsel
for the Appellant

Appellant is in Court

Counsel for the Respondent Mr. Matovu is not present

J. Agweto Court Clerk.