THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT GULU

HCT – 02 – CV – MA – 0061 – 2008

(Arising from HCT – 02 – CV – CS – 0024 – 2006)

HASSAN MITCHEL
THROUGH HIS ATTORNEY
HARRIET ABER ::::::::::::::::::::::::PLAINTIFF/APPLICANT

=VERSUS=

MAJOR GENERAL
OKETA JULIUS ::::::::::::::::::::DEFENDANT/ RESPONDENT

BEFORE: HON. JUSTICE REMMY KASULE

RULING

This Ruling is in respect of an application for a temporary injunction.

A dispute over ownership of land exists between the applicant and Respondent.

The land, the subject of the dispute, is situated at Omee, Paliyec Parish, Amuru Sub-county, Kilak County, Amuru District.

According to the respondent the land he owns is about 10,000 hectares. The applicant asserts hers is 3,500 acres.

The applicant has employed the services of Messer's Jerusalem International Limited, surveyors, who have carried out a survey and produced a survey map of the portion of land applicant claims is hers. From this map, as one looks at it with Alero Sub-County being directly down, on the right the land borders with Ome 1 camp, on the left with Palema and Lwoka Obijo, at the top the farm of UMA ABDALLA and down the map, ALero Sub-county.

It appears from the map that the real area of contention, where applicant and respondent are claiming counter-interest of ownership and trespass is an area of 650 acres bordered by River Alii 1 River Alii 2, access road to Bana camp and River Alii.

The application was filed in court by way of Notice of Motion and brought under the land Tribunal Procedure Rules.

Counsel for applicant, however, applied, at commencement of hearing to amend the Notice of Motion to chamber summons.

The application was vehemently opposed by Counsel for the Respondent who on the authorities of:- **G.M Combined (U) Ltd V. A. K Detergents (U) Ltd (1995) IV KALR 92**

and

Aloysius Tibamanya vs. Januario Tibamanya (1994) VI KALR 68

prayed court to strike out the application as incompetent.

Court appreciates that a party who comes to court has the responsibility to abide and follow the law as to the lodgment of pleadings in court. In appropriate cases, where an application is brought under a wrong provision of the law and argued to finality, court may find itself with no other alternative but to strike out the application.

In this case however, the applicant, before delving into the merits of the application applied to amend the application from a Notice of Motion into a Chamber Summons. Counsel submitted that the application had been inadvertently titled Notice of Motion instead of a Chamber Summons.

This court, is vested with powers by virtue of Order 41 Rules 1 and 2 of the Civil Procedure Rules, to grant a temporary injunction, where it is proved in a suit, by affidavit or otherwise, that a property the subject of the suit dispute is in danger of being wasted, damaged or alienated by any party to the suit.

Civil Procedure Rules are intended to serve as the hand maiden of Justice not to defeat justice: **See Iron steel Wares Ltd vs C.W. Marty & Co. (1956) 23 EACA 175.**

The respondent is not in anyway being prejudiced by the application to amend. On the other hand there is every reason, and it is in the interests of the parties, that the application be determined on its own merits.

Court therefore in the exercise of its discretion, allows the application to have the Notice of Motion amended to Chamber Summons and to have the same proceeded with under

Order 41 Rules 1, 2 and 9 of the Civil Procedure Rules. Since Counsel already submitted on the merits of the application, court will proceed to determine the application on its own merits.

In an application for a temporary injunction, in order to succeed, the applicant must show that

i. The temporary injunction is aimed at maintaining the status quo until determination of the dispute, the subject of the main suit.
ii. There is a prima facie case with some probability of success in the case of the applicant.
iii. Irreparable injury is to be suffered – or likely to be suffered by applicant which an award of damages cannot adequately atone for, if the injunction is refused and later on the applicant turns out to be successful in the main suit.
iv. If the applicant fails to satisfy court of the above three considerations, then it has to be shown that the balance of convenience is in favour of the applicant.

See: SCCA 8/90:Robert Kavuma vs M/S Hotel International

J.K. Sentongo & another vs Shell (U) Ltd (1995) III KALR 1

TONY WASSWA VS JOSEPH KAKOOZA(1987) HCB 79

and

GIELLA VS CASSMAN BROWN CO. Ltd. (1973) EA 358.

The case of the applicant, who in the head suit, sues as the attorney of one Hassan Mitchel, is that the said Hassan Mitchel, is the owner of the suit land since 1976. In 1998 the defendant/respondent sought to hire for agricultural purposes, the suit land from the owner (Hassan Mitchel) who refused the request. Thereafter in February 2006, the defendant/respondent trespassed upon the suit land by growing simsim and putting up a permanent house thereon, and on 26.09.2006, defendant/respondent, using armed soldiers stopped applicant from carrying out a re-survey of the land and warned applicant and her people never to get back any near the suit land. Hence this suit, seeking, among others, an order of ejectment of defendant/respondent from the suit land.

The defendant/respondent denies trespassing on the suit land, and challenges the plaintiff/applicant to strictly prove the location, size and demarcation of the same. Defendant/respondent further contends that the land he is cultivating is given to him on trust by and in partnership with the community and has never trespassed into the plaintiff/applicant's land.

In the considered view of this court, the pleadings filed in the head suit by both parties to the suit raise serious issues that court has to resolve at a full hearing of the head suit.

In her affidavit of 25.06.2008 in support of this application, applicant complains that inspite of the existence of the head suit, the respondent has proceeded to lodge an application with the District Land Board, Amuru District, for leasing 10,000 hectares, part of the plaintiff/applicant's suit land inclusive. On resisting any inspection of the suit land for purposes of the application to lease lodged by the respondent, the applicant and her employees have met acts of assault, intimidation and threats by use of armed army soldiers on the part of the respondent; who happens to be a high ranking officer in the national army, the UPDF. Applicant contends she is to suffer irreparable damage if the suit land, or part of it, is leased out to the respondent before the determination of the head suit.

The respondent's case, as disclosed in his own affidavit in reply of 04.07.2008 and those of : Rwot Otinga Atuka and Owot Aliki (both undated, but filed in court on 07.07.2008) is that on 16/06/2008 there was inspection of the land, applied to be leased by respondent, which went on smoothly, and that it is the applicant and her mob who confronted and assaulted them, after the inspection had been completed. The land applied for by respondent is not part of the applicant's land, the clan leaders had, at any rate, resolved the land dispute in question and that respondent desires to carry out industrial development on the land in the nature of a sugar factory in partnership with a Canadian investor. He(respondent) was suffering irreparable damage by any delay in accessing the land. It was thus forcefully submitted for the respondent that the application for a temporary injunction be rejected by court.

On the basis of the affidavits and submissions made in the application for either party; as well as the pleadings in the head suit, this court finds that two crucial issues that this court has to resolve on are brought out:-

i. Whether or not the disputants, or one of them, own(s) the alleged suit land; or part of it, and if so,

ii. Whether there is trespass by one disputant on the land of the other and vice-versa.

It follows therefore that there is need to maintain the status quo of the suit land until the determination of the stated two issues, possibly amongst others, in the head suit.

Court is also satisfied that there are serious issues raised by both parties, and there is thus a prima facie case in the case of the applicant, with some probability of success. So too, of course, is the case of the respondent.

The head suit dispute is about ownership of a chunk of land. Once a party to the suit is deprived of what is being claimed as that party's own land, the damage so suffered may appropriately be described as irreparable, in sense that, once alienated or disposed of one cannot get back the exact chunk of land, whatever the compensation that may be sought and offered. Applicant has thus made out a case of the likelihood to suffer irreparable loss.

Lastly, even in case of balancing the inconvenience Court finds that maintenance of the status quo pending the determination of the head suit will result in more convenience to both applicant and respondent so that none of the two incurs in terms of effort, resources, money and expense on the suit land, only to be re-adjusted later, depending on what the decision in the head suit will be.

It is to be noted that pleadings in the head suit are closed, conferencing completed and the case is fixed for hearing on 24th and 25th September, 2008. Thus the determination of the isues in the head suit is only a few months away.

As to the exact size of the suit land, the subject of this application, the evidence availed, and both parties tend to agree on this, the land that the applicant asserts is suit land is only 3500 acres, and is clearly set out on the survey map and report of M/S Jerusalem International Ltd, dated 12/06/2008, annexure"C" to applicant's affidavit in support of application dated 25/06/2008.

On the other hand, the land the respondent claims to be working on and is applying to lease is measuring 10,000 hectares, far much larger than the 3500 acres, applicant claims to be the suit land. It is possible that the 10,000 hectares, include the whole of or part of the 3500 acres the applicant claims. It follows therefore that the injunction, if granted, will apply only to the 3500 acres, the applicant claims as the suit land, and not to the whole 10,000 hectares, respondent asserts is the land he is in occupation and use of.

Court therefore allows this application. A temporary injunction is hereby granted restraining and forbidding the respondent or any one claiming through the respondent, or carrying out instructions, requests and or applications of the respondent, from trespassing, developing, giving out leases or executing any other land dealings and transactions, developing,

constructing, alienating, and /or selling off the suit land measuring 3500 acres, situate at Omee 1, Paliyec Parish, Amuru Sub-county, Kilak County, Amuru District , whose boundaries are more specifically set out in a survey map of Messrs Jerusalem Limited surveys mapping & CAD Design Consultants, dated 12/06/2008, Annexure 'C" to the applicant's affidavit dated 25.06.2008 and filed in support of this application.

The interim injunction issued by this court on 25/06/2008, is to be applied as part and parcel of this temporary injunction, but the same, like this application, shall only apply to the suit land of 3,500 acres, as herein described and set out in the stated survey map.

The temporary injunction shall be operative pending the final determination of civil suit No 0024 of 2006, or until further orders of this court.

The costs of this application shall go to the successful party in the head suit.

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Remmy Kasule

Judge

31st July 2008