THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION N0. 558 OF 2009

(Arising out of Civil Suit N0. 186 of 2009)

ENERGOPROJEKT NISKOGRADNJA :::::::: APPLICANT/
JOINT STOCK COMPANY DEFENDANT

VERSUS

1. BRIGADIER KASIRYE GWANGA :::::::: RESPONDENTS/
2. COMMISSIONER FOR LAND PLAINTIFFS
REGISTRATION

RULING BY HON. MR. JUSTICE JOSEPH MURANGIRA

The applicant, Energoprojekt Niskgradnja Joint Stock Company, through its lawyers Paul Byaruhanga Esq. Advocates filed this application against the respondents: 1st respondents, Brigadier Kasirye Gwanga and the 2nd respondent, Commissioner for Land Registration. The 1st respondent is represented by A. F Mpanga Advocates. The 2nd respondent did not appear in court at all, that is, she never filed any affidavit in reply to the application.

The application is for the following orders:

1. That a temporary injunction doth issue to restrain the respondents by themselves or through their agents and servants from alienating or causing alienation of the suit property by canceling the leasehold Certificate of title for Kyadondo Block 82 LRV 3836 Folio 25 plot 1253 for the benefit of the defendant /applicant until final determination of the suit.

2. That in the case of disobedience the respondents shall be committed to prison and their property be attached and sold.

3. That the costs of the application be provided for.

The application is supported by the affidavit of Milivoje Milisavljevic. And the grounds of this application are briefly that:

1. The applicant is the registered owner of the leasehold interest in the suit land.
2. The 1st respondent has moved the 2nd respondent to cancel the applicant's certificate of title.
3. The 2nd respondent has issued notice of intention to effect such cancellation.
4. The applicant had an interim order of injunction.
5. The applicant will suffer irrepairable damage and loss if the cancellation of title takes place before the final determination of the suit.
6. That the applicant is in occupation and use of the suit land and balance of convenience is in its favour.
7. That the 1st plaintiff/1st respondent threatened to use armed violence to take occupation of the suit land.
8. That the 2nd respondent's intended action while the suit is pending is unconstitutional.
9. That the orders are necessary to prevent the ends of justice from being defeated.

The affidavit evidence in support of the application repeats the grounds of the application in an evidential affidavit form. The same affidavit introduces in Court the documentary evidence. The documentary evidence, too, is in support of the grounds of the application.

In his submissions, Counsel for the 1st respondent Mr. A. F. Mpanga made presentations also in favour of the 2nd respondent. Counsel for the 1st respondent submitted that he was doing it as an officer of the Court. I do not agree with him on that submission. He did not have instructions from the 2nd respondent.

Having admitted that he was not representing the 2nd respondent, it was wrong for him to submit at length and making prayers for the application to be dismissed and costs awarded to the 1st and 2nd respondents. Counsel for the 1st respondent had no locus to represent the case for the 2nd

respondent. He was not her legal agent in this application. Under Order 3 (1) of the Civil Procedure Rules, it is provided that:-

> **“Any application to or appearance to act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognized agent, or by an advocate duly appointed to act on his or her behalf, except that such appearance shall, if the Court so directs, be made by the party in person.”**

From the arguments made hereinabove and the law cited, counsel for the 1st respondent was not supposed at all to oppose the application, in the way he did, on behalf of the 2nd respondent.

The aforesaid notwithstanding, counsel for the applicant is being criticized by counsel for the 1st respondent for adding the 2nd respondent to the application. Counsel for the 1st respondent relied on Order 1 rule 10 (2) of the Civil Procedure Rules, which deals with the addition of parties to suits. This Order, in my view, empowers Court either to add or struck out a party to a suit as plaintiff or defendant.

The 1st defendant is not suing the 2nd respondent in the main suit. There is no party that was added or struck out from the suit/plaint. The applicant being aggrieved by the actions of the 2nd respondent brought this application against the two respondents. According to the affidavit of service of Aata Stephen sworn on 8th October 2009, the 2 (two) respondents were served with the copies of this application by chamber summons. The 2nd respondent did not protest such service on her the Court process. It is presumed that she received service of the said summons with the plaint.

And according to paragraph 4 of that affidavit M/s A.F. Mpanga Advocates also accepted service of the said application by chamber summons. Further, according to paragraph 5 of the Aata Stephen’s affidavit the 2nd respondent was served, but she declined service saying it was short notice. From the said affidavit of Aata Stephen, both respondents refused to file affidavits in

reply. In such scenarios, the parties are presumed to have conceded to the application. In the case of the **Samwiri Mussa vs Rose Achen (1978) HCB 297**, Ntabgoba Ag. J. (as he then was);held that

> **“where facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted.’**

This very case binds both respondents. Their failure or refusal or/and neglect to file affidavits in reply when they were duly served with the application is clear indication that they never intended to challenge the application. I also note that though there are some points of law involved, there are also some facts that were deponed upon in the affidavit in support of the application, which needed an affidavit in reply and rebuttal to the application. And the burden of denying the avernments in the affidavit in support of the application squarely lies on the respondents. In the result, I make a finding that the applicant’s application was unchallenged by the respondents.

Accordingly, therefore, the applicant proved amongst other conditions, that it would be convenient on its part if it was to be granted the prayers/orders sought for in the application. The applicant proved that it would suffer loss and damage if the temporary injunction being sought for in his application is not granted. I am satisfied that the applicant also proved the condition of conveniency of a party as one of the pre-conditions emphasiged under Order 41 rule 1 of the Civil Procedure Rules.

Wherefore, I am not convinced by the submissions by Counsel for the 1st respondent; The Commissioner for Land Registration was properly added as a party to the application. There was no need to serve a hearing notice to Commissioner for Land Registration when she had refused to file an affidavit in reply after being served with the Chamber Summons. An injunction may be granted against the Commissioner for Land Registration. She was served with the application, and she opted not to opposed the same. The 1st respondent did not depone any affidavit to show that he was never served with the affidavit in support of Chambers Summons. What is contained in his submissions to that extent is evidence from the bar which is not admissible in law.

Counsel for the 1st respondent on 10th December 2009 never made an application in Court to have the applicant's only witness cross-examined as he tried to submit in his submissions. The record is very clear. Therefore, Counsel's submissions in that regard are not maintainable.

Consequent to the above, I considered the entire application, the averments in the affidavit in support of the application, the submissions by both counsel, and I find that this application has merit. It ought to be allowed.

Before I take leave of this application, It should be noted that when this instant application came up for hearing on 12th October 2009, Counsel for the 1st respondent made a request for an adjournment to 12th December, 2009 for reasons that all parties to be present so as to be allowed to sort out this matter amicably. He also submitted that he shall undertake to write a letter to the effect that they are not pressing for the cancellation of the suit land title.

Further, the same Counsel for the 1st respondent informed court that he had instructions from his client that he is willing to negotiate this matter out of Court. In reply counsel for the applicant insisted that parties should enter a consent ruling so as to settle the matter once and for all.

From my own analysis of the submissions by both parties, I deduce that there was no need for a full trial of this application. They (parties) should have come up with a common position of consent settlement of this application. To have a heated and prolonged trial of such straight forward interlocutory matter, with due respect to Counsel for the respective parties, they would be encouraging a style of litigation which is out modeled. Such styles are being discouraged by Courts for unduely lengthening disputes, and effectively denying parties substantive justice. In such circumstances, the headliner counsel would be kicking his opposite colleage for no meaningful contest.

When Courts are encouraging parties to settle their matters amicably, we as judges are only being constructive and trying to assist the parties to attain substantive justice in a shortest time possible. I would implore all advocates to embrace the constructive approach in solving all

matters pending in our respective Courts if the Bench and the Bar is to fight the current backlog of cases pending in our various Courts.

In conclusion, I find that the applicant had proved its grounds in the application which are well set out in the affidavit in support of the application. The applicant's interests in the suit property have to be protected until the hearing and full determination of the main suit.

Accordingly, the application is allowed with all the orders sought therein against all the respondents. The respondents shall pay the costs of this application to the applicant.

Dated at Kampala this 5th day of February, 2010

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JOSEPH MURANGIRA
JUDGE