THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBRARA

HCT-05-CV-CA-0066-2009
(Arising from MBR-00-CV-MA- 0199-2009)

MUHWEZI ASTONE……..……APPELLANT

VERSUS

1. IRENE NUMBER ONE
2. ABAASA JULIUS T/a WESTERN AUCTIONEERS & COURT BAILIFFS …….RESPONDENTS

BEFORE: THE HON. MR. JUSTICE BASHAIJA K. ANDREW

J U D G M E N T

The appeal is against the ruling of His Worship, Julius Borore, Magistrate Grade One *(hereinafter referred to as "the trial court")* delivered on the 10/11/2009, in which he dismissed an application for a temporary injunction.

The brief background to the appeal is that one Muhwezi Astone, *(hereinafter referred to as "the Appellant")* sued Irene Number One and Abaasa Julius, (*(hereinafter referred to as "the Respondents"),* in the trial court at Mbarara. The Appellant had taken a loan of Shs, 4,000,000/= from the 1st Respondent on 16/4/2007 to be repaid with an interest of Shs. 1,400,000/=. The Appellant gave as security a land title for property comprised in ***LRV Plot 13 Volume 3009 Folio 18 land at Kyamugorani Link 111 Mbarara.***

Both parties executed what they called a "Sale Agreement" dated 16/4/2007 in respect of the said land, and it was agreed that on repayment of the entire loan amount, the "Sale Agreement" would cease, and the certificate of title, whose original copy was handed over to the 1st Respondent, would be returned to the Appellant. It is stated by the Appellant that he paid all the money advanced to him plus the agreed interest, but that the 1st Respondent refused to hand back the

certificate of title. Instead, the 1st Respondent advertised the property for sale in the ***"Entatsi"*** Newspaper of 17/11/2009 through the 2nd Respondent.

The Appellant sued both Respondents in the trial court seeking various declarations and orders among which was that the "Sale Agreement" between the Appellant and 1st Respondent was meant to act as security for the loan, and not to confer ownership of the land on the 1st Respondent; and for the cancellation of the "Sale Agreement" dated 16/4/2007 between the parties. The Appellant also sought for an order that the 1st Respondent hands back the original certificate of title to him.

On 13/10/2010, the Appellant did not appear in court to prosecute his case and the trial court dismissed the suit with costs for the non-attendance, and ordered that the counterclaim which the Respondents had put in be heard *ex parte* on 6/12/2010. On 7/2/2011, the Appellant filed an application in the trial court to set aside the dismissal on grounds that he was not aware of the hearing date and that on that date he was also sick. The trial court dismissed the application with costs.

The Appellant then filed an application for stay of execution of the court order dismissing the above latter application pending the outcome of an appeal (present one) against the dismissal for an application to set aside the earlier trial court's ruling. Again this too was dismissed by the trial court. The Appellant then applied for a temporary injunction to restrain the Defendants from transferring the suit land or alienating it and from evicting him from the land. Once again the trial court dismissed the application with costs. It is against the dismissal order of 10/11/2009 refusing to grant the temporary injunction that this appeal lies.

The Appellant advanced three grounds of appeal as follows:

1. ***The learned trial Magistrate erred in law in dismissing the Appellant/Applicant's application in total disregard of the law.***
2. ***The learned trial Magistrate erred both in law and fact to determine the application in a manner that disposes of the main suit.***
3. ***The learned trial Magistrate erred in law to award costs to the Respondent yet the Respondent had not prayed for the same.***

The Appellant made the following prayers:

(a) That this appeal be allowed.

(b) That the ruling of the lower court be quashed and the orders made therein be set aside.

(c) That the orders sought by the Appellant/Applicant in the lower court be granted by this Honorable court.

(d) That the Respondents be ordered to pay the Appellant costs of this appeal and costs of the application incurred by the Appellant in the lower court.

Both Counsel for the Appellant and Respondents, Ms Kentaro of M/s Nowangye & Kentaro Advocates and Mr. Ngaruye Ruhindi Boniface of M/s Ngaruye- Ruhindi, Spencer & Co. Advocates, respectively, agreed to put in written submissions, which I have considered in resolving the issues in the grounds of appeal.

Ground. 1.

The learned trial Magistrate erred in law in dismissing the Appellant/Applicant's application in total disregard of the law.

It was argued for the Appellant that under ***Order 41 R (1 (a)*** of the ***Civil Procedure Rules***, it is provided that where in any suit it is proved by affidavit or otherwise that any property in a suit is in danger of being wasted, damaged or alienated by any party to the suit, the court may by order grant a temporary injunction to restrain such acts or make such order for the purpose of staying and preventing the wasting, damaging, alienating, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

Counsel for the Appellant in her written submissions argued that by the time the application and even the main suit were filed, the 2nd Respondent under the directive of the 1st Respondent had advertized in the ***"Entatsi***" Newspaper for sale the land now in dispute. The Appellant had brought this to the attention of the trial court by annexing the advert-copy to the pleadings, but that the trial court ignored that fact and provisions of ***Order 41 R (1)(a)*** of the ***Civil Procedure Rules*** which state that once it is proved that the property in dispute is in danger of being wasted, damaged

or alienated, that is enough to warrant the grant of an order of a temporary injunction.

Counsel criticized the trial court for ignoring the statutory; and only paying close attention to case law, by relying heavily on the case of ***Uganda Commercial Bank vs. General Parts (U) Ltd [1992-1993] HCB 210***; and considered the principle of a *prima facie* case with possibility of success laid down therein. Counsel argued that in determining a *prima facie* case, the applicant is only required to raise *prima facie* triable issues; but that in the instant case the trial court ruled that the application was a waste of court's time and had no chances of success since the Applicant had admitted executing a Sale Agreement.

Counsel strongly maintained that the triable issue would be whether the purported Sale Agreement was actually a sale agreement capable of conferring ownership to the 1st Respondent or it was security for a loan. Further, that the trial court did not put into consideration that this was family land where the Appellant together with his wife and children stay. Counsel concluded this ground arguing that by dismissing the application the trial court was allowing the eviction of the Appellant with his family, and the sale of the land before hearing the suit, which would render the main suit irrelevant.

Counsel for the 1st Respondent opposed the appeal and argued that what was executed between the Appellant and the 1st Respondent was a Sale Agreement and not a security/mortgage agreement. That court saw the dishonesty of the Appellant and rightly rejected the application, and did not have to go into other grounds because it was of the firm view that the main suit *prima facie* has no grounds of success and should not waste any more time. Counsel further argued that allowing the application would have the Applicant/Plaintiff relax and use the temporary injunction to delay the disposal of the main suit.

Mr. Ngaruye also advanced the view that the trial court needed not to consider all grounds; and if one pivotal ground to the application failed there would be need for considering the other grounds. Counsel cited the case of ***Nitco Ltd. vs. Hope Nyakairu [1992-1993] HCB 135*** where it was held that on top of proving other

grounds the applicant must go further to show that the suit *prima facie* has a probability of success.

After considering the submissions of both Counsel, in light of the law in respect of this ground, I am of the view that, indeed, the trial court ignored the law applicable to temporary injunctions in dismissing the application.

Order 41 R (1) (a) *of the* ***Civil Procedure Rules*** cited by counsel for the Appellant is clear enough about the considerations court ought to take into account when granting or refusing to grant an order for a temporary injunction. There is also a wealth of authorities in decided cases on the matter. See ***Robert Kavuma vs. M/S Hotel International, SC. Civil Appeal No. 8/1990; American Cynamid vs. Ethcon Ltd [1975] A.C. 396,; Kiyimba-Kaggwa vs.Haji A. N. Katende [1985] HCB 43; Sugar Corporation of Uganda Ltd. vs Muhamed Jejani; Nitco Ltd vs. Hope Nyakairu [1992-1993] HCB 135; Giella vs. Cassman Brown & Co. [1973] EA 358*;** and many others. The principles are that:

(a) The purpose of a temporary injunction is to maintain the *status quo* until the question to be investigated in the suit is finally disposed of.

(b) The applicant must show a *prima facie* case with a possibility of success.

(c) The injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately be compensated or atoned for by an award of damages.

(d) If the court is in doubt, it will decide an application on the balance of convenience.

In exercising the duty of the 1st Appellate Court, I have read the entire record of the lower court and subjected it to fresh scrutiny and evaluation. I have noted that all the conditions for the grant of a temporary injunction existed in the case. But the trial court, with due respect, either ignored or refused to consider them, and did not assign any reason thereof. There was evidence that the suit property, which was subject of the dispute before court, was in danger of being alienated. The applicant annexed the advert for sale of the suit land which appeared in the ***"Entatsi"*** Newspaper of the property by the 2nd Respondent on instructions of the 1st Respondent. Certainly, this should have put the trial court on notice, and the provisions of ***Order 41 Rule (1) (a)*** *of the* ***Civil Procedure Rules*** should have come into play.

I entirely agree with Ms Kentaro learned Counsel for the Appellant, that by dismissing the application the trial court was allowing the eviction of the Appellant, and the sale of the land to proceed before even hearing the suit, which would render the main suit nugatory. Having relied on the case of ***Uganda Commercial Bank vs. General Parts (U) Ltd*** (supra); the trial court should not have stopped at the principle of a *prima facie* case with a possibility of success, but should have gone ahead and also considered the entire decision in that case which spells out the applicable principles governing the granting of a temporary injunction. As it were, the trial court decided to apply the decision only selectively, which led to an obviously wrong decision. Ground 1 of the appeal therefore succeeds, and I accordingly allow it.

Ground 2.

The learned trial Magistrate erred both in law and in fact to determine the application in a manner that disposes off (sic) the main suit.

I have noted that this ground is, in some way, related to *ground 1* above, in that the major complaint is against the trial court's over-reliance on the *"prima facie"* principle to dismiss the application. The trial court, primarily, based itself on the ground that the main suit had no chances of success. In that regard, the trial court held as follows:

> ***"Under the plaint paragraph 9, Plaintiff admits executing a Sale Agreement of land with Defendant. Plaintiff/Applicant contends that the Sale Agreement was for purposes of security of a loan obtained from Defendant/Respondent. That the Sale Agreement was not meant to confer ownership on the Defendant/Respondent. It is my view a transaction of sale reduced into writing cannot act as a mortgage agreement at the same time. It is like mixing Petrol and water together. It is my view based on paragraph 9 of plaint that the instant application is a waste of court's time and the main suit has no chance of success. I shall accordingly dismiss the application with costs."*** *(emphasis mine)*

The reasoning adopted by the trial court in the above extract of the ruling certainly has a number of gross mistakes. Firstly, in determining whether or not an application discloses a *prima facie* case with a probability of success, the applicant only needs

raise *prima facie* triable issues in the main suit. The applicant is not required to prove that the main suit has a chance of success or should succeed. There is quite a wealthy of authorities on that point which would have properly informed the decision of the trial court on the issue. See ***Peace Isingoma vs. MGS International (U) Ltd, HC Misc. App. No. 0761*** *of* ***2006 (****Commercial Court per Lameck Mukasa, J.),* ***Ratibu Shaban vs. Lucy Miwanda HC LDCA No. 18*** *of* ***2006*** *per Maitum, J;* ***E. L. T. Kiyimba*** *case (supra);* ***Paul Matembe Damulira vs. Bernard Damulira, H.C. Misc. App. No. 710*** *of* ***2003*** *per L. Mukasa, J,* and a lot of others.

My understanding of the facts of the case is that the main issue was not so much about the success of the Plaintiff's/Appellant's main suit as it was as to whether the document dated 16/4/2007 is really a Sale Agreement or security for a loan. This point without doubt raises *prima facie* triable issues, which require judicial consideration.

Secondly, it was certainly erroneous for the trial court to pronounce itself on the merits of the main suit, that the suit had no chance of success. By doing so, the trial court put itself into a prejudicial position, where it would not fairly nor competently determine the main suit as there would be no need for trial in the main suit on this point. The trial court had pre-determined the main suit in the application for a temporary injunction. It is settled law that if the order has the effect of disposing of the main suit, then it cannot be properly obtained in an application for a temporary injunction.

I cannot; but hold that the trial court erred in law and fact to have held that the main suit had no chances of success, and to have based on that to dismiss the application as a waste of time. *Ground 2* of the appeal succeeds and I accordingly allow it.

Ground 3.

The learned trial Magistrate erred in law to award costs to the Respondents yet the respondents had not prayed for the same.

It was argued by Counsel for the Appellant that the Respondents' affidavits in reply did not include a prayer for costs, and as such court cannot award what is not prayed

for. That in the instant case, the trial court went ahead to award the same, which was a wrong decision.

For their part, Counsel for the Respondents countered by arguing that under ***Section 27*** of the ***Civil Procedure Act***, costs are discretional and follow the event; and that the application had been dismissed, the Appellant had initiated the litigation as far as the application was concerned, the Respondent had filed a reply contesting the application, and naturally if the application is dismissed the Respondent recovers costs. That, in fact, the Applicant consented to pay the costs.

With respect, I disagree with the arguments of Counsel for the Respondents. Whereas ***Section 27*** of the ***Civil Procedure Act*** gives court discretion to award costs in a suit, such discretion must be exercised judiciously and not arbitrarily, and must be based on sound principles of the law. See ***Donald Campbell & Co. Pollack [1927] AC 732*** *at 881;* ***National Pharmacy Ltd. Vs. Kampala City Council [1979] HCB 256;*** *and* ***Liska Ltd. vs De Angelis [1969] EA 6.***

Secondly, if a party does not specifically plead for a remedy, it is not up to the court to grant it. It is a well known position of the law that a party must specifically plead for a remedy, and that court will not grant remedies not prayed for. Provisions of ***Order 7 Rule 7*** of the ***Civil Procedure Rules*** are to the effect that a party seeking reliefs in court should make specific averment as to the reliefs sought either simply or in the alternative. See also ***Nkambo vs. Kibirige [1973] EA 102; Odd Jobs Vs Mubia [1920] EA 476.*** Even if a party makes a prayer "any other reliefs this court deems fit", it is treated as a mere surplusage, and cannot be used as an inclusive cover to obtain what has not been specifically prayed for. See ***Take -Me - Home Ltd Vs Apollo Construction [1981] HCB 43.***

I would also add that court is not expected to "shop around" for reliefs on behalf of the litigants. If a party chooses not to specifically plead for a particular relief, he or she is deemed to have abandoned it. To that extent, the award by the trial court of costs which were not prayed for to the Respondents amounted to nothing short of exercising the court's discretion based on the wrong principle of the law, which was grossly irregular. The irregularity could not be cured even by the consent of the parties that the appellant pays costs. *Ground 3* also succeeds, and I accordingly allow it.

Before taking leave of this matter, let me restate the position which currently guides court in the determination of matters which touch and/ or concern land disputes. Guidance has been given by the Supreme Court of Uganda in ***Re: Christine Namatovu Tebajjukira [1992-1993] HCB 85 that;***

> ***"The Administration of justice should normally require that the substance of disputes should be investigated and decided on merits and those errors and lapses should not necessarily debar a litigant from the pursuit of his rights."***

Needless to add that this is a position that has to be born in mind by judicial officers and legal practitioners alike when handling land –related disputes.

Based on the findings by this court above, the ruling of the lower court is quashed, and the orders issued therein are set aside. An order for a temporary injunction is issued in the terms prayed for by the Appellant in the application in the lower court. The Appellant is also awarded costs of this appeal and costs of the application for a temporary injunction in the lower court. It is further ordered that the case file be remitted to the Chief Magistrate – Mbarara, who should cause for the expeditious hearing of the main suit before another trial Magistrate.

Bashaija K. Andrew
J u d g e
23/11/2011