

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

MISC. APPLICATION NO. 98 OF 2010

(Arising from Civil Suit No. 47 of 2009)

- 1. MARK OLINGA**
- 2. RAPHAEL OWERE ODUMBI**
- 3. MUSIKA CHARLES**
- 4. SAM MULONDO.....APPLICANTS**

VERSUS

TORORO MUNICIPAL COUNCIL.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

RULING

The applicants through M/s Dagira & Co. Advocates filed this application for a temporary injunction by way of chamber summons under O.41 rr 1 and 9 CPR and S.101 of the Civil Procedure Act. The applicants are seeking for orders that:-

- (i) A temporary injunction does issue restraining the respondent, its servants/agents, successors in Title, assigns and/or legal representatives from wasting, damaging, alienating, selling in any way, disposing of and or evicting the applicants from the disputed land i.e. plot 2-6 Bazaar Street Tororo.

- (ii) Costs be provided for.

The respondent, Tororo Municipal Council is represented by the Attorney General.

The grounds of application are that:

- (a) The applicants have on their own behalf and that of 118 others filed HCCS No. 0047 of 2009 which has high chances of success.
- (b) The applicants and their other 118 colleagues are in physical possession of the disputed property so the order now sought is to maintain the *status quo*.
- (c) The applicants and their other 118 colleagues will suffer irreparable damage if the order now sought is not granted.
- (d) Alternatively and without prejudice to the foregoing, the balance of convenience favours the applicants to be granted the said order.
- (e) It is in the interests of justice that the restraining order be granted.

The chamber summons is supported by the affidavit of the first applicant Mark Olinga in which he reiterates the contents of the chamber summons but goes on to explain that they have filed HCCS 47 of 2009 against respondent. That the suit has high chances of success because they are entitled to quiet enjoyment of their not attached individual leases/tenancies granted by the respondent to the applicants for various terms. They in the alternative claim adequate compensation. That the respondent wants to remove the applicants from their individual shops, break each of them down without paying adequate and prompt compensation for the land and developments thereon. That the respondent on 2 June 2010 directed that the applicants and other persons carrying on business in Tororo Municipality Market must move out between September- December 2010 and thereafter construction of

a new market will start which will endanger the various properties and livelihood derived from the market. That the injunction will preserve the status quo which will be rendered nugatory if not preserved before the main suit is heard. That the balance of convenience is in favour of the applicants since the respondent will continue to receive revenue from the applicants.

One Choli Guloba John, the Ag. Town Clerk Tororo Municipal Council swore an affidavit in reply objecting to the application and denying the averments by the applicants that there is imminent eviction or termination of the individual tenancies granted to the applicants. That they are planning to redevelop the market into a modern one and allocate stalls to the applicants and a memorandum of understanding is to be entered into to that effect. That the applicants will not therefore suffer any irreparable loss.

Both Mr. Dagira learned counsel for the applicant and Mr. Lumbe for the Attorney General submitted in support of their respective cases.

I have studied the entire civil suit file. I have studied this application as a whole including the annexures relied upon by the parties hereto plus the respective submissions. O.41 r.1 CPR provides that a temporary injunction may be granted at the discretion of court if it is proved by affidavit evidence that:

- (a) Any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) The defendant threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors.

Therefore the granting of a temporary injunction is an exercise of judicial discretion and its purpose is to preserve matters in *status quo* until the question to be investigated in the suit can finally be disposed of. As rightfully pointed out in ***Kiyimba Kagwa v. Katende [1985] HCB 43*** by Odoki J (as he was), the conditions for the grant of interlocutory injunction are first that:-

- (i) The applicant must show a *prima facie* case with a probability of success.
- (ii) The applicant might suffer irreparable damage or injury which would not be adequately compensated by an award of damages.
- (iii) If court is in doubt it will decide the application on a balance of convenience.

Irreparable injury does not mean that there must not be physical possibility of repairing injury. It means that the injury must be a substantial or material one that is, one that cannot be adequately compensated for in damages.

While deciding to grant or not to grant a temporary injunction, court must be mindful of the fact that the suit has not been tried and evidence on both sides has not been tested yet. The only evidence available now is affidavit evidence.

In the instant application, the applicants have given contradictory statements as to their status vis-à-vis the disputed land and the respondent. As deposed by the respondent in their affidavit in reply, paragraph 3 thereof, in civil suit 47/2009, the applicants claim for a declaration that they are the lawful owners of the suit property and deny being tenants to the respondent. But in Misc. Application 98 of

2010, the instant application the applicants claim to be tenants of the respondent implying the respondents are the owners of the land.

In paragraph 5 of the affidavit in reply, the respondent deposes that the applicants were granted tenancies of different durations each by the respondent in the gazette Tororo Municipal Market and in paragraph 6 the respondent deposes that they are not in any way terminating the individual tenancies granted to the applicants. The respondent is desirous of constructing a new modern market wherein the tenants/vendors operating in the old market are supposed to be allocated shops or stalls. This development has been drawn to the attention of the applicants in various meetings, see annexure 'A'. The applicants have been registered for allocation of shops and lock ups in the intended newly constructed modern market. Infact some vendors have registered and sample Registration forms are attached to the affidavit in reply as annexure 'B'.

Further to this, the applicants/vendors representatives and the respondents have entered into a memorandum of understanding for a Temporary relocation of vendors to pave way for the construction of the modern market as per annexure 'C'.

From the above revelations, I am persuaded by the submission by the respondent that the applicants will not suffer irreparable damage since the respondent is trying to modernize the environment of the market and will not terminate the tenancy of the applicants after redevelopment. Secondly there is no proof on a balance of probabilities that the respondent is going to waste, damage or alienate the property

in dispute to the detriment of the applicants. There is no indication that the respondent intends to defraud the applicants.

Thirdly, the applicants have not made out a *prima facie* case likely to succeed because they claim varying status in both the main suit and in this application. In the main suit they claim to be owners but in the application they claim to be tenants who are paying dues to council. The status of parties shall be determined after the suit is heard. A majority of the vendors has agreed to move to a temporary location provided by the respondent to pave way for redevelopment of the present gazette market and thereafter shall be re-allocated lock ups and shops in the redeveloped market. The development is in public interest since this project is being undertaken with support by the Uganda Government.

I do not think that the respondent will defraud the applicant in view of the numerous joint meetings that have been held on the subject and the memorandum of understanding as well as an undertaking to give the applicants priority in allocation of business space in the redeveloped market. In case of a misunderstanding which may arise, which appears a remote possibility if the memorandum of understanding is entered into freely and voluntarily, then adequate compensation shall be made to the applicants by the respondent. As prayed for in paragraph 5 of the plaint, the respondent shall be in a position of payment of adequate compensation for the suit land and any developments thereon to those opposed to the redevelopment depending on the outcome of the trial of the main suit.

It is my considered view that given the circumstances of this case, the balance of convenience is not in favour of the applicants because the venture is for public good.

For the reasons outlined herein, I decline to grant this application. It is dismissed.

Costs shall abide the outcome of the main suit.

Musota Stephen

JUDGE

3.3.2011

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Applicants not in court.

Representative of Respondent in court.

Dagira for applicant.

Lumbe for Respondent.

Kimono Interpreter.

Dagira: Matter for ruling.

Court: Ruling delivered.

Musota Stephen

JUDGE

3.3.2011