

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**  
**MISCELLANEOUS APPLICATION NO. 516 OF 2011**  
*(Arising From Civil Suit No. 405 of 2010)*

**SAUBA**

**NABITINDO.....APPLICANT**

**VERSUS**

**1. UMAR NASSOLO SEKAMATE**

**2. JOHN JAMESSON SENSEKO KULUBYA.....RESPONDENTS**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This is an application for temporary injunction restraining the respondents and their servants, agents, workmen, employees, and anyone working under their authority or direction from accessing, entering, evicting the applicant or from alienating or disposing of the suit property or in any way alienating or disposing of the suit land or in any way interfering with the applicant's suit property comprised in part of land in Kibuga Block 12 Plot 346 and 347 at Mengo Kisenyi pending final determination of the suit. The application is by chamber summons brought under Order 41 rules 1, 2, and 9 of the Civil Procedure Rules (CPR). It is supported by the affidavit of **Sauna Nabitindo**, the applicant.

The application was opposed by the respondents who filed affidavits in reply respectively deposed to by **Umar Nasoolo Sekamate** the 1<sup>st</sup> respondent and **John Jamesson Senseko Kulubya** the 2<sup>nd</sup> respondent. Counsel were given time schedules within which they filed written submissions on the matter.

The law on temporary injunctions is now settled law, as is deduced from the numerous case decisions on the matter. The gist of a temporary injunction is the preservation of the suit property pending the disposal of the main suit. In addressing this, courts have set out conditions to be fulfilled before the discretion of granting the temporary injunction is exercised. These are that the applicant must show a *prima facie* case with probability of success; that the applicant might otherwise suffer irreparable damage which would not easily be compensated in damages; and, if the court is in doubt, it will decide the question on the balance of convenience. In addition, Order 41 of the CPR requires the existence of a pending suit. Order 41 of the CPR states that where it is proved to court that in a suit, the property in dispute is in danger of being wasted damaged or alienated by any party to a suit, the court may grant a temporary injunction to restrain, stay and prevent the wasting, damaging, and alienation of the property. See **Kiyimba Kaggwa V Haji Katende [1985] HCB 43; Solome Tibariraine Kyomukama Besigye V National Housing and Construction Company Ltd [2007] HCB 109.**

The pendency of a suit is not in issue. In this case it is Civil Suit No. 405 of 2010 filed by the plaintiff/ applicant against the defendants/respondents pending in this court.

As to whether the suit establishes a *prima facie* case with probability of success, case law is to the effect that though the applicant has to satisfy court that there is merit in the case, it does not mean that one should succeed. It means there should be a triable issue, that is, an issue which raises a *prima facie* case for adjudication. See **Kiyimba Kaggwa (supra); Wanendeya V Norconsult [1987] HCB 89; Devon V Bhades [1972] EA 22.**

In the main case from which this application arose, the respondent/plaintiff is suing the defendant/applicant for declarations that she is the owner of approximately one acre of land (kibanja) in Kibuga Block 12 Plot 346 and 347 at Mengo Kisenyi; that the respondent's demolition of the plaintiff's structures/houses on the suit kibanja was illegal and does not extinguish her kibanja interest; orders for compensation for the value of the plaintiff's houses, lost income, punitive and general damages for trespass, mesne profits, vacation of the property, a permanent injunction and costs of the suit. She further alleges that she was in possession of the suit land and between 2002 and 2005 when the respondents forcefully evicted her and demolished her structures, offering her compensation of U. Shs. 5,000,000/= (five million) which she refused. The respondents/defendants on the other hand, claim that they have interest over the

suit land in that the 2<sup>nd</sup> respondent who has a mailo interest in the suit land has lawfully leased it out to the 1<sup>st</sup> respondent. They claim that compensation was paid to the applicant's father as the lawful occupant.

This, in my opinion is enough to give rise to serious triable issues raising a *prima facie* case for adjudication.

On the question of the applicant otherwise suffering irreparable injury not sufficiently atoned for by damages, this court will look at the situation under which the application is brought. The applicant avers in paragraphs 10 and 11 of the affidavit in support of the application that the respondent has fenced off the suit land and is in advanced stages of commencing construction unless stopped by court; and that she will suffer irreparable damage if the order is not granted as the suit land will be taken over permanently and put out of her reach. Counsel for the applicant submitted that owning of property is a constitutional and statutory right and no monetary value could compensate the applicant's attachment to the property. In paragraphs 29, 30 and 31 of his affidavit in reply, the 1<sup>st</sup> respondent avers that his development of the suit land, which is in advanced stages, cannot cause waste to the land but will only enhance its value; and that the applicant cannot suffer irreparable damages which cannot be compensated in damages. The respondent's Counsel submitted that since the applicant claims compensation and damages in the main suit, the damage is accordingly quantifiable and if there is any injury, it can be compensated by payment of that amount.

According to decided cases, irreparable injury does not mean that there must not be physical possibility of repairing injury. It means that the injury must be substantial or material, that is, one that cannot be adequately compensated in damages. See **Kiyimba Kaggwa (supra)**. In **Commodity Trading Industries V Uganda Maize Trading Industries [2001 -2005] HCB 119**, it was held that this depends on the remedy sought. If damages would not be sufficient to adequately atone the injury, an injunction ought not be refused.

In the instant application, the affidavit evidence adduced reveals that since the demolition of the structures in 2009, the 1<sup>st</sup> respondent has been in possession of the suit land and the applicant is neither occupying, nor does she have access to the same. In the main suit the applicant is seeking declarations that she is the owner of approximately one acre of land (kibanja) in Kibuga Block

12 Plot 346 and 347 at Mengo Kisenyi; that the respondent's demolition of the plaintiff's structures/houses on the suit kibanja was illegal and does not extinguish her kibanja interest; orders for compensation for the value of the plaintiff's houses, lost income, punitive and general damages for trespass, mesne profits, vacation of the property, a permanent injunction and costs of the suit.

In my opinion, considering the nature of the plaintiff/applicant's prayers in the main suit, if there is any damage caused by the respondents' activities, it is atonable in damages. In the event that the applicant is successful in establishing her rights in the main suit, the orders prayed for would be an adequate solace to atone the injuries claimed.

This brings me to the question of preserving the *status quo*. In exercising the discretion of whether or not to grant the temporary injunction, court does not determine the legal rights to property but merely preserves it in its actual condition until the main suit is disposed of. The cases in point are **Godfrey Sekitoleko & Ors V Seezi Mutabaazi & Ors [2001 – 2005] HCB 80; Kiyimba Kaggwa (supra); Wasswa V Kakooza [1987] HCB 79**. The Court of Appeal in **Seezi Mutabaazi (supra)** made the position clear by stating as follows;-

***“The court has a duty to protect the interests of parties pending the disposal of the substantive suit. The subject matter of a temporary injunction is the protection of legal rights pending litigation. In exercising its jurisdiction to protect legal rights to the property from irreparable or serious damage pending the trial, the court does not determine the legal rights to property but merely preserves it in its actual condition until legal title or ownership can be established or declared.”***

In the instant application, the applicant's affidavit evidence is that the 1<sup>st</sup> respondent has commenced preparations for developing the suit land at the expense of the applicant who is not in possession of the suit land. Counsel for the applicant did not submit on what *status quo* is to be preserved but the respondents' Counsel submitted that that the *status quo* to be preserved is the 1<sup>st</sup> respondent's physical and legal possession of the land.

I find that in a case like this where the 1<sup>st</sup> respondent has been in possession of the suit land and the applicant is neither occupying, nor accessing the same, preserving the *status quo* would be preserving the situation as it is, that is the 1<sup>st</sup> respondent continuing to occupy and use or develop

the land pending the determination of the rights of the parties in the main suit. I find the *status quo* to be in favour of the respondents who are in actual possession of the suit land rather than the applicant. As such, restraining the respondents would alter the *status quo* rather than maintain it.

On the balance of convenience, the pleadings in the main suit and the affidavits in this application show that the land is currently registered in the names of the respondents albeit that this is challenged by the applicant. The 1<sup>st</sup> respondent is in possession of the same, has fenced it off and is in the process of developing it. I find that the balance of convenience is in favour of the respondents as opposed to the applicant who is not currently registered as proprietor of the suit land nor is she in possession of the same. It would cause more hardship and inconvenience to the respondents than to the applicant if this injunction is granted going by the nature of the injunction sought, which is to restrain the respondents and their servants, agents, workmen, employees, and anyone working under their authority or direction from accessing, entering, evicting the applicant or from alienating or disposing of the suit property or in any way alienating or disposing of the suit land or in any way interfering with the applicant's suit property pending final determination of the suit. The balance of the risk of doing an injustice through grant of the injunction, in the given circumstances, lies more against the respondents than the applicant.

On the basis of the foregoing authorities, and in the given circumstances, I decline to grant the temporary injunction.

The application is dismissed with costs.

**Dated at Kampala this 8<sup>th</sup> day of November 2012.**

Percy Night Tuhaise

**JUDGE.**