

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS APPLICATION NO. 774 OF 2011
ARISING FROM CIVIL SUIT NO. 602 OF 2007

AMOS RWAMASHODI.....APPLICANT

VERSUS

- 1. GATRIDA NALWOGA**
- 2. YOWASI NSUBUGA KAZOوبا.....RESPONDENTS**

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under Order 41 rules 1 and 9 of the Civil Procedure Rules (CPR) and section 98 of the Civil Procedure Act cap 71. It seeks orders that a temporary injunction be granted restraining the plaintiff/respondents from entering into the suit land, intimidating, threatening and evicting the defendant from the suit land pending the disposal of the main suit; restraining the plaintiffs/respondents from selling, pledging, mortgaging, leasing or even transferring the suit land to any third persons pending the disposal of the suit; an order that the *status quo* be maintained until the disposal of the main suit; and costs of the application.

The application is supported by the affidavit of **Amos Rwamashodi** the applicant. The respondents opposed the application through an affidavit in reply sworn by Yowasi Nsubuga Kazooba the 2nd respondent on his own behalf and on behalf of the 1st respondent.

The gist of a temporary injunction is the preservation of the suit property pending 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 that there

is a *prima facie* case with probability of success; and that the applicant might otherwise suffer irreparable damage which would not easily be compensated in damages. If 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. It provides 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**.

The pendency of a suit, in this case civil suit no. 602 of 2007 filed by the respondents/plaintiffs against the applicant/defendant, is not in issue.

On whether there is a *status quo* to be preserved, the applicant avers in his supporting affidavit that he lawfully took possession of the disputed land comprised in Gomba Block 23 plot 1 land at Nabuguyo in 1991 when he purchased it from Yudita Nalongo Nagadya daughter to the late John Baptist Kagolo, one of the registered proprietors. That the said Yudita was in possession of a certificate of succession from the Administrator General and she later executed transfer deeds in favour of the applicant/defendant after the latter had completed payments in respect of purchase of the land. The plaintiff/respondent challenged the decision of the Registrar of Titles to register the applicant as proprietor of the suit land on grounds that they were not accorded a hearing. The applicant avers that if the respondent is given the title, the land in dispute risks being sold, wasted or transferred to third parties before the disposal of the suit thereby rendering the suit nugatory.

The *status quo* the applicant/defendant seeks to maintain is that the plaintiffs/respondents should be restrained from dealing with the suit land in ways highlighted in the application and the supporting affidavit, pending the disposal of the suit. The applicant's Counsel relying on paragraph 14 of the applicant's supporting affidavit submitted that the property on the suit land is in imminent danger of being fully occupied, sold or even mortgaged by the respondents/plaintiffs. This fact has not been expressly denied by the respondents in their affidavit in reply.

The *status quo* is not about who owns the suit property but the actual state of affairs on the suit premises prior to the filing of the main suit. The subject matter of a temporary injunction is the

protection of legal rights pending litigation. Court's duty is only to protect the interests of parties pending the disposal of the substantive suit. In exercising this duty, 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." See **Commodity Trading Industries Commodity Trading Industries V Uganda Maize Industries & Anor [2001 – 2005] HCB 118; Sekitoleko V Mutabaazi & Ors [2001 – 2005] HCB 79.**

In the instant case, the actual state of affairs is that the applicant is in possession of the suit premises. Thus, there is a *status quo* to preserve in that the actual state of affairs should remain as they are on the suit land until the main suit is disposed.

As to whether the suit establishes a *prima facie* case with probability of success, case law is 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 the existence of a triable issue or a serious question to be tried, that is, an issue which raises a *prima facie* case for adjudication. See **Kiyimba Kaggwa, supra.**

The applicant/defendant avers that his defence has a possibility of success. The applicant's written statement of defence in the main suit alleges that he owns the land through purchase from Yudaya. The respondents/plaintiffs' claim to the suit land on the other hand is allegedly through letters of administration of their deceased father's estate, and their suit against the defendant/applicant is for trespass.

In my opinion, this gives raise to serious triable issues pointing to a *prima facie* case for adjudication. It is not for court at this stage to go into the merits of the main suit. This will be done when the main suit is heard on the merits. Thus this court has refrained from addressing all that affidavit evidence and submissions on who is the rightful owner of the suit property.

The applicant avers in paragraph 6 of the affidavit supporting the application that he will suffer irreparable loss and damage if the injunction is not granted as the respondent will, as done before, enter the land, destroy the applicant's structure, trees and domestic animals and dispose of the suit land by sale and subsequent transfer to a third party. His Counsel submitted that if the suit land is sold in part or occupied by the respondent it will be physically not possible to evict them without colossal costs. The respondent's affidavit in reply, other than deponing to facts concerning ownership of the disputed property, did not address the issue on whether or not the

applicant is likely to suffer irreparable damage. His Counsel however invited this court to find that no irreparable damage would be met on the applicant as the damage would be compensatable in monetary terms.

It has been held that irreparable injury does not mean that there must 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. This depends on the remedy sought. If damages would not be sufficient to adequately atone the injury an injunction ought not be refused. Further, in this case, this court does not have any basis upon which it can hold that the respondent is in position to meet the monetary damages, whatever the amount that court may order. See **Giella V Casman Brown & Co. Ltd [1973] EA 258; Kiyimba Kaggwa, supra; Commodity Trading Industries, supra.**

The unrebutted adduced affidavit evidence in the instant case is that the applicant is in possession of the suit property. If the injunction was not granted, in the event that the applicant/defendant is successful in establishing his rights on the suit land, he would incur irreparable loss to regain possession of the same. Financial compensation would not be adequate solace to atone his being evicted from the property since he is in occupation of the same. Besides this court does not have any basis upon which it can hold that the respondent is in position to meet the monetary damages, whatever the amount that court may order. I am satisfied that the applicant will suffer irreparable injury if the injunction was not granted.

Even the balance of convenience is in favour of the applicant who is in occupation of the suit land, whose interests would need to be protected pending the hearing and determination of the main suit, unlike the respondents who are not in occupation of the same.

In the premises, I allow this application.

Costs of this application will be in the cause.

Dated at Kampala this 22nd day of November 2012.

Percy Night Tuhaise

JUDGE.

