THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 287 OF 2012

ARISING FROM CIVIL SUIT NO. 129 OF 2012

ST. MARK EDUCATION CENTER LTD…….....APPLICANT

VERSUS

NKATA JAMES LUYOGA….……...……RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under Order 41 rules 1, 3 and 9 of the Civil Procedure Rules (CPR). It seeks orders that a temporary injunction issues against the respondent restraining him, his agents assignees and all those deriving authority from him from any further development, construction, alienation, interference and/or any other dealings in the suit land comprised in Kyadondo Block 65 Pots 28, 91, 92, 203, 204 and 205 at Migadde pending determination of the main suit; and that costs be in the cause. The application is supported by the affidavit of **Kisubika Tusubira Joseph** a Director in the applicant company. It is opposed by the respondent through an affidavit in reply sworn by him.

The facts as alleged by the applicant, as deduced from the pleadings and supporting affidavit, is that the defendant/respondent has breached the terms of payment in an agreement he signed with the plaintiff for the purchase of the suit land. The plaintiff consequently rescinded the contract and advised the defendant/respondent to vacate the occupied portion of the land. The plaintiff/applicant then filed civil suit 129 of 2012 against the defendant/respondent pending before this court. He prayed for orders for eviction, damages, mesne profits, a permanent

injunction, interest on the foregoing, and costs of the suit. In his defence and affidavit in reply, the defendant/respondent denied allegations maintaining that he was not in breach of the contract. He claimed that he made two installments totaling U. Shs.550,000,000/= (five hundred and fifty million) and that the last installment of U. Shs.373,000,000/= (three hundred and seventy three million) is not yet due. He denied that he forcefully took possession of the suit land and averred that he did so with the plaintiff/applicant's consent. He prayed for dismissal of the suit.

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. Order 41 of the CPR also 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. 129 of 2012 filed by the applicant/plaintiff against the respondent/defendant is not disputed.

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 facts as highlighted above, in my opinion, give 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. This court has therefore refrained from addressing all affidavit evidence on who is the rightful owner of the suit property.

I have noted that the respondent's Counsel's attempted to tender photographs attached to his submissions as **JN1, JN2** and **JN3** purportedly to rebut the applicant's affidavit in rejoinder.

First, I did not find any affidavit in rejoinder referred to by the respondent's Counsel. Second, even if such affidavit was on record, the respondent's Counsel's efforts to rebut it the way he did would tantamount to adducing evidence from the bar which this court rejects outright. The appropriate way of rebutting such affidavit evidence coming after the respondent had filed his affidavit in reply would have been through praying court's leave to file an affidavit sworn by the respondent rebutting any new evidence raised by the applicant in his affidavit in rejoinder, or to request court during submissions to reject such evidence adduced after the respondent had filed the affidavit in reply.

On whether there is a *status quo* to be preserved, the applicant avers in the supporting affidavit that the respondent was only to take possession of the suit land after paying the entire consideration but that the applicant took forceful possession of the said land. The *status quo* the applicant seeks to maintain is that court should restrain the respondent, his agents, assignees and all those deriving authority from him from any further development, construction, alienation, interference and/or any other dealings in the suit land pending determination of the main suit. The respondent on the other hand avers in paragraphs 10 and 12 of his affidavit in reply that he is on the land as per their agreement with the applicant and that he has since developed it by constructing on it a farm house, a banana plantation and setting up a farm.

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. In such situations, the court has a duty to protect the interests of parties pending the disposal of the substantive suit. In exercising its jurisdiction 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. See **Commodity Trading Industries Commodity Trading Industries V Uganda Maize Industries & Another [2001 – 2005] HCB 118; Sekitoleko V Mutabaazi & Ors [2001 – 2005] HCB 79**.

The actual state of affairs on the suit premises, as adduced from the affidavit evidence before court, is that the respondent is in possession of the suit land and has effected some developments on it. In my opinion, that is the *status quo* to be preserved pending the disposal of the suit. I find the *status quo* to be in favour of the respondent who is in actual possession of the suit land rather than the applicant. As such, restraining the respondent who is engaged on a number of

developmental activities on the suit land would alter the *status quo* rather than maintain it. I agree with the respondent's Counsel that if the *status quo* is to be maintained, then this application ought to be denied.

The applicant avers that it will suffer irreparable loss and damage if the respondent or his agents are not restrained from any further development, construction, alienation, interference and/or any other dealings in the suit land until the disposal of the main suit.

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. See **Giella V Casman Brown & Co. Ltd [1973] EA 258**; **Commodity Trading Industries V Uganda Maize Industries & Anor.**

The applicant's affidavit evidence is that it is the registered proprietor of the suit land and it will be more inconvenienced if the application is denied. Their Counsel submitted that the applicant being the registered owner of the land will be greatly inconvenienced as the respondent trespassed on the suit land and took possession of it, as he is altering the land terrain and use, that he has the aim of defeating justice as there is no clause in the contract inferring possession. The respondent avers in his reply however, that he has exclusive possession of the suit land and has developed it. He contends that it is the *status quo* that should be preserved, that the applicant/plaintiff will receive adequate compensation in the event of succeeding in the main suit, and that he will not suffer irreparable loss if the injunction is not granted.

In my opinion, considering the nature of the plaintiff/applicant's prayers in the main suit, if there is any damage caused by the respondent's activities, it is atonable in damages. In the event that the applicant/plaintiff is successful in establishing its rights in the main suit, the orders prayed for if granted would be an adequate solace to atone the injuries claimed, in that the respondent would vacate the land in addition to paying the plaintiff/applicant damages, costs and mesne profits as prayed.

The balance of convenience is also in favour of the respondent who is in possession of the suit land which he has developed. His interests would need to be protected pending the hearing and

determination of the main suit, unlike the applicants who are not in possession of the same. The balance of the risk of doing an injustice through grant of the injunction, in the given circumstances, lies more against the respondent than the applicant.

In the given circumstances, and on the basis of the foregoing authorities, I dismiss this application with costs.

Dated at Kampala this 22th day of November 2012.

Percy Night Tuhaise

JUDGE.