

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT Jinja**

**MISC APPLICATION NO. 335 OF 2018
(ARISING OUT OF CIVIL SUIT NO. 112 OF 2018)**

MUGERWA KADIRI

KIBAMBO YASSIN..... APPLICANTS

VERSUS

1. KALASINGA MAWAZI 2. WILBERFORCE KIGENYI 3. BOGERE IBRAHIM	} RESPONDENTS
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RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

The facts and brief background.

- 1] The applicants presented this application by motion for a temporary Injunction with respect to unregistered land with rocks/stones located at Bugunga Village, Bugunga Parish, Kapyanga Sub County in Bujiri district (hereinafter referred to as the suit land). They seek an order to prevent the activities of the respondents on the suit land until determination of HCCS No. 112/18 (hereinafter referred to as the main suit).
- 2] The grounds as related in the motion are that in the main suit, the applicants as plaintiffs, claim ownership of the suit land which is currently in occupation of the respondents as trespassers. That the respondents and those claiming to be their agents have excavated stones and continue to invite or bring people to excavate and remove more stones from the suit land. The applicants have as a result suffered loss and continue to suffer loss for which compensation is sought. They in

addition seek an order of vacant possession, damages and a permanent injunction against the respondents in the main suit which they believe has a likelihood of success. The question of the rightful owner of the suit land is a subject of the main suit and this application is thus meant to arrest the actions of the respondents on the suit land until its determination.

- 3] The first applicant who is represented by Kibeedi & Co., Advocates filed an affidavit in support of the application and Kalasinga Muwazi, represented by Kafuko Ntuyo Advocates filed one in reply. That evidence and submissions by counsel will not be reproduced here but will form the basis of my ruling.

The law

- 4] The law on temporary injunctions is contained in **Order 41 rules 1(a)** of the **Civil Procedure Rules**. The principles to be followed before granting a temporary injunction are well settled and quite well articulated in the submissions of counsel.
- 5] It is now settled law that when court is considering the application for a temporary injunction it must bear in mind that its purpose is to preserve the status quo in respect of the matter in dispute until determination of the whole dispute: See for example **E.L.T. Kiyimba Kaggwa Vs Haji A.N., Katende (1985) HCB 43** and **Commodity Trading Industries Vs Uganda Maize Industries and another [2001-2005] HCB 118**. The principles governing the grant of a temporary injunction are well settled and have been well argued by both counsel. In the case of **American Cyanamid Co. Vs Ethicon Ltd [1975] AC 396** Lord Diplock laid down guidelines for the grant of temporary injunctions that have been followed in the Ugandan cases of **Francis Babumba and 2 others Vs Erisa Bunjo HCCS No. 697 of 1999** and **Robert Kavuma Vs M/S Hotel**

International SCCA No.8 of 1990 and Giella Vs Cassman Brown Co., Ltd (1973) 1 EA 358 they include;

- a) The applicant has to show that he has a *prima facie* case with a probability of success in the main suit.
 - b) The applicant has to show that he is likely to suffer irreparable damage if the injunction is denied.
 - c) If court is in doubt as to the above considerations it will decide the application on the balance of convenience.
- 6] In considering the above principles, the court should also bear in mind that temporary injunctions are discretionary orders and always that the court should not attempt to resolve issues related to the main suit: See: **Prof. Peter Anyang Nyongo & others Vs The Attorney General of Kenya & Others; East African Court of Justice Case Ref. No. 1 of 2006 (unreported)**

The applicant has to show that he has a *prima facie* case with a probability of success in the main suit.

- 7] In my view, a *prima facie* case is not necessarily a tight case. It is a case in which the court need only be satisfied that there is a serious question to be tried. Wambuzi C J (as he then was) in the case of **Robert Kavuma (supra)** explained it well when he stated that the applicant is required at this stage of trial to show a *prima facie* case and a probability of success but not success. (Emphasis mine)
- 8] In the main suit, the applicants claim that the suit land once belonged to the late Kafero Kabibu (hereinafter referred to as the deceased) and now

forms part of his estate to which they are beneficiaries. That between 2012 and 2015, the respondents in cohort with the area leadership, trespassed on part of it by occupation, quarrying and taking away stones from it without prior consent of the applicants. That as a result, the applicants have suffered and continue to suffer loss for which they seek compensation and vacant possession against the respondents.

- 9] In defence to the suit, the first respondent stated that the deceased did not leave any land and that whatever share he may have had was sold off way back in the 1970s to offset costs of a suit he lost. That instead, the 2nd respondent received the suit land as a gift *inter vivos* from the late Mubale Wakatwe his and the applicants' relative, and had been in occupation since February 1976. Thus, he could not be in trespass on land that he owned and in which he could deal in by himself and with third parties. The respondents as defendants then raised a counter claim giving some detail on how the suit land passed on in the families of the late Wakatwe and Kiokoso, predecessors in title and relatives of the parties.
- 10] Much of what is pleaded in the plaint and written statement of defence and counter claim is what is repeated in the affidavits of Kadiri and Mawazi.
- 11] It is clear from the above facts that the parties do share a common ancestry and that the suit land is now owned as a result of succession or a gift in contemplation of death. Ownership of the suit land is certainly in contention in the main suit. The respondents by their defence acknowledge the fact that the applicant's father and grandfather at some point owned a portion of the suit land which they claim was sold off before Kafeero Kabibu's demise. The court is required in the main suit to determine who is the true owner of the suit land, and it is an important triable issue that

can only be resolved by evidence of succession in the two families. Also, the time when the respondents gained possession can also only be determined by evidence. In my view therefore, the plaintiff discloses a prima facie case.

The order is intended to preserve the status quo

- 12] I believe the above principle is very important because it is important for the court and the litigants to be given time and space to exhaustively handle the matters in issue in the main suit with no disruption on the ground, especially the kind that would result into irreparable damage to the applicants.
- 13] It appears from the pleadings in both the motion and the plaint that it is the respondents that are in possession of the disputed part of the suit land but the applicants have some graves thereon. The applicants' concern is that the respondents are continuing excavate and remove stones from the suit land and have intentions to lease or rent it to third parties. The 1st respondent argued in his affidavit that the activities on the suit land are lawful and currently his only source of livelihood, thus, it would be unfair to stop him from working there.
- 14] I would agree with the applicants that the excavation of stones which is continuous and not monitored is difficult to quantify. This can affect the quantification of damages in the result that their claim in the main suit succeeds. Conversely, the occupation of the respondents must be investigated by the Court especially where they have raised a counter claim to lay claim of ownership of the suit land. What is important is for the status quo to be maintained to allow the Court to adjudicate over this matter with the suit land preserved in its current state, otherwise the decision of the Court may be rendered mute. Counsel Ntuyo's argument

that the continuous excavation of the stones has not led to deterioration of the suit land was not mentioned by Mawazi in his affidavit. It would therefore be a submission from the bar, and thus untenable.

- 15] However, it is evident from the pleadings in the main suit that the respondents have ever let out the suit land to 3rd parties who were working on the Bujiri-Malaba Busia Road project and the fears of the applicants that they may in the future enter into similar transactions with other parties, are not farfetched.
- 16] Thereby, in order for this court to fully and effectually investigate the triable issues raised in the main suit with the status quo being maintained, I allow the application but with conditions.
- 17] The respondents shall remain in possession of the suit land but in effect, desist from carrying out any economic activity on it.
- 18] I am therefore issuing a temporary injunction restraining the respondents, their agents and/or any persons deriving title or authority from them from grading, quarrying/excavating stones, building/developing, subdividing, selling, or otherwise dealing in the suit land until the main suit is finally determined by this Court or until further orders of the Court.
- 19] The costs of this application shall abide the outcome of the main suit.

I so order

Signed

EVA K. LUSWATA
JUDGE
29/05/2019

