THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

MISCELLANEOUS CIVIL APPLICATION No. 113 OF 2019

(Arising from Civil Suit No. 41 of 2019)

KUKUA AGRICULTURE LIMITED ..... APPLICANT

VERSUS

1. **AHMED TEJANI**
2. **KINYARA SUGAR LTD..... RESPONDENTS**

RULING BY GADENYA PAUL WOLIMBWA - JUDGE

Introduction

The application is brought under the provisions of O. 41 rule 1 and 9 of the Civil Procedure Rules SI 71-1; section 98 of the Civil Procedure Act cap 71, and section 33 of the Judicature Act Cap 13, seeking a temporary injunction. The purpose of the injunction is to restrain the Respondents or their agents, servants and/or employees or any person claiming interest under them from evicting the Applicant from land comprised in Leasehold Register Volume 3539 Folio 15, at Rwenkondomi, Buruli, Block 10 Plot 80, measuring 387 hectares or from trespassing, dealing with the suit property or carrying out any activity or transaction on the suit land until the final disposal of the main suit.

The application was filed by Kukua Agriculture Limited, hereinafter called the 'Applicant' against Ahemed Tejani, hereinafter called the '1st Respondent' and Kinyara Sugar Limited, hereinafter called the '2nd Respondent'. The Applicant was represented by Mr. Sim Katende and Mr. Sebowa of M/s Katende Ssempebwa and Company Advocates, while the 1st Respondent was represented by Mr. Edison Ruyondo of Edson Ruyondo & Co Advocates and the 2nd Respondent by Mr. Nangwala of Nangwala Rezida & Co Advocates.

Background to the Application

Briefly, the Applicant entered into a tenancy agreement with the 1st Respondent in 2015, were the latter leased the suit land to the Applicant. Under the tenancy agreement the 1st Respondent let the suit land for a term of four years with a provision to review the rent every two years as agreed by the parties. Under clause 1(b) of the Tenancy Agreement, it is provided that the tenant and land lord shall complete the review of rent not later than 30 days before the due date of renewal. The due date for purposes of this suit was 1st December 2018 upon the expiry of the old term on 31st November 2018. The agreement also gave the tenant the right of first refusal to purchase the suit land if the landlord wished to sell it. Accordingly, the agreement obliged the land lord to inform the tenant of its intention to sale the land by written notice and the tenant was given 30 days to either accept or in that case put an offer to buy the land or to decline the offer.

The parties worked well at the beginning but the 1st Respondent says that though the rent was revised for the subsequent years, i.e. 2018 and 2019 by an agreed 10% increment, the Applicant never paid the rent despite reminders and threatened termination of the tenancy agreement. But this matter was amicably resolved and the Applicant paid the rent in April and May 2018.

The 1st Respondent says that the Applicant never approached the 1st Respondent to renew the tenancy agreement for the next two years. It is the 1st Respondent's case that failure by the Applicant to take steps to renew the Tenancy Agreement effectively terminated it and hence the Applicant is supposed to vacate the suit land.

The Applicant's case is that under clause 1 of the Tenancy Agreement, it had an absolute right to renew the agreement and the landlord could not object to the renewal. That under clause 3(m) of the agreement, the Applicant had the first option to purchase the suit land if the 1st Respondent wished to sell the land and that the mode of communication between the parties was to be done in writing addressed to the Applicant's registered address, which in this case was P. O. Box 8700 Kampala or delivered to MMAKS Advocates. It is the case for the Applicant that on 29th November 2019, before the expiry of the Agreement, it wrote to the 1st Respondent informing him that it wished to renew the agreement for another four years and accompanied that letter with a cheque of UGX 312 million drawn on the account of Asili farms Masindi Ltd.

That on 2nd December 2019, the 1st Respondent wrote to the Applicant that the land had been sold to the 2nd Respondent. On the same day, the Applicant wrote a letter to the 2nd Respondent requesting to renew the tenancy and attached a cheque of UGX 312,800,000 being rent for the proposed new term. However, the 2nd Respondent rejected the cheque and instead wrote a letter on 4th December 2019, directing the Applicant to vacate the land. The Applicant claims that the 1st Respondent contravened the tenancy agreement for failing to inform it about the sale and purchase of the land. The Applicant also says that even if the sale of the land by the 1st Respondent was valid, the 2nd Respondent bought the land subject to its absolute right to renew the tenancy as provided for in the agreement.

The 2nd Respondent on its part contends that the Applicant failed to renew the Tenancy Agreement and it therefore expired. It is the 2nd Respondent's case that the Applicant cannot therefore claim any rights under the expired tenancy agreement and that for that reason, they have no cause of action against it.

The grounds of the Application are as follows:

The grounds of the application are:-

1. That if a temporary injunction is not immediately issued to preserve the property and maintain the status quo, the property is likely to be sold off or dealt with in manner that is injurious to the applicant's interest and the applicant shall suffer irreparable loss which cannot be atoned by an award of damages.
2. That Civil Suit No. 0041 of 2019 is pending hearing before this honorable court and if a temporary injunction is not issued to preserve the suit property and maintain the status quo, the main suit shall be rendered nugatory and the applicant shall suffer irreparable loss which cannot be atoned by an award of damages.
3. The pending suit has a high probability of success.

Evidence in support and against the Application

The application is supported by the affidavit of Philipp Prinz, the Managing Director of the Applicant Company. In his affidavit Phillip Prinz, states that on the 1st day of 2015, the Applicant entered into a tenancy agreement with the 1st Respondent, in which the latter rented out land to the former for a renewable contract of four years. According to the Tenancy Agreement the Applicant

had a right to inform the landlord about the intention to renew the tenancy and the landlord had a duty to renew the agreement for two terms under the same terms and conditions. That in the event the 1st Respondent opted to transfer the title into any subsidiary or holding company or to any direct family member without consent of the Applicant, the transferee was to hold the suit property on the same terms and conditions as contained in the rental agreement. That if the 1st Respondent wished to sell the land, the Applicant had the first option to purchase the 1st Respondent's interest in the suit property and that right was to continue for the duration of the rent and the Respondent was to give the Applicant a notice in writing and the Applicant had 30 days to from receipt of the notice to make an offer to purchase the 1st Respondent's interest. That incase a third party made an offer to purchase the Applicant's interest in the property during the term of the rent, the 1st Respondent had a duty to immediately notify the Applicant of the offer in writing. The rental agreement provided for penalties for any party who breached any of the terms and warranties.

Phillip Prinz deponed that before the expiry of the rental agreement, the Applicant wrote to the 1st Respondent a letter on the 29th day of November 2019, informing him of its interest to renew the lease for another term of 4 (four) years. That however, when the Applicant received the letter, the 1st Respondent's Advocate on the 2nd day of December 2019 replied with a back dated letter of 21st November 2019, informing the Applicant that the suit property had been sold to the 2nd Respondent. That on the 2nd day of December 2019, Asili Farm Limited paying on behalf of the Applicant issued a cheque to the 2nd Respondent for the terms of the rental agreement which they rejected. It is therefore necessary to restrain the Respondents or any other agents, servant and or employees or any person claiming interest under them from evicting the Applicant from land comprised of leasehold Register Volume 3539 Folio 15 land at Rwenkondomi Buruli Block 10 Plot 80 measuring 387 hectares or from trespassing, dealing with the suit property or carrying out any activity or transaction on the suit land until the final disposal of the main suit.

In his affidavit in reply, the 1st respondent opposes the application and instead avers that the Applicant had the first option to purchase the interest in the suit property, where the Applicant had 30 days from the time of offer to purchase the property to make an offer to purchase the same. He states that in March 2018, he held a meeting with one of the Directors of the company at his office and agreed to continue the tenancy relations with the Applicant for the next 2 years 2018-2019 and that the company pays the rent that was due and he was going to mobilize and look for money to

buy the suit property and request that an offer to purchase the land within 30 days be made to him through his appointed agents M/S Katende, Ssempebwa & Co. Advocates, Solicitor and Legal Consultants who acknowledged the offer letter without any objection. He continued engaging the said director on phone requesting him to make an offer but his efforts were futile he told him verbally that the company was unable to secure funds to purchase the suit property and advised him to look for another purchaser the information was not put in writing as he had requested. That after he had waited for nearly a year without any communication from the Applicant for the offer to purchase the land or not, he decided to sell the suit land to another willing purchaser the 2nd Respondent and transferred the interest in the land to the 2nd Respondent. That the Applicant's tenancy agreement expired on 30th day of November 2019 and it has never been renewed and the Applicant is a trespassed on the suit land. He deponed that the Applicant has not and will not suffer any loss or at all since they failed to comply with the process of the offer or purchase the land in issue and have never renewed the tenancy agreement. He prayed that the application be dismissed with costs.

In his affidavit in reply, the company secretary to the 2nd Respondent opposed the application and averred that before the 2nd Respondent started dealing with the 1st Respondent in relation to the suit land, the 2nd Respondent was appraised of the existence of the claimed tenancy agreement and it established that the tenancy was for a period of 4 years ending 30th November 2019 and that it was not registered. That the 2nd Respondent inquired from the 1st Respondent as to whether the applicant had exercised a right of refusal to purchase the suit land and was informed that an offer was made to the Applicant to purchase but no response was received within the prescribed 30 days. That he inquired from the 1st Respondent as to whether there was any relationship between Agil Partners and the Applicant and he was furnished with evidence of various correspondences made to that address as furnished by the Applicant and also alluded to various cheque made by the said Agil Partners on behalf of the Applicant. That he was satisfied indeed the 1st Respondent had given the Applicant the first offer to purchase the land. He said that after being satisfied with compliance with the questionable tenancy agreement inter-parties, he executed an agreement of purchase of land from the 1st Respondent on the 27th day of March 2017. The 1st Respondent was fully aware that under the questionable Tenancy agreement, rental increment was supposed to be agreed upon not less than 30 days before the due date for the renewal and he is not aware that any

rental agreement had been agreed upon or a negotiation of the said increment initiated by the applicant 30 days before the 30th November 2019. He deponed that the 2nd Respondent is not liable for any purported omission between the applicant and 1st Respondent. He said that any negotiations inter-party could only have been done before the 30th November 2019, when the tenancy agreement was still in force. He deponed that the suit is founded on an expired Tenancy agreement is therefore, misconceived and devoid of any merits and hence the Applicant will not suffer irreparable injury and that in any case, the Applicant will be allowed time to harvest any crop that it may have on the land. He deponed that the 2nd Respondent has invested over USD 1,000,000 in carrying out a due diligence over the suit land and depositing towards the purchase price of the suit land and will therefore suffer greater convenience than the Applicant if an interim injunction is issued against them.

Arguments of the Parties

The Applicant submitted that according to section 38 of the Judicature Act and Order 4 of the Civil Procedure Act, purpose of an injunction is to require an individual to do or omit doing a specific action and that the court has discretion to grant the injunction if it is it is just and convenient to do so. The Applicant submitted that the purpose of an injunction is for the preservation of the party's legal rights pending litigation. He submitted that at this stage, the court does not determine the legal rights to property but merely preserves it in its current form until the legal title or ownership can be established or declared. He submitted that an injunction can only be granted if the harm to be suffered by the Applicant cannot be atoned for in damages. See *Rashid Abdul Hanallai vs. Adrisi HCMA 11 of 2017*.

The Applicant's counsel further submitted that that the conditions for the grant of a temporary injunction were laid down in *E L T Kiyimba Kaggwa vs. Haji Abdu Nasser Katende (1985) HCB 43*, where the Court held that the conditions for granting a temporary injunction are: Firstly that the applicant must show a prima facie case with a probability of success; Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated for by an award of damages; Thirdly, if the court is in doubt, it would decide an application on the balance of convenience.

With regard to whether the Applicant had made out a prima facie case, Counsel for the Applicant submitted that the Applicant had made out a prima facie case based on the following facts, namely that:

1. The purported sale to the 2nd Respondent was invalid because the 1st Respondent breached its duty to offer the Applicant a right of first refusal before entering into a memorandum of sale with the 2nd Respondent;
2. That the 2nd Respondent was fully aware of the Applicant's right of first refusal but instead colluded with the 1st Respondent to effect the breach including not informing the Applicant of the alleged sale for 8 months;
3. That without prejudice to the above, even if the sale to the 2nd Respondent is valid, the 2nd Respondent purchased the land subject to the Applicant's rights under the rental agreement to renew the contract; and that,
4. The Applicant validly exercised its right to renew the said tenancy agreement and is therefore entitled to the occupation of the land.

Counsel for the Applicant also submitted that under clause 6 of the Tenancy Agreement all communication from the 1st Respondent to the Applicant was to be done in writing addressed to the Applicant at its registered address. Under the agreement, the Applicants registered address was P. O. Box 8700 Kampala (Uganda) and the lawyers for the Applicant were MMAKS Advocates. That contrary to this, the 1st Respondent on March 20th 2018, wrote a letter to Agil Partners, a nonexistent legal entity asking Agili partners whether they were interested in purchasing the land or not. That this letter cannot be valid because it was not addressed to the Applicant's registered office or appointed agent as required by clause 6 of the Tenancy Agreement.

Furthermore, counsel submitted that the Applicant complied with the Tenancy agreement in seeking a renewal of the tenancy agreement. He said that the Applicant on 29th November 2019, a day, before the expiry of the Tenancy Agreement, wrote a letter to the 1st Respondent informing it that it was exercising its right to renew the lease for another term of four years and also enclosed cheques issued by Asili Farms Masindi Limited of UGX 312,800,000 to cater for the rent. That instead of the 1st Respondent renewing the rental agreement, he wrote back in a letter dated 21st

November 2019 and received on 2nd December 2019 that it had sold the land to the 2nd Respondent. That on receipt of this letter, the Applicant wrote a letter and enclosed a cheque of UGX 312,800,000, to the 2nd Respondent who declined to receive it and instead wrote a letter on 4th December 2019, evicting the Applicants from the land.

It was the Applicant's case that the 2nd Respondent knew from the time of purchasing the land that the 1st Respondent had not notified the Applicant before the sale and that the Applicant had a right to exercise its rights to renew the Tenancy Agreement. That even if the court was to establish that the sale to the 2nd Respondent was valid, the Applicant's rights to renew the tenancy agreement is enforceable against the 2nd Respondent.

Lastly, the Applicant submitted that the court cannot permit the 1st and 2nd Respondent to benefit from their mischief because they hid the sale from the Applicant for eight months. In conclusion, counsel submitted that the Applicant had satisfied the requirements of a prima facie case.

With regard to the issue of irreparable damage, counsel for the Applicant submitted that his client will suffer irreparable damage if the injunction is not granted. He submitted that irreparable damage according to the case of *Kiyimba Kaggwa (supra)* means injury that is substantial or material one that cannot adequately be compensated for in damages. He submitted that not granting the temporary injunction would remove the applicant's legal rights pending litigation that would determine the main counter claim without giving the Applicant chance to be heard. He also submitted that the sale of the suit land to the Respondent and the notice to vacate the suit land will lead to loss that cannot be atoned by damages. Last but not least, counsel submitted that the 2nd Respondent in theory claim are seeking an order of vacant possession and not granting the injunction will determine the suit at this point before the trial.

On the issue of whether the Applicant will suffer significant financial and reputation loss, counsel submitted that the Applicant has invested U$ 1,837,428 in developing the land, bush clearance, road construction, putting up latrines on the land, purchasing farm engineering plant and soil fertility correction. Furthermore, that the Applicant had borrowed U$ 950,000 and purchased equipment such as tractors, Rome harrows, s680 combines corn header, kvernerland sprayer,

boggie trailers and other equipment and that they did so because they had intention of using the land for 12 years and that failure to renew the tenancy agreement will occasion them irreparable damage.

Relatedly the Applicant submitted that it has maize on the suit land which it is yet to harvest. It also added that it is difficult to establish the amount of maize it expects from the suit land this season and the coming seasons. That the 2nd Respondent damaged its maize and that the Applicant therefore seeks the protection of Order 41 to prevent further waste and damage to the crops yet to be harvested.

On the issue of balance of convenience, the Applicant submitted that the balance of convenience is in its favour. Counsel submitted that balance of convenience means that if the risk of doing an injustice is going to make the Applicant suffer then probably the balance of convenience is favorable to him / her the court will most likely be inclined to grant him or her the temporary injunction.

Counsel submitted that the balance of convenience favours the Applicants who have been in possession of the suit land since 2015, and have invested heavily in the land and that refusing to grant a temporary injunction would determine the counter claim before the Applicant is heard. Furthermore, counsel submitted that the balance of convenience does not favour the 2nd Respondent because it illegally took over the suit land using state agents; that the 2nd Respondent under the contracts cannot take possession of the land until June 2020; that the 2nd Respondent has less to lose if the injunction is not granted; that the 2nd Respondent has invested less money in the land than it has done and therefore stands to lose if the injunction is refused.

Additionally, counsel submitted that the 2nd Respondent has not paid the full purchase price of the land; that it bought the land well aware of the rights of the Applicant; that it is not in physical possession of the land, the Applicants rights to renew the tenancy agreement is absolute and that therefore, any interest the 2nd Respondent has in the land is subject to the Applicants' rights to renew the Tenancy and that the 2nd Respondent can only take possession of the land in June 2020.

In response, counsel for the 1st respondent argued that if a temporary injunction is granted against him, it will be of no value or use as there is no evidence by the Applicant against it to support the issuance of such an order. Counsel referred to the in rejoinder to the 2nd Respondent that the evidence therein does not disclose a cause of action against the 1st Respondent and does not warrant issuance of a temporary injunction order against the 1st Respondent. Counsel submitted that the 1st Respondent had never breached the salient terms of the tenancy agreement but rather honored them. That the 1st revision of the 2 years was to be negotiated and be paid one month before the due date though it was revised with an increment of 10% rent the Applicant did not pay the said agreed rent in time. Counsel further submitted that during the time of the tenancy neither Applicant nor his agent approached the 1st Respondent to express their intentions to renew the lease for other 2 terms and that therefore the tenancy between the Applicant and the 1st Respondent expired since it was not renewed and the Applicant had to vacate the suit land. He submitted that since there is no subsisting tenancy relations between the Applicant and the 1st Respondent, the Applicant has no legal right on the suit land and no valid grounds upon which the court can rely on to grant an injunction.

The 2nd Respondent submitted that the court in determining whether the Applicant has made out a prima facie case, it must look at the plaint and that in this regard the court must establish whether the plaint raises triable issues and that the issues must be such that the court would grant the injunction. That the case before the court is one that concerns a dispute on the land and rights thereof. That the plaint must disclose that the Applicant has existing user rights are enforceable in law and these are:

1. He is the registered proprietor;
2. The registered proprietor has conferred on it proprietary rights;
3. That it is a lessee or tenant of the owner;
4. That it is a bonafide occupant;
5. That the applicant is none of the above, its tenancy in the land having expired and was not renewed during its currency.

Furthermore counsel for the 2nd Respondent submitted:

1. That a consideration of the Applicant's case is about breaches which occurred when it had a subsisting tenancy but that such breaches are only compensated for in damages.
2. That the Applicant does not have a tenancy agreement with the 2nd Respondent and therefore has no relationship with the Respondent.
3. That the court cannot contracts for parties. The court only interprets contracts for parties.
4. That the right to renew the agreement could only be exercised during the subsistence of the tenancy however, the tenancy expired before renewal and that the right to renew also expired with it.
5. That the Applicant had an option to renew a tenancy. In *Habib Punja & Sons vs. Agas (1968) EA 161* – the Judge held that an option of renewal in a lease gives rise to a new tenancy but does not extend the old where the rent is not progressive. He submitted that progressive rent is defined in that case as rent which automatically rises. In the case under consideration, the rent would not automatically rise but had to be discussed by the parties and agreed upon provided the increment did not exceed 15% of the then existing rent in clause 1(b) of the Tenancy Agreement.
6. He submitted that determination of the rent payable was a condition precedent to the exercise of the option to renew the tenancy and it had to be agreed upon 30 days before it was due for payment under clause 1 (b) of the tenancy agreement.
7. That the Applicant's failure to initiate and fulfill this condition with ether of the respondents before the time of expiry of the tenancy ipso facto brought the tenancy to an end by effluxion of time.
8. That the court cannot grant a temporary injunction to a party who is seeking a user right and a temporary and limited one as such , created by the court.

With regard to preserving the status quo, the 2nd Respondent submitted that the Respondent is in possession of the land and that it has almost completed ploughing the land ready for planting of sugar cane. That there is no maize on the land as alleged by Mr. Prinz. That the 2nd Respondent as owner of the land did not require a court order to enter upon its land since it lawfully acquired the land. That photographs exhibited by the Applicants cannot be that of growing maize on the land since the land has already been ploughed. That the 2nd Respondent is in possession of the land and that as an owner, it cannot trespass on its own land.

With regard to irreparable injury, counsel submitted that the evidence offered by Prinz are mere laminations of what took place when the Applicant still had a tenancy on the land with the 1st Respondent. That Prinz's first affidavit never disclosed evidence of irreparable injury. Evidence of purported irreparable injury was manufactured in affidavits in rejoinder as an afterthought. And that the alleged expenditure and loan existence is immaterial and irrelevant when the applicant has no tenancy on the land.

He submitted that the complaints by Prinz can be adequately be dealt with by an award of damages. The court should consider that the 2nd Respondent has invested money and resources to develop the land.

With regard to the balance of convenience, Counsel submitted that the balance of convenience lies in favour of the 2nd Respondent who is the owner of the land. Counsel for the 2nd Respondent relied on Paragraph 766 Volume 21 of Halsbury's laws of England where it's stated that:

> **"Where any doubt exists as to the plaintiffs right, or of his right is not disputed but its violation is denied , the court in determining whether an interlocutory injunction should be granted , takes into consideration the balance of convenience to the parties and the nature of injury which the defendant on the other would suffer if the injunction is granted and he should ultimately turn out to be right...The burden of proof that the inconvenience which the plaintiff would suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted , lies on the plaintiff".**

He submitted that the existence of the Applicant's rights is disputed since it has no tenancy and since the Applicants rights are disputed, there is no way the Respondent could have violated the right which does not exist.

He submitted that on the contrary, the 2nd Respondent has invested a lot of money in acquiring the land and preparing it for commercial farming and has in that regard entered into contracts with owners of equipment to ensure that the land is put to productive use.

Lastly, counsel submitted that it is not the business of the Applicant to assess the volume of business of the 2nd Respondent and to question why it is acquiring the land. The 2nd Respondent is an owner and the Applicant is a trespasser and it would be a travesty of justice to restrain the 2nd Respondent from using the land in favour of the Applicant, who is a trespasser – seeking the court to grant it a tenancy.

Consideration of the Application

Section 38(1) of the Judicature Act grants the High Court power to grant an injunction to restrain any person from doing any act. The power to grant injunctions is discretionary and it must therefore exercise judiciously to prevent abuse of court process. An injunction should thus be granted to meet the ends of justice, prevent abuse of court process and promote procedural justice pending determination of substantive issues by the court.

In *Kiyimba Kaggwa vs. Katende 919850 HCB 43*, as quoted in the Uganda Justice Bench Book at page 55 and cited by the Applicant, the court noted that the granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in status quo until the question to be investigated in the main suit is finally disposed of. The court further laid down the conditions for the grant of an interlocutory injunction. These conditions are:-

1. Firstly, that the applicant must show a prima facie case with a probability of success;
2. Secondly, such injunction will not normally be granted unless the applicant might suffer irreparable injury which would not adequately be compensated by an award of damages;
3. Thirdly, if the court is in doubt, it would decide an application on the balance of convenience.

I will now consider each of the grounds to establish whether the Applicant has made out a case for which I should exercise my discretion to grant the injunction.

Has the applicant made out a prima facie case?

It is true both the Applicant and the 1st Respondent had a tenancy agreement on the suit land which was renewable every two years on the terms set out in the agreement which included a review of

the rent and a request from the Applicant to the 1st Respondent or his successors in title to renew the tenancy. For as long as the conditions precedent to renewing the tenancy, the Applicant's rights to a new term were absolute. It is also true that the Applicant had the 1st option to purchase the 1st Respondent's interest in the suit land within 30 days from the date offer and the agreement provided that the offer to sell would be made in writing and delivered to a named address or served on MMAKS advocates, who were the Applicant's lawyers.

It was the Applicant's case that 1st Respondent breached the tenancy agreement by first of all not offering it the land for sale and secondly, for keeping secret this sale of the land to the 2nd Respondent for eight months. It was also the Applicant's case that it exercised its right to renew the tenancy agreement when it sent its notice of intention to do to so, first to the 1st Respondent and then to the 2nd Respondent, when it learnt that the land had been sold to the 2nd Respondent. This evidence was not disputed. It was also the case for the Applicant that even if the sale of the land to the 2nd Respondent was valid, the 2nd Respondent bought the land subject to its right to automatically renew the tenancy agreement for two years. The Applicant, argued that it made an offer to the 2nd Respondent, but it rejected the offer.

On the other hand, the Respondents did not dispute the fact that the Applicant was entitled to renew the tenancy agreement but blamed it for ignoring invitations from the 1st Respondent to renew the tenancy. It was the 1st Respondent's case that it duly offered the Applicant chance to buy the land through a written notice sent to Agili Partners through M/s Katende Ssempebwa and Co Advocates but it yet again, ignored the offer. This offer came was after the Applicant, had told the 1st Respondent that he was going to mobilize funds to buy the land and that it advised that an offer to purchase land be made to his appointed agent – M/s Katende Ssempebwa. That despite the Applicant receiving the notice, it kept quiet and as such the 1st Respondent had to look for another buyer. Thirdly the Respondents contend that the Applicant skipped an essential step of negotiating rent for the next two years before applying for the renewal of the tenancy. It was the 2nd Respondent's case that the Applicant having missed out this material step, it could not automatically renew the tenancy agreements as the tenancy was not a progressive one. The 2nd Respondent, was also emphatic in arguing that the Applicant's case did not disclose a cause of

action because the Applicant does not have any proprietary interests in the land, having failed to renew the Tenancy Agreement in time.

A review of the respective cases of the different parties raises the following issues, namely:
Firstly, whether the notice sent by the 1st Respondent to Agili Partners through M/s Katende Ssempebwa and Co Advocates was effective or valid within the context of the Tenancy Agreement and relatedly whether Agili Partners and by extension M/s Katende Ssempebwa were the agents/ advocates of the Applicant ?;

Secondly, whether the failure by the Applicant to negotiate rent for the next two years before seeking a renewal of the tenancy was a material gap which precluded the Applicant from renewing the tenancy?

Thirdly, whether the Applicant can enforce its rights under the expired tenancy agreement to acquire a new tenancy and if so, what obligations has the 2nd Respondent got to the Applicant?

These issues raise material points that will be resolved through production of evidence and consideration of the law during the trial. I am sure that during the trial, the court will have to determine the legality of the determination of the Applicant's tenancy agreement and invariably, whether the Applicant at the time it sought to renew the tenancy agreement was time barred or not. Additionally, the court, will also determine the issue of whether the 2nd Respondent has any obligations to the Applicant arising out of the expired tenancy agreement.

To this extent, therefore, there are triable issues on both sides of the case that merit consideration of the party's rights. I am therefore satisfied that the Applicant has established that it has a prima facie case that merits consideration.

Will the Applicant suffer irreparable loss if the injunction is not granted?

Irreparable loss is defined as that loss that cannot be easily be compensated for in damages. It is also accepted that irreparable injury does not mean that there must not be physical possibility of repairing the injury but means that the injury must be a substantial or material one that is one that cannot be adequately be compensated for in damages. See *Kiyimba Kaggwas'* case supra. *Tonny Wasswa v. Joseph Kakooza [1987] HCB 79; NTCO Ltd. v. Hope Nyakairu [1992 – 1993] HCB 135.*

Similarly, *Lord Diplock in American Cyanamid Co vs. Ethicon (1975) ALLER 504*, said that:

> **"The governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his rights to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant continuing to do what was sought to be enjoined between the time of Application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in position to pay them, no interlocutory injunction should normally be granted".**

Therefore, for an injury to be irreparable, it must meet the substantiality and inadequacy test as enunciated in the above cases before the Applicant can qualify for an injunction. But there is a proviso to this, the Applicant must satisfy the court that the Respondent is incapable of paying damages should the Applicant succeed at the trial. Where the Respondent has the means to pay the damages, then prima facie, an injunction should be denied because of the guarantee that the Applicant will not be without a remedy if they emerge as the successful party.

The Applicant has extensively argued that it will suffer irreparable loss if the injunction is not granted. The Applicant gave the following reasons:

1. It has a subsisting tenancy or in the alternative that it has rights under the Tenancy Agreement entitling it to specific performance that are inconsistent with an award of damages or that damages would not be a suitable remedy for its claim;
2. It has invested substantial sums of money in clearing the land, purchasing farm equipment , construction of roads and farm houses estimated at more than U$ 2,500,000;
3. It has a crop of maize on the land that is yet to be harvested;

4. It borrowed close to U$ 800,000 to invest in the land;
5. That it has contracts with suppliers with financial obligations that would expose it to financial risk and reputation risk;

The Respondents in opposition, argued that the Applicant had not established that it would suffer irreparable damage that cannot be atoned for by way of damages. The Respondent advanced the following reasons:

1. That there was no proof that the Applicant had invested heavily in the suit land.
2. That the purported investment put forward by the Applicant were speculative and an afterthought;
3. That investments made after the expiry of the tenancy agreement were irrelevant in determining irreparable loss;
4. That the Applicant did not have a valid subsisting tenancy agreement – out of which it could assert contractual rights
5. And that there is nothing …to entitle the Applicant to specific performance of the Tenancy Agreement.

It is true that the Applicant for the last four years has been on the suit land, were they have been growing maize and possibly other plants. Although the court, was not appraised about the condition in which the Applicant found the land in 2015, I am sure that the Applicant as a commercial farmer invested resources in clearing and tilling the land as well constructing access roads for movement of farm produce and equipment. As I write this ruling, I am aware that the Applicant has a crop of maize on part of the suit land that is due for harvesting within the next few days. To this far, there is no doubt that the Applicant has invested resources in the suit land.

However, I am not convinced about the claims put forward by Prinz that the Applicant has invested close to 4 million dollars in the land. I have not found any other evidence beyond the affidavits of Prinz, that the Applicant has invested very substantial resources in the suit land apart from opening it for cultivation and maintaining gardens of maize. I did not get any evidence from the Applicant, who prides itself to be a big commercial business entity to show that it had invested substantial resources in the land or indeed, borrowed substantial funds to invest in the farm. I would have expected the Applicant, upon whom the burden of proving that it is going to suffer substantial loss if the injunction is denied, to have brought such evidence to court to back up its investments and

expenditure in the land. This evidence could have included bank statements, contracts with third parties, and log books for machinery, audited books of account or indeed, any other evidence on which the court could have relied on to make a decision on the alleged investments in the land. I am therefore, in agreement with the Respondents that the evidence of substantial investment by the Applicant in the suit land was a mere after thought and is therefore, unreliable. I am not therefore in position to agree with the Applicant that it has invested so substantially in the suit land. With this evidence out of the way, I am only left with evidence of clearing and tilling the land and some crop of maize, which remains unharvested on part of the land. The question that begs an answer is whether these losses would be substantial if an injunction was refused? Guidance on what amounts to substantial loss was given by Lord Diplock in *American Cyanamid Co vs. Ethicon (1975) ALLER 504*, where he said that:

> **"The governing principle is that the court should first consider whether if the plaintiff were to succeed at the trail in establishing his rights to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant continuing to do what was sought to be enjoined between the time of Application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in position to pay them, no interlocutory injunction should normally be granted".**

According to Lord Diplock, the court looks at whether the damages apart from being substantial , would be an adequate remedy to the plaintiff or Applicant and whether the Respondent / Defendant has the capacity to pay the damages if the court found in favour of the Applicant.

As I have indicated above, the Applicant will obviously suffer loss as a result of the Respondents actions, should it succeed in the main trial. In particular, the Applicant will lose land for commercial farming, lose profits from the land and incur losses in securing alternative land. But there is no evidence to show that these losses will be substantial and cannot be ascertained. This loss, can be ascertained since the business of the Applicant is known i.e. of growing of maize on this land. Such evidence can be ascertained from business records of the Applicant that the Applicant can establish at the trial. The job of ascertaining the losses will even be made much

easier given that the Applicant had not invested very heavily on the land and even if it had, a thorough valuation of the investment would help the court to ascertain the Applicant's losses.

Before concluding this matter, let me consider the Applicant's arguments that damages would not be an adequate remedy since it is seeking the remedy of specific performance. A party is at liberty to ask for any remedies that they deem fit, however, whether the court will grant the remedy depends on a careful evaluation of the respective cases of the parties, unless of course, the case for the Applicant is very unequivocal. I have found in this matter, that both the Applicant and the Respondents have arguable cases that can take the case either way. That being the case, the court at this point cannot, be certain that if the Applicant were to succeed, it would be granted the remedy of specific performance. It is therefore very speculative to determine the inadequacy of damages from this perspective and as such this argument has no merit.

I will now turn to the issue of whether the Respondents would be in position to pay the damages? I am satisfied that the 2nd Respondent who is an established commercial entity in the sugar industry has adequate resources to compensate and or pay damages should the Applicant succeed in the main suit. In view of this finding, I am unable to agree with the Applicant that this loss would be irreparable if the injunction was not granted.

Having reached a negative finding as to whether the Applicant will suffer irreparable injury, I do not consider it necessary to inquire into who as between the parties would be favored by the balance of convenience! Suffice to mention that given that the Applicant has not invested very heavily in the land and does not have a subsisting tenancy agreement over the land, the balance of convenience would be in favour of the 2nd Respondent, who purchased the land and is in occupation of part of the land.

Costs

The costs of the Application are awarded to the Respondents who have successfully defended the Applicant's action.

Decision

I am unable to grant a temporary injunction to the Applicant for failing to establish that it would suffer irreparable harm if the injunction was granted. I accordingly dismiss the Application with costs to the Respondents.

Gadenya Paul Wolimbwa
JUDGE

This ruling will be delivered by the Assistant Registrar to day the 12th of February 2020, to save the inconvenience of the parties coming back to court on 14th of February 2020.

Gadenya Paul Wolimbwa
JUDGE
12th February 2020.

Gadenya Paul Wolimbwa
Judge