

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC APPLICATION NO. 094 OF 2022

[ARISING FROM CIVIL SUIT NO. 065 OF 2022]

BRAIN BRIDGE HIGH SCHOOL LTD::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. MONTCLAIR SCHOOLS LTD

2. OPPORTUNITY BANK LTD ::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

RULING

This is an application for a temporary mandatory injunction by chamber summons under Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act, Order 41 Rule 1(a) & 2 of the Civil Procedure Rules S.I 71-1, for orders that;

1. A temporary mandatory injunction doth issue directing the 1st respondent to vacate the applicant/plaintiff's school premises and restraining the respondents, their agents, servants and/or employees from using the applicant's school name, property, students, operations, good will and licence, utilizing, selling, alienating or interfering an or in any way dealing with the applicant's school property and facilities until the final determination of Civil Suit No. 065 of 2022.
2. Costs of this application

Background.

By a tenancy agreement dated 10th October 2018, the applicant entered into a tenancy agreement with Byaruhanga Muhamood over land

comprised in FRV KB029 Folio 10 Block 29 plot 21 at Kisomoro II in Kabarole district (the suit land) to run a school in the names of the applicant. The same property was later mortgaged by the landlord on 31st October 2018 to secure the borrowings of Mashunga Enterprises (U) Ltd in the sum of UGX 1,300,000,000/= from the 2nd respondent and for which the applicant issued a corporate guarantee.

Until 18th August 2022, the applicant was running the school on the aforementioned rented premises. It is alleged that Mashunga Enterprises (U) Ltd defaulted on its loan obligations with the 2nd respondent and the latter proceeded with a foreclosure process that led to the sale of the suit land to the 1st respondent. The suit land was then handed over to the 1st respondent on 18th August 2022 and the 1st respondent has taken possession of the same ever since.

The applicant filed Civil Suit No. 065 of 2022 against the respondents seeking for among others a declaration that the respondents' takeover of the applicant's licenced school premises, students, staff members, operations and property was unauthorised by the applicant, was high handed and illegal. It also sought for a declaration that the continued running of the school operations is illegal and an order for recovery from the 1st respondent of all properties of the school that were unlawfully taken over. The present application arises from this suit.

On 13th October 2022, this court ordered that the candidate students in senior four and senior six in the applicant school be allowed to sit for their Uganda National Examinations Board exams under their registered school name and index numbers of Brain Bridge High School Ltd.

The grounds of this application are set out in the affidavit of Kabarokole Sarah, the Human Resources Manager of the applicant and are among others that;

- a. That the respondents forcefully took over the applicant's school name, property, students, operations, goodwill, and licence on 18/08/2022
- b. The 1st respondent continues to commit a tort of detinue by unlawfully remaining with the property of the applicant's school, its operations, name and goodwill, and if not restrained, they will continue depreciating the applicant's property, facilities, equipment and goodwill and probably dispose it off thereby rendering the main suit nugatory.
- c. That the applicant is likely to suffer irreparable loss if the application is not granted

The 1st respondent opposed the application by an affidavit in reply deposed by Nabunya Mary Lilian Manyonga, a director of the 1st respondent and she states inter alia that;

- a. The applicant's director, Byaruhanga Muhamud executed a mortgage over the suit land to secure borrowing from the 2nd Respondent, wherein the suit property was lawfully sold to the 1st respondent after the borrower had defaulted on the loan.
- b. The applicant, as guarantor for the said loan failed to act on the statutory notices served upon it before the suit land was sold
- c. On 18/8/2022, the respondent peacefully handed over the suit property to the 1st respondent in the presence of the applicant's head teacher and area local council executives
- d. That the 1st respondent has never taken over the applicant's property and that the applicant has never made a request for its properties that

is in the suit premises and has not led evidence to prove that the alleged property belongs to it.

- e. That the plaint in the main suit does not disclose a prima facie case with any likelihood of success.

The 2nd respondent also opposed the application through the affidavit in reply deposed by Julius Ahumuza, a Senior Legal Officer of the 2nd respondent. He deposes a reply in the same terms as those of the 1st applicant and I need not reproduce them.

Representation and hearing.

The applicant is represented Mr. Francis Harimwomugasho of M/S Newmark Advocates while both respondents are represented by Mr. Philip Kasimbi of M/S Okalang Law Chambers. On the direction of this court, the hearing proceeded by way of written submissions. Both parties filed submissions which have been considered in this ruling.

Preliminary matters

In his written submissions, counsel for the respondents raised three preliminary points against the application. They are;

- a. That the chamber summons in this application is defective
- b. That an application for mandatory injunction cannot seek for restrictive measures
- c. That the application discloses no cause of action against the 2nd respondent

It is convenient that they are handled first and I am pleased to do so. I will handle them in the order presented. The applicant has not filed submissions in rejoinder and did not therefore respond to these objections.

That the chamber summons in this application is defective

Counsel for the respondent argued that the chamber summons is defective in as far as it doesn't contain the grounds of the application. Counsel did not cite any authority to support this argument.

Under Order 41 of the Civil Procedure Rules, provisions are made regarding the procedure for applications for temporary injunctions and interlocutory orders. **O.41 r.1** states that “*where in any suit it is proved by affidavit or otherwise....*” **O.41 r.9** then states, applications under rules 1 and 2 shall be summons in chambers. The rules above indicate that the evidence in cases of temporary injunction can be provided by affidavit. The proof is therefore by affidavit. Failure to place grounds in the summons is not fatal as it was not specifically covered under the rule above. The summons of the applicant is not faulty for failure to include the grounds of the application.

The above position is guided by **Section 33 of the Judicature Act** Cap 13, regarding the general provisions as to remedies. The High Court, in the exercise of the jurisdiction vested in it by the Constitution, or any written law, may grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim, so that as far as possible all matters in controversy between the parties may be completely and finally determined. In the instant application, court's discretion to grant remedies cannot be fettered by form of the pleadings in the Chamber Summons. The substance of litigation is the guiding factor whether or not court can grant any remedy. This objection is overruled.

That an application for mandatory injunction cannot seek for restrictive measures.

Counsel for the respondents argues that the nature of a mandatory temporary injunction is that it ought to require the performance of an affirmative act or to mandate a specified course of conduct.

It is my considered opinion that this objection can well be dealt with in the determination of the merits of the application. The same goes for the third objection.

The application

The only issue for determination in this application is whether the application raises sufficient grounds for the grant of a temporary mandatory injunction.

Counsel for the applicant relies on the case of ***Xing Wang Co. Ltd Vs Zheng Zuping HCMA No. of 2018*** to lay down four principles that he submits are what court needs to consider before it grants a temporary mandatory injunction.

- i. Orders for the preservation of assets, the very subject matter in dispute, where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute;*
- ii. Where generally the processes of the court must be protected even by initiatives taken by the court itself;*
- iii. To prevent fraud both on the court and on the adversary;*
- iv. Qua timet (because he fears) injunctions under extreme circumstances to prevent a real (threatened) or impending threat (though not yet commenced) of removal of the assets from the jurisdiction.*

Counsel submits that the aim of a mandatory injunction is to improve the chances of court to be able to do justice after determination of the merits at trial. That court must assess the whether granting or withholding an injunction is more likely to produce a just result at the end of the trial and if there is serious issue to be tried and the applicants could be prejudiced by the acts or omissions of the respondent pending trial and the cross undertaking in damages would provide the respondent an adequate remedy, then an injunction should be granted.

It has also been submitted for the applicant that the respondents forcefully took over the applicant's school name, property, students, operations, goodwill, and licence on 18/08/2022 and that the 1st respondent continues to commit the tort of detinue by holding onto the applicant's property. Further that the applicant was reliably informed that the 1st respondent is effecting change to the applicant's licence with the Ministry of Education and Sports, has put the suit land on the market, hence the justification for the grant of the orders sought.

Counsel for the applicant further argued that the balance of convenience favours the applicant. That is the injunction is granted, the respondents would be at liberty to deal with the suit property, create third party interests and dispose it off to the detriment of the lease that was granted to the applicant over the suit property.

In response, counsel for the respondents relied on the case of ***Kenya Breweries Ltd & another Vs Washington O. Okeya [2002] EKL***R to submit that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, but only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction is directed at a simple and

summary act which could easily be remedied. That the court has to feel a higher degree of assurance that at the trial, it would appear that the injunction was rightly granted, which is a higher standard.

It was also submitted for the respondents based on the case of ***Morris Vs Redland that Bricks Ltd [1970] AC 652*** that a mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave danger may accrue to him in the future. Counsel submitted that the applicant executed a corporate guarantee to secure the borrowing of Mashunga Enterprises Ltd which has the same directors as the applicant. That no special circumstances have been advanced to warrant the grant of a very peculiar order since the directors of the applicant are simply using the applicant company to defraud the 2nd respondent.

Counsel for the respondents submits further that the applicant has not shown that it has a prima facie case with a likelihood of success in the main suit, has not shown what irreparable damage it would suffer if the injunction was not granted and that the balance of convenience favours the 1st respondent who is in occupation of the suit land and the 2nd respondent who has lawfully exercised its statutory right to sell the mortgaged property.

In the alternative, counsel for the respondents prays that should court be inclined to grant the injunction, it should invoke Regulation 13 of the Mortgage Regulations 2012 to compel the applicant to deposit 30% of the forced sale value of the suit property.

I have carefully examined the pleadings of the parties and their submissions in support of their respective cases. I need to commend both

counsel for the extensive research into this peculiar type of injunction. The reason it may differ from the many other types of injunctions is that it may require the performance of an affirmative act rather than restrain the respondent from taking a particular step. This may in effect actually alter the status quo that exists immediately before the application is made. This however should be done with so much care because it may have the effect of substantially disposing off the merits of the main suit. They are injunctions that tend to determine matters in finality.

I have looked at the decision of my learned brother Justice Stephen Mubiru in ***Xing Wang Co. Ltd (supra)*** as cited by counsel for the applicant. While determining an application like the present one, he said;

“A temporary mandatory injunction is not a remedy that is easily granted. It is an order that is ordinarily passed in circumstances which are clear and the prima facie materials clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demand that the status quo ante be restored by way of a temporary mandatory injunction. In circumstances of that nature, the essential condition is that the party claiming it must be shown to have been in possession on the date of the order directing the parties to maintain the status quo and it must be further to shown that the party was dispossessed when the order was impending or after such an order was passed.”

While exercising the discretion of the Court on whether to grant an injunction like the one applied for herein, regard must be had to the facts and circumstances of each case including the extent of injury or inconvenience caused to the applicant, the extent of injury or hardship that will be caused to the respondent by the grant, and the possibility of

substantially affecting the ultimate result of the main suit. Where these in material particular don't favour the grant, court could be at liberty to look into the possibility of granting an alternative remedy such as security for costs or damages.

In ***Nottingham Building Society Vs Eurodynamics Systems plc., [1993] FSR 468***, cited with approval in ***Xing Wang Co. Ltd (supra)***, Chadwick J laid down tests for the granting of mandatory interlocutory injunctions, thus;

- a. This being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong'.
- b. The court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the *status quo*.
- c. It is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.
- d. Even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist

where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.

From the above, I note that in an application like the present one, the applicant is required to show a very strong probability upon the facts that grave danger will accrue to him in the future if the injunction is not granted. The level of proof is relatively higher than in usual civil matters. See ***Morris Vs. Redland Bricks Ltd (supra)***. The court must also exercise its jurisdiction sparingly.

Bearing the aforementioned parameters in mind, I move to determine whether the present application satisfies the conditions for the grant of a temporary mandatory injunction. I agree again with the decision in ***Xing Wang Co. Ltd (supra)*** that it appears that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the *status quo* and not granted to establish a new state of things, differing from the state which existed at the date when the suit was instituted.

I have looked at the plaint in Civil Suit No. 065 of 2022 and without the fear of contradiction or delving into the merits of the suit, the applicant seems to challenge the legality of the respondent's occupation of the school premises, and the respondents' use of the applicant's name, students, licence, goodwill, members of staff and movable property.

In this application, the applicant seeks for mixed orders. The first is that it wants court to order the 1st respondent to vacate the school premises. The nature of this order would be to compel the 1st respondent to perform some affirmative act of moving out of the premises which the 1st respondent currently occupies. In my opinion, this in effect alters the state of affairs that are present at the time of filing the suit and the present application.

Secondly, the applicant prays for restraining reliefs to prohibit the respondents from using the applicant's property, name, licence, students and goodwill.

It is my considered opinion that the applicant has not demonstrated that it would suffer greater damage if the injunction prayed for is not granted. I also note that change of the applicant's name may only happen at the Registry of companies only with the consent of the applicant and the respondents have no capacity to effect such change. In the premises, where the respondents wish to run the suit property as a school, they can only use their own name under a licence granted to them by the licencing authority. As regards the applicant's goodwill, students, staff members, facilities, depreciable assets, the applicant may well be compensated with an award in general damages, mesne profits or other remedies should their suit succeed.

The applicant has fallen short of supporting proving the required high degree of assurance that the applicant will establish its right at the trial and that that if it did, the damage occasioned to it would not be adequately atoned for by a grant of damages which it prays for in the main suit. It has not been shown that failure to grant the order, poses a real danger of compromising the final determination of the question of ownership of the property that the applicant claims.

It also my considered opinion that the balance of justice and convenience in the present application favours the 1st respondent who, if the facts presented herein are taken to be true, might have lawfully acquired the suit land for whatever reason it did for valuable consideration and ordering them to vacate the same may cause the undesired injustice should it turn out later that an injunction has been wrongly issued. It would also deprive

the 2nd respondent the right to recover the monies it lent on the power of the suit property for the entire period of the suit.

The application therefore fails with the following orders;

- a. The interim order that was issued by this court on 13th October 2022 shall continue in force until it ceases to have the desired effect.
- b. The parties are ordered to jointly carry out a stock count and inventory of all the properties that are claimed by the applicant at the suit land under the supervision of H/W Basaija Steven, Magistrate Grade one and officer of this court and to file the same on or before the 15th of December 2022.
- c. The parties are advised to fast track the main suit so that it is determined in the shortest possible time.
- d. Costs of this application are awarded to the respondents.

I so order

Dated at Fort Portal this 17th day of November 2022



Vincent Emmy Mugabo

Judge.

Court: The Assistant Registrar shall deliver the Ruling to the parties.



Vincent Emmy Mugabo

Judge

17/11/2022