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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL MISC. APPLICATION NO. 0052 OF 2022

(Arising from Miscellaneous Application No. 0028 of 2022)

(Arising from Civil Suit No. 0027 of 2022)

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[illegible]

VERSUS

JONATHAN BYARUHANGA:::::::::::::::::::::::::::: RESPONDENT

BEFORE HON. JUSTICE SAMUEL EMOKOR

RULING

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This applicant brings this instant application by Notice of Motion under Sections 38 (1) and 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 44 r I (q), and Order 50r8 of Civil Procedure Rules seeking orders that the ruling and orders of the learned Deputy Registrar are set aside and that this Appeal be allowed and provisions made for costs.

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The grounds upon which this application is premised is that the learned Deputy Registrar erred in law and fact when held that the respondent was in possession of the Suitland whereas not and allowed the Respondent to use the land which he is not in possession of hence partially determining the main suit. That the learned trial Deputy Registrar erred in law and fact when he merely considered the

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Respondent's purchase agreement to determine the Application and find that the

5 balance of convenience favors the Respondent and that irreparable damages were not proved.

The Application is supported by the affidavit of the Applicant.

The Respondent filed an affidavit in reply to the Application.

Representation.

10 The applicant was represented by Messrs Kasumba, Kugonza & Co. Advocates while Messrs Kiiza & Kwanza Advocates were for the Respondent. The Counsel in this matter proceeded by way of written submissions.

Background.

The brief background to the Application is that the Applicant instituted HCMA No.
15 28/2022 seeking orders that a temporary injunction doth issue against the Respondents, their agents and servants assignees or anyone acting on their behalf or any other person whatsoever from claiming, transacting, dealing or evicting the Applicant from the suit property located at Rwamacumu village, Kasheregyenyi Parish Kabale district measuring approximately one acre pending
20 the determination of the main suit.

The court presided over by the Deputy Registrar upon hearing of the Application on 21/09/2022 dismissed the same with costs.

The Applicant formulated six grounds of Appeal as follows;

- i. The learned Deputy Registrar erred in law and fact when he held that the
25 Respondent is in possession well as not.

- 5 ii. The learned erred in law and fact when he allowed the Respondent to use
the land which he is not in possession of hence partially determining the
main suit.
- iii. The learned Registrar erred in law and fact when he merely considered the
Respondent's purchase agreement to determine the application.
- 10 iv. The learned Deputy Registrar erred in law and fact when he held that the
balance of convenience favors the Respondent whereas not.
- v. The learned Deputy registrar erred in law and fact when he held that
irreparable damage had not been proved.
- vi. The learned Deputy registrar erred in law and fact when he didn't properly
15 evaluate the evidence on record and thereby reaching a wrong conclusion.

I will not reproduce verbatim the averments of the parties as contained in their affidavits in this matter nor will I reproduce the submissions of Counsel since they are all a part of the court record. It should suffice to note that I have carefully studied the averments of the parties and perused the submissions of Counsel.

- 20 It is well-settled law that a first appellate court is under a duty to re-evaluate the
evidence on record and arrive at its own conclusion. **See J. Muhita vs. Katama
SCCA No. 11/99.**

- It is also well-settled law that an appellate court will always be cautious to
interfere with a finding of fact arrived at by a trial court and will only do so when
25 after taking into account that it has not had the advantage of studying the
demeanor of the witnesses, it comes to the conclusion that the trial court is plainly
wrong.

5 **See Kasifa Namasisi and ORS vs. Francis M.K Ntabaazi SCCA No. 4 of 2005.**

It must be noted though that HCMA No. 28/2022 from which this appeal arises proceeded by affidavit evidence and therefore no oral evidence was taken by the court.

I will not resolve each of the six ingredients that the Applicant/ appellant has
10 raised in this appeal because to do so would be repetitive. The central concern in this application should be whether the trial Deputy Registrar erred in law and fact when he didn't properly evaluate the evidence on record and thereby arrived at a wrong conclusion.

I will for clarity reproduce below the relevant extract from the decision of the
15 court.

“From the submission of both Counsel on record I find that both parties claim to be in possession.

I find it is not disputed that there is a sale agreement signed in favor of the respondent who paid consideration in exchange for the land. It wouldn't be
20 fair to stop him from using or claim of the property before the said sale is canceled by the trial court. The balance of convenience favors him and irreparable damage is not proved because, from the photographs attached, I didn't see anything that cannot be paid in damages. I find other issues going into the merits of the main suit which is still pending before the judge and I
25 cannot find on them in this application.

In the premises, the application is dismissed with costs payable after the conclusion of the main suit.”

5 It is imperative to note from the onset that the purpose of a temporary injunction as was sought in HCMA No. 28/2022 is to preserve the status quo pending the disposal of the main suit”.

See Noora mohammed Jammohamad Vs. Kassamali Virji Madhvan (1953) 29 EACA 8.

10 It was therefore essential that the trial court establishes the status quo on the suit property that the applicant sought to maintain. The trial court, unfortunately, didn't make a finding on the same apart from observing that both parties claim to be in possession.

The first ground raised in this appeal is that the trial Deputy Registrar found that
15 the Respondent is in possession of the suit property is therefore misplaced.

This court in a bid to establish the status quo on 14/12/2022 visited the locus in quo and found that the Applicant/appellant owns a garden of beans on the upper part of the suit property that were about 3 months old and some trees on the lower part of the same. The Respondent did not lay claim to the beans and trees
20 but informed this court that he has a caretaker who is responsible for looking after the property on his behalf. Indeed the said caretaker was amongst the people present at the locus visit.

The parties also agreed during the locus visit that the Applicant would harvest her beans and not plant any new crops on the suit property while the Respondent
25 agreed not to cut down any of the trees.

The conditions for the grant of a temporary injunction are;

- 5 1. *That the Applicant has a prima facie case with a probability of success.*
2. *That the Applicant would suffer irreparable injury which an award of damages could not adequately atone if the injunction was refused and later on he turned out to be the successful party in the main suit.*
3. *If the court is in doubt in respect of the above two, that the balance of*
10 *convenience is in the Applicant's favor.*

See Noora Mohamed Jammohamed (Supra).

The trial Deputy Registrar didn't make a finding on the first consideration. I would, however, basing on the pleadings on record find this to be proved.

On the 2nd consideration, it was the finding of the trial Deputy registrar that he
15 didn't see anything that cannot be paid for in damages. The trial court in reaching this finding had at its disposal the averments of the parties and the photographs of the suit property.

This court as already indicated did visit the locus in quo on 14/12/2022 and made observations as indicated above. I would therefore not depart from the findings
20 of the trial court and agree that the Applicant/ Appellant would not suffer irreparable injury if this application were denied since the same can be compensated for in damages.

The trial Deputy Registrar found the balance of convenience to tilt in favor of the Respondent having found that it is not disputed that there is a sale agreement
25 signed in favor of the Respondent who paid consideration in exchange of the land.

The criticism levied against the finding of the Deputy Registrar that he considered the respondent's purchase agreement to determine the application is not tenable.

5 The Deputy Registrar made an observation of a fact that indeed was not in
dispute. This observation didn't entirely determine the dispute as can be seen
from the extract of the court's decision. The trial court found that irreparable loss
had not been proved by the applicant and that the balance of convenience was
tilted in favor of the respondent. I do not find sufficient reason to differ from the
10 findings of the Deputy Registrar.

In the final result, it is my finding that the Applicant has not met the legal test
necessary for this appeal to succeed. The same is accordingly hereby dismissed
with no orders as to costs.

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Samuel Emokor

Judge

21/03/2023