

Justice Tseheoko

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE

CIVIL APPEAL NO. 6 OF 1992

(FROM ORIGINAL MISCELLANEOUS APPLICATION NO. 9/90)

Esparte
by

1. NASSER KIINGI	¶	5
2. RASHID KIINGI	¶ ::::::::::::::::::::::::::	APPELLANTS
3. OUNDO	¶	

V E R S U S:

M/S THABIT ABDALLAH &
BROTHERS HIDES & SKINS :::::::::::::::::::::::::: RESPONDENTS

BEFORE: THE HONOURABLE MR. JUSTICE S.G. ENGWAU.

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J U D G E M E N T

The Respondents/Plaintiffs in Civil Suit No. 9/92 in the Chief Magistrate's Court at Mbale, sued the Appellants/Defendants inter alia for specific performance, general damages for trespass, declaration that they were the lawful tenants of Store No. 2, Government Prison Road, return of some properties and the costs of the suit. 15

While the substantive suit was pending, the Respondents/Plaintiffs filed an application before Magistrate Grade 1 in the Chief Magistrate's Court of Mbale seeking an injunction ex-parte and were granted an Order restraining the appellants/defendants from entering, trespassing or dealing in other way with the Store No. 2, Government Prison Road, Mbale. 20

The appellants therefore brought an application to vacate that Order on the 5th February, 1992 and the application was heard ex-parte though the other party was aware of the hearing date. 25

Ruling on the 3rd March, 1992 was delivered against the appellants to the effect that the parties should find a buyer for hides and skins which were in the suit premises and the proceeds thereof be deposited into court. Alternatively, the appellants were required to deposit in court not less than half of the expected income from hides and skins. Thereafter, the court would consider opening the suit premises for the appellants to operate their business of trade in hides and skins. 30

In the light of the above brief background ~~stems~~ this appeal on the following grounds:-

1. THAT, the learned trial Magistrate erred in law in completely failing to address the application before the court and as such occasioned a miscarriage of justice. 5
2. THAT, the learned trial Magistrate erred in fact and law in relying on extraneous matters not before the court, unknown to the appellants and in failing to afford the appellants the opportunity to challenge the extraneous matters and as such occasioned a miscarriage of justice. 10

From the onset, I must point out that this appeal proceeded ex-parte under O. 39 r 14(2) C.P.R. which states:

"where the appellant appears, and the Respondent does not appear, the appeal may be heard ex-parte." 15

In the instant appeal, service was effected on one of the respondents in person and service was accepted on the 26th March, 1992 at 8.40 a.m. for their appearance in this court on the 2nd April, 1992 but neither the respondents nor their Advocates did attend the court. Although, the Counsel for the appellants attended the court, an adjournment was nonetheless granted by this court to give the respondents one more chance in the interest of justice. The appeal was then set down for hearing on 10th April, 1992. 20

Mr. Wandera, Counsel for appellants appeared in court on 10th April, 1992 but neither the respondent nor their Counsel did attend court although service was this time effected on the Counsel for the respondents and an affidavit of service filed in Court. 25

"THAT, Maluku Tanners Credit and Co-operative Society were allocated the suit premises with effect from 1st January, 1992 (see annexure "B")."

Paragraph 4 thereat:

"THAT, the Society took vacant possession of the premises and started operating the business."

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Paragraph 6:

"THAT, by the time the order was issued the Society had completed rent formalities with the Landlord (see annexure "A") and entered the premises on 31.12.91."

And in paragraph 7, Rashid deponed:-

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"THAT, he and the two co-appellants were merely members of the Society and there were many other members."

It is the argument of Mr. Wandera that the issue that the injunction was obtained through suppression of material facts was argued but not considered otherwise that was a valid ground for the dissolution of the injunction. In support of his argument, the learned Counsel cited Halsbury's Laws of England, 3rd Edition, volume 21 at page 437, where it is stated that an injunction may be dissolved if it was granted on a suppression or misrepresentation of material facts. He also cited to fortify his case by referring this court to Robert Kavuma Vs. M/S Hotel International Ltd., Civil Appeal No. 8/90 - Supreme Court of Uganda (unreported).

It is evident from the records of the trial court that there was a misrepresentation or suppression of the fact that the suit premises belonged to the Co-operative Society namely Maluku Tanners Credit and Co-operative Society of which the appellants were no more than ordinary members. The Society being a legal entity, should have been a party to the substantive suit leave alone the application for the injunction. In the instant case, the appellants were wrongly joined as parties to the case as individuals whereas the Society should have been the right party to be sued.

It is also clear from the records that by 31.12.91, the Society had already taken vacant possession of the suit premises.

It is for the above reasons that this court deemed it fit and granted the appeal to be heard ex-parte under O.39 r. 14(2) of the Civil Procedure Rules.

Turning now to the first ground of this appeal that the learned trial Magistrate erred in law by completely failing to address the application before court and as such occasioned a miscarriage of justice, Mr. Wandera for appellants, argued that Notice of Motion filed in Court on 5/2/92 raised some issues for determination but none of them was dealt with by the trial court. Such issues raised included the following inter alia:-

1. THAT, the injunction was obtained through a misrepresentation and suppression of material facts.
2. THAT, the respondents have no propriety rights in the suit premises.
3. THAT, no notice was served upon the appellants.
4. THAT, the appellants were wrongly joined in the suit.

The learned Counsel for the appellants contended that the trial court failed to address itself on the above mandatory issues framed therefore a miscarriage of justice was occasioned under O.18 r.5 CPR which stipulates that:-

"In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefore, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit."

It is the contention of the learned Counsel that if the learned trial Magistrate had considered the above framed issues, he would have set aside the injunction. The issue that the injunction was obtained through suppression of material facts was argued but not considered. He referred this court to paragraphs 3, 4, 6 and 7 of the affidavit deposed by one Rashid Kiingi one of the appellants, dated 5.2.1992.

In paragraph 3 of the said affidavit, the said Rashid Kiingi deposed:

Therefore, when the court Order was issued on 30/1/92, the eviction should have been made against the Society rather than against the appellants as individuals. These facts are manifestly clear and fully backed by annextures "A" and "B" on records. It is the finding of this first appellate court as per records that in fact the appellants were wrongly joined as a party to the case. 5

It is also to be noted that as far as the records of the trial court reveal, there was no notice served upon the appellants prior to the hearing of application for injunction. It is mandatory that service be given to the opposite party unless service was dispensed with or that there was a prayer in the affidavit of the respondents to that effect: Noormohammed Jan Mohamed Vs Kassam Virji Madhani (1951) 20 EACA. 10

Apparently, the learned trial Magistrate made an Order granting injunction under O. 37 r. 1 C.P.R. which states:- 15

1. "Where in any suit it is proved by affidavit or otherwise -

a) that any property indispute in a suit in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or 20

b) that the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors.


The court may by Order grant a Temporary Injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damage, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders." 25

In the instant case, there was no justification for an immediate issue of a temporary injunction there being no danger to immediate loss or disposal of the suit premises. Moreover, according to the records of the trial court, neither the appellants nor the respondents claimed proprietary rights over the suit premises apart from their claims of being tenants. To justify an immediate issue of a temporary injunction, there must be danger of immediate loss or disposal of the subject matter. In the affidavits of the respondents/applicants, there was no such evidence. The purpose of a temporary injunction is to preserve the status quo. In the case of eviction from the suit premises, a temporary injunction is justified where the other party admits being a trespasser which was not the case in the instant case. However, except in exceptional circumstances, an injunction will not be granted unless the opposite party is likely to suffer irreparable damage which cannot be adequately remedied or atoned for by damages: Noor Mohamed Janmohamed vs Kassamali Virji Madvani (supra). Such situations never existed here in the present case and therefore the first ground of this appeal succeeds.

The second ground of appeal is that the learned trial magistrate erred in law and fact in relying on extraneous matters. The Counsel argued, and in my view argued well, that the trial Magistrate in his ruling relied on the information received from one J.Kuku, Court Broker, that the appellants had removed some hides and skins from Store No. 2 Government Prison Road, whereas such evidence should have been allowed only after the said J.Kuku was cross-examined on oath. It is the basis of information received from the said J.Kuku after the application was heard but before ruling that the learned trial magistrate gave orders that the hides and skins be sold and the proceeds thereof be deposited in court or in the alternative that the appellants deposit not less than half the expected income from hides and skins to court. The question of hides and skins was not

raised or even argued by the ~~respondents~~/applicants when the application for a temporary injunction was being heard. The order to that effect was therefore ultra vires and to that extent the second ground of appeal must also succeed.


In view of my holdings above, the appeal is allowed, the order of the trial court set aside. Costs to be in the cause. Trial of the substantive suit to take off as soon as possible.


S.G. ENG'AU,
JUDGE.

12.5.92.

12.5.92.

Appellants and Respondents absent.
Mr. Wandera for appellants present.
Mr. Gabula Court clerk present.
Judgment read out and signed.


S.G. ENG'AU,
JUDGE,
12.5.92.