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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

HCT-01-CV-MA-0144-2006

(Arising from HCT-01-CV-CS-0066-2006)

BIRUNGI ABDU & OTHERS..... APPLICANT

VERSUS

M/S FBW (U) LTD.RESPONDENT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOOKI

RULING

This is an application for a temporary injunction. It was brought by way of Chamber Summons under O. 41 rr. 1, 2 and 9 of the Civil Procedure Rules and S. 98 of the Civil Procedure Act. The application sought court orders to restrain the respondents, their servants or workmen from surveying suit land, and destroying the developments thereon. The application in particular sought orders of court to restrain the respondents from cutting down trees, planting their own trees, and dispossessing or evicting the applicants from the suit property till final disposal of the head suit, and for costs of the application.

The rather sad background to this application is thus. The applicants who number about 4000 people are resident in an area in Mwenge known as Plot 2 Mwenge Block 1 approximately 633 hectares. The registered proprietor is one George Kalyegira. He mortgaged the same to International Credit Bank and upon default, the bank foreclosed and the respondent purchased the same from the bank. The said Kalyegira has since died. The respondent

started planting trees in the suit land, and in the process razed down crops and homes, destroyed the applicants developments, and is threatening to evict them. The respondent has since issued eviction notices to the applicants. Hence the head suit for a permanent injunction plus damages by the applicants against the respondent.

It was argued that the applicants have been on suit land for several years and have thereby enjoyed undisturbed possession for more than 15 years. That they hold good title by adverse possession, and that they are bona fide occupants under the law and have an overriding interest over the respondent's claim.

The application was supported by the affidavit of Birungi Abdu on behalf of the other applicants. In that affidavit, the applicants allege that George Kalyegira acquired the title to the land fraudulently. He never had the land surveyed, did not consult the occupants, had no right to claim the land as his own, and had never been in possession of the same. The applicants also alleged in the same affidavit that the respondent was equally fraudulent in that he failed to inspect the title to ascertain the ownership and possession of the land before he purportedly bought.

It was alleged in the affidavit in support that in the process of surveying the land, the respondent used high handed measures. Peoples houses were burnt. Their crops were completely destroyed. This was their only means of survival. Their entire livelihood was thus completely erased. This was irreparable damage. The land was being alienated for a different user.

The respondent opposed the application. It was argued that the applicants had not shown any irreparable damage which could not be atoned by way of damages if the temporary injunction was not granted. In any event, the suit had no chance of success as the respondent was in possession of a certificate of title to the land. Lastly it was submitted for the respondent that the grant of a temporary injunction would dispose of the suit without hearing it on the merits since the main prayer in the head suit was a permanent injunction.

Order 41 rule 1 of the Civil Procedure Rules provides that,

“ Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in a decree; or

(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, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

It is not disputed that there is a suit between the applicants as plaintiffs, and the respondent as defendant. This is the civil suit titled HCT-CV-CS-066-2006. In that suit, it is averred in the plaint that the applicants have been in lawful possession of suit land as owners at all material times. The allegation is that the registered proprietor Kalyegira acquired the title to the land by fraud and the respondent followed likewise. The applicants seek the

cancellation of the certificate of title, a permanent injunction and general damages for trespass.

The respondent in the written statement of defence denies any knowledge of the fraud alleged, and avers that he acquired good title. That the applicants are trespassing on his property, and are not as many as claimed. The trespass started only in the year 2000. There clearly is a dispute concerning the 633 hectares of land.

The grant of an interim or temporary injunction is an exercise of judicial discretion. The principles upon which a temporary injunction will be granted were fully spelt out in the case of Noor Mohamed Jan Mohamed v. Karamali Virji Madhani (1953) 20 EACA 8. It was held that the whole purpose of a temporary injunction is that parties ought to be preserved in status quo until the question to be investigated in the suit can be finally disposed of.

Except in very exceptional circumstances, an injunction will not be granted if there is no likelihood of "irreparable" damage or injury. By irreparable injury is meant injury which is substantial and could not be adequately remedied or atoned for by damages.

Secondly, an applicant for a temporary injunction must show a prima facie case with a probability of success. There ought to be a triable issue, which ought to go to a tribunal for adjudication, not necessarily one that must succeed.

Thirdly, if the court is in doubt it will decide the application on a balance of convenience. See Giella v. Cassman Brown & Co. Ltd. [1973] EA. 358 (CA-U). This was cited with approval by the Supreme Court in Robert Kavuma v. Hotel International Ltd. [1993] 11 KALR 73.

Lord Diplock in American Cyanadnid Co. v. Ethicon [1975] AC 396, said that the court must be satisfied that the case is not frivolous or vexatious and that there is a serious case to be tried. Once that was established then the governing consideration is the balance of convenience.

In the above cited case of Noor Mohamed Janmohamed v. Karamali Virji Madhani (supra), irreparable injury was defined to mean such injury, which is substantial and could not be adequately atoned for by damages. In the present case, the complaint is that the entire livelihood of the entire community is being uprooted by the respondent, in planting trees in the suit land instead. There are schools, churches, dispensaries and other community infrastructure. To raze all this down in the comfortable knowledge that after all, should the applicants be successful, they can be compensated by way of monetary damages is too brazen a way of looking at societal values. This is not the kind of situation which ought to be left for award of damages. It is the kind, which I would describe as irreparable injury.

An applicant for temporary injunction must show a prima facie case with a probability of success. In the affidavit in support of this application it was alleged that the respondent and the one from whom he acquired title did so through fraud. Particulars of fraud were particularized in the plaint in the

head suit. If this was to be found by court to be true, it would no doubt affect the title of the respondent.

As the cases have held, there ought to be a triable issue, which ought to go to a tribunal for adjudication, not necessarily one that must succeed. Proof, prima facie, of the existence of fraud, which fraud is denied, shows that there is a triable issue, which ought to go for adjudication.

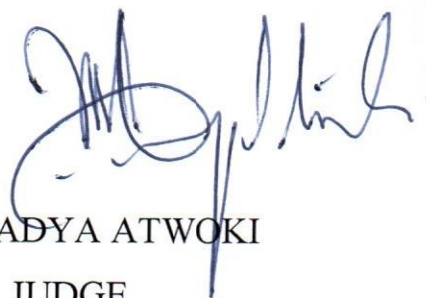
In American Cyanamid Co. v. Ethicon (supra), it was emphasised that the court should not embark on anything resembling a trial of the action. At the interlocutory stage, it is no part of the courts function to resolve conflicts of evidence on affidavit, nor resolve difficult questions of law. These matters are for the trial. At the interlocutory stage, facts may be disputed, the evidence incomplete, there is no cross-examination. The courts discretion would be stultified if on untested and incomplete evidence it could only grant the injunction if it were shown that there was a high likelihood of success. What is needed is a prima facie case, and from what I have stated above, this has been shown.

With regard to the balance of convenience, it was submitted that this did not favour the applicant. The respondent denied being fraudulent in the acquisition of the title. On the other hand, the applicants deposed that there was fraud. It was argued for the respondent that the respondent had already with leave of court planted some 50 acres of trees. So the status quo which the court ought to maintain was that the respondents be allowed to proceed with the tree planting. It was further argued that to allow the application would be a back door way of achieving the result in the head suit.

I do not see the basis of that last argument. The claim of the applicant in the head suit was that the title having been obtained by fraud, it ought to be cancelled. A permanent injunction would then follow. Grant of a temporary injunction would not in any way prejudice the decision in the head suit. The planting of trees, which was the main preoccupation of the respondent could always be done at any time should the respondent be the successful party. The balance of convenience was tilted in favour of the applicants.

The status quo was that the applicants were in possession of suit land. This was what the court was being asked to preserve till the final determination of the head suit. This is what the court would proceed to do.

I would therefore allow the application. A temporary injunction shall accordingly issue forbidding the respondent herein from damaging, wasting or alienating the suit land comprised in Mwenge Plot 2 Block 1 in any way, whether by way of planting trees, razing or grading the land, pulling down or destroying crops and houses of the applicants or evicting or threatening to evict or dispossess the applicants or otherwise, till final disposal of the civil suit HCT-01-CV-CS-0066-2006, or till other orders of this court. The respondent shall bear the costs of this application.



RUGADYA ATWOKI

JUDGE

22/08/2007.