

and had since been in possession. Further, that in 2007 the Respondent falsely claimed the suit land to be his and cut down the Appellant's boundary marks of *miyenje* plants, but that the Appellant later re-fixed the boundary with the assistance of the RDC Isingiro. The Appellant prayed for the dismissal of the suit with costs.

On 12/05/ 2009 the Respondent filed an application in the trial court for a temporary injunction. In the supporting affidavit he made the same compliant as above, but added that the Appellant had blocked a cattle path leading to the Respondent's water well thus denying the cattle access to the water, and that the cattle were in danger of dying. The Appellant refuted the allegations and maintained that the suit land belonged to him and that there has never been a cattle path on the suit land.

The trial court ruled in favour of the Respondent and issued an order for a temporary injunction. It is this order that the Appellant has appealed against, and preferred three grounds of appeal as follows;

- 1. The learned trial Magistrate erred in law and fact to make an order granting a temporary injunction by ordering the Appellant to open a cattle path through the Respondent's land when the effect of that order was in the nature of finally settling the case in court.***
- 2. The learned trial Magistrate erred in law and fact when he held in his ruling "On the basis of annexure A (Vernacular vision), it is shown that the land purchased by the Applicant contained a water well etc" which was not the case.***
- 3. The learned trial Magistrate erred in law and fact to grant the order of temporary injunction in the absence of the usual factors for granting of such order.***

The Appellant prays that the appeal be allowed with costs.

Submissions.

Mr. Katembeko H, Counsel for the Appellant, submitted that while granting the temporary injunction the trial court (at page 2 of the ruling) erroneously stated that given the strong attachment of Banyankole to cattle, a substantial loss of cows cannot be adequately compensated in terms of emotional and cultural value attachments, and that based on that the trial court ordered the Appellant to remove the fence on the one point on the suit land where Respondent's cattle can access the water well.

Counsel submitted that the trial court's finding and order were obviously wrong given that the Respondent had not claimed in his plaint that the Appellant had fenced off and blocked the cattle path. That the Respondent's sole concern was that the Appellant had trespassed on to his land and the Respondent did not even amend his pleadings to reflect the issue of blocking any cattle path. Counsel argued that the application before the trial court in which the Respondent raised the issue of cattle cannot be said to be part of the plaint, and that the finding by the trial court that the Appellant had fenced and blocked cattle path was made out of context of the case.

Mr. Katembeko further submitted that the Respondent in his plaint made a prayer for a remedy of temporary injunction as a permanent order which meant that the granting of such order had the effect of disposing the case prematurely, and that in such circumstances the order ought not to have been granted. Counsel relied for this proposition on the case of ***Francis Babumba & Others vs. Erusa Bunju (1992) 111 KALR 120***, where it was held that a temporary injunction would not be granted if its effect is to dispose of the whole case. Mr. Katembeko also argued that the trial court erred to rely on customary law of Banyankore regarding attachment

to cattle when no evidence was given to court to prove such custom and that for these reason the appeal should succeed.

For his part Mr. Kahungu – Tibayeita, Counsel for the Respondent, submitted that the appeal is frivolous and intended to delay the disposal of the main suit, and that granting of an order of temporary injunction is a remedy the court is enjoined to grant for specific purpose to stop damage, alienation or destruction that may not be reparable in terms of damages, and to preserve the *status quo ante*.

Further, that in this case the Appellant had invaded the Respondent's land and fenced it off denying the Respondent's cattle access to the water well. That this was a gross act on the part of the Appellant, and if the order had not been granted the Respondent's cattle would die or else he would incur enormous expenses in buying water for his for his cattle, and that such loss could not be atoned for in monetary terms. Counsel also relied for this proposition on the case of ***Francis Babumba & Others vs. Erusa Bunju (supra)***.

Counsel for the Respondent also argued that their case has a high probability of success, and that if the application had not been granted the loss caused would be unimaginable and would not be adequately compensated by an award of damages. Furthermore, that since the blocking of the cattle path followed the Appellant's initial act of trespass, there was no need for amending the plaint because it is all trespass and it is a continuing nuisance which had to be stopped. That the blocking of the cattle path was the most urgent and it called for immediate intervention by the court since the cows were using the water well before the Appellant's acts of trespass, which had to be stopped in order to maintain the status quo.

Mr. Kahungu – Tibayeita argued also that as long as a party prays for a permanent injunction in the main suit then he is entitled to apply for temporary injunction pending the disposal of the main suit, which only stops an evil that crops up before the case is disposed of. Regarding the point on the Banyankole custom which the

trial court relied upon and which the Appellant criticized, Mr. Kahungu – Tibayeita argued that custom or no custom the trial court was bound to make the order by relying on the law backed up with evidence which the trial court termed customary attachment to cattle.

Consideration.

Ground 1.

The law governing the grant of a temporary injunction is well settled. Under **Order 41 r. 1 of the Civil Procedure Rules (CPR)** court will normally not grant such order unless the acts complained of are such that an irreparable damage which cannot be compensated with money is likely to occur if the order is not granted or that the property in dispute in the suit is in danger or being wasted, damaged or alienated by any party to the suit. These principles have been amplified by the several decisions of the superior courts. See **Geila vs. Casman Brwon Co. Ltd (1973) E.A. 358;**

In deciding whether or not to grant an injunction, courts have been guided by the consideration that unless the injunction is granted the damage so occasioned is such that the applicant would not be adequately compensated by an award of damages. Secondly, the applicant must show that his case has a probability of success. Thirdly, if the court is in doubt it will decide the application on the balance of probability. Fourthly, the applicant must show or prove that the aim of the temporary injunction is to maintain the status quo until the determination of the whole dispute. See **Robert Kavuma vs. M/s Hotel International, S.C.C.A. No. 8 of 1990; Kiyimba Kaggwa vs. Haji A.N. Katende [1885] HCB 43.**

In ground 1 of the appeal, the Appellant faults the trial court for granting an order of a temporary injunction by ordering the Appellant to open a cattle path through the suit land; which order had the effect of finally determining the case in court. Indeed, in its ruling (at page 2 last line) the trial court made an order that the

Appellant removes his fence from the suit land to allow access to the Respondent's cattle to access water source. However, it is noted that the issue in contention was trespass to the suit land and not cattle access to water. Since the case primarily concerned who of the parties owned the suit land, and the trial court decreed on the right of one party to remove its fence on the suit land, the order had the effect of determining the case as to who actually owned the suit land.

It is, however, tritelaw that an injunction will normally not issue if it has the effect of disposing of the main case. See *Francis Babumba & O'rs vs. Erusa Bunju(supra)*. It follows that the trial court erred in granting an order of a temporary injunction that had the effect of entirely disposing of the case.

The above aside, it is clear that the Respondent's sole complaint, as per his pleadings, concerned the Appellant's trespass on to his land. There is nothing in the Respondent's pleadings on the issue of blocking any cattle path; which was only raised in the application for a temporary injunction, and hence could not be said to be part of the plaint. Therefore, the trial court's order based on finding that the Appellant had fenced off and blocked cattle path was made without any basis in the pleadings of the Respondent. Ground 1 of the appeal succeeds.

Ground 2.

The main complaint in this ground of appeal is based on the trial court placing its reliance upon a document, *Annexure A* to the plaint, which was in vernacular language with no English translated version of it, as evidence to prove that the land was purchased by the Respondent from one Kubihikayo Lazaro on 15/4/2007 and contained a water-well, which the trial court suspected to be the water well whose access the Respondent sought orders from the court in the application.

On evaluation of the record of the trial court, it is clear that the trial court in fact relied on the said vernacular version of the document (*Annexure A* to the plaint) as evidence that the suit land had in it water well. There is no English translation of

the document on record, and this was contrary to the mandatory provisions of **Section 88 of the Civil Procedure Act** which require that the language of all courts shall be English, and that evidence in all courts shall be recorded in English, and that written applications to the court shall be English. The trial court, therefore, erred in law to have acted on the document when it was not translated into English. To that end, I respectfully disagree with Counsel for the Respondent that the conditions in **Section 88 (supra)** were duly complied with by the trial court; because they were not. Ground 2 of the appeal succeeds and it is allowed.

Ground 3.

This ground of appeal is general in nature and faults the trial court for granting the order of temporary injunction in the absence of the usual factors for granting of such order. I have already outlined the principles and considerations that guide court in deciding whether to grant an order of a temporary injunction or not, and I will not repeat them. I only wish to emphasise that the primary purpose of granting a temporary injunction is to maintain the status quo. See Vincent **Muyimba vs. BW Kapiri [1974] HCB 34; Erisa Rainbow Musoke vs. Ahamada Kezala [1987] HCB 81.**

On reading the pleadings of the Respondent (plaint) at trial, it is evident that his complaint was that the Appellant had trespassed on his land and fixed new boundary marks thereon with the help of the RDC of the Isingiro District. The specific prayers were for an order of temporary injunction to restrain the Appellant from further acts of trespass on the suit land. It is apparent from the plaint that the subject matter of the suit was land, and this is the sole issue the trial court was called upon to adjudicate in the application to determine whether the suit land was in danger of being wasted, alienated or destroyed. The orders ought to have been for the preservation of the status quo of the subject matter of the suit in accordance

with provisions of **Order 41 r 1 CPR (supra)**; and not for the cattle which were not the subject matter of the suit.

In addition, the tort of trespass calls for general damages as a remedy, and is usually claimed and granted by court. However, where monetary compensation can be awarded, the courts will usually be reluctant to grant the order of temporary injunction. It is obvious that cattle are capable of being compensated by payment of money and their value can always be ascertained. Therefore, the Respondent failed to demonstrate the irreparable damage or any injury that could be occasioned to him which could not be atoned for by the award of damages. The trial court ought not to have granted the order of a temporary injunction in absence of this factor.

Regarding the point that trial court based its decision on culture of Banyankole attachment to cattle when no evidence was adduced to that effect, it is trite law under **Section 46 of the Evidence Act (Cap 6)** that when court has to form opinion as to the existence of any culture evidence must adduced to that effect by a person who would likely know of its existence. The court is not supposed to draw from its own experience or imagination, unless the culture or custom has gained such notoriety as to be taken judicial notice of. In the instant case there was no evidence led as to the culture of the Banyankole attachment to cattle, and it was extremely dangerous for the trial court to draw more from its own experience and to play about with its imagination. Ground 3 of the appeal succeeds and it is allowed.

The net effect is that the appeal is allowed with costs. The order of temporary injunction issued by the trial court is set aside. It is further ordered that the case file be placed before the trial court to hear and determine the main suit expeditiously.

BASHAIJA K. ANDREW

JUDGE

25/07/2013