

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
MISCELLANEOUS APPLICATION NO.215 OF 2014
(ARISING OUT OF CIVIL SUIT NO. 122 OF 2014)

JOVER BYARUGABA ::::::::::::::::::::::::::::::::::::::
APPLICANT

VERSUS

1. ALI MUHOOZI
2. KASHAIJA ROBERT JOM ::::::::::::::::::::::::::::::
RESPONDENTS

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA
NAHAMYA

RULING

The Applicant, through his Lawyers, Counsel Kandebe of M/s Ntambirweki Kandebe & Co. Advocates brought this Application against the Respondents, by Chamber Summons under Order 41 Rules 1 and 9 of the Civil Procedure Rules S.I 71-1. The Applicant seeks the following orders;

1. A Temporary Injunction doth issue restraining the Respondents and its servants, agents or other persons in any way trespassing or interfering with the suit land comprised in Singo Block 549 Plot 20 at Kakunyu, Dwaniro, Kiboga District pending the disposal of the main suit;

2. Costs of the Application be provided for.

The Application is supported by Affidavit deponed by **Ms. JOVER BYARUGABA**, the Applicant dated 30th day of April 2014. The grounds upon which the Application is based are particularized in the Affidavit set out above but for purposes of brevity are that;

1. The Applicant has filed Civil Suit No 122 of 2014 which has high chances of success.
2. The Applicant will suffer an irreparable loss that cannot be atoned by damages if this Application is not granted.
3. The main suit has not yet been fixed for hearing and final determination.
4. The balance of convenience is in favour of the Applicant who is in occupation of the suit and has developed/ maintained the same as a mixed farm.
5. It is fair and equitable that this Application be allowed.

An affidavit in reply opposing the Application was sworn by Mr. Kasheijajomo Robert, the 2nd Respondent dated 11th day of September, 2014 and a Supplementary Affidavit sworn by Mr. Ali Muhoozi, the 1st Respondent dated 11th day of September, 2014. The Applicant did not file an Affidavit in Rejoinder.

PARTIES REPRESENTATION

The Applicant was represented by Counsel Kandeembe Ntambirweki of Messrs Ntambirweki Kandeembe & Co. Advocates whilst the Respondents were represented by Counsel

Tumwesigye Louis of Messrs Tumwesigye Louis & Co Advocates.

BRIEF FACTS

The facts as deduced from the application and supporting affidavit are that the Applicant is the occupier and owner of the land comprised in Plot No. 20 Singo Block 549 at Kakunyu, Dwaniro, Kiboga District, “the suit land”. The suit land originally belonged to the father of one, Major Ondoga who is the neighbour of the Applicant.

It is further alleged that the Applicant and her predecessors in title have lived on the land for Fifty (50) years who have since then developed the suit land in to a modern farm and have been in continuous adverse possession with knowledge of all the neighbours and local leaders without any objection.

The Applicant states that on the 19th day of November, 2012, he received a letter from Kiboga Police Station referring to her as a trespasser on the 1st Respondent’s land which is the suit land. The 1st Respondent purportedly claimed that one, Kafuluma had been granted a lease for Forty Nine (49) years with effect from 1st July, 2006 by Kiboga District Land Board, the 3rd Defendant in the main suit.

It is further alleged that the 1st Respondent further claims that he obtained his title from the said Kafuluma who was still holding an initial lease of five (5) years without knowledge of the involvement of the Applicant, who at all material times was and is in adverse possession. The said Muhoozi (1st

Respondent) fraudulently applied for extension of the alleged lease to full term falsely claiming to be in occupation of the same land with developments whereas not. That the developments on the suit land belong to the Applicant.

In conclusion, the Applicant alleges that the 1st Respondent subsequently transferred the suit land to the 2nd Respondent both of whom are jointly threatening to evict the Applicant to her loss and detriment.

The Law on Injunctions:-

Definition

An Injunction is a Court order requiring an individual to do or omit doing a specific action. It is an extraordinary remedy that Courts utilize in special cases where preservation of the *status quo* or taking some specific action is required in order to prevent possible injustice. Injunctive relief is a discretionary power of the Court in which the court, upon deciding that the plaintiff's rights are being violated, balances the irreparability of injuries and inadequacy of **damages** if an Injunction were not granted against the damages that granting an injunction would cause. Choosing whether to grant Temporary Injunctive relief is a discretionary power of the Court. An Injunction is an **equitable remedy** and as such is available only in cases of *in-personam* jurisdiction (not in *in-rem* proceedings). **See: <http://www.law.cornell.edu/wex/injunction>**

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; KiyimbaKaggwa vs. Haji A.N. Katende [1885] HCB 43.**

Section 38 Judicature Act Cap 13 gives this Honourable Court power to grant orders of a Temporary Injunction in all cases in which it appears to it to be just and convenient to do so to restrain any person from doing acts. The grant of a Temporary Injunction is invariably in the discretion of the Court.

The general considerations for the granting of a Temporary Injunction under **Order 41 r. (2) CPR** are that;

(1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a Temporary Injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising

out of the same contract or relating to the same property or right.

(2) The Court may by order grant such Injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court thinks fit.

In ordinary situations, the principles governing the grant of a Temporary Injunction are well settled although each case must be considered upon its own peculiar facts. See: ***American Cyanamid Co v Ethicon Ltd [1975] AC 396*** where Lord Diplock laid down guidelines for the grant of Temporary Injunctions that have been followed in Ugandan cases of ***Francis Babumba and 2 others Vs Erisa Bunjo, HCCS No. 697 of 1990*** and ***Robert Kavuma Vs M/S Hotel International SCCA NO.8 of 1990***. These principles are that;

1. The Applicant must show that there is a substantial question to be investigated with chances of winning the main suit on his part;
2. The Applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and the *status quo* not maintained; and
3. The balance of convenience is in the favour of the Application.

I now consider the issues as were put before me. That is;

1. Likelihood of success
2. Issue of *status quo*
3. Irreparable damages
4. Balance of convenience.

Issue 1

Whether there is a *Prima facie* case with a probability of success

In answering this question, the Applicant is required to show that there must be a *prima facie* case with a probability of success of the pending suit.

The Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried. (***See American Cynamide versus Ethicon [1975] ALL ER 504***).

A *prima facie* case with a probability of success is no more than that the Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. In ***Robert Kavuma vs. M/S Hotel International SCCA NO.8 of 1990 [Supra], Wambuzi CJ*** (as he then was) was emphatic and stated that the Applicant is required at this stage of trial, to show a *prima facie* case and a probability of success but not actual success.

As to whether the suit establishes a *prima facie* case with probability of success, case law is to the effect that though the Applicant has to satisfy Court that there is merit in the case, it

does not mean that one should succeed. It means there should be a triable issue, that is, an issue which raises a *prima facie* case for adjudication. See ***KiyimbaKaggwa [1985] HCB 43, Wanendeya V Norconsult [1987] HCB 89; Devon V Bhades [1972] EA22.***

Further, the Applicant must demonstrate that there are serious issues to be tried. See: ***Daniel Mukwaya v. Administrator General, H.C.C.S No. 630 of 1993 [1993] IV KALR I.*** In event the Court is in doubt as to any of the above factors, the case ought to be decided after weighing doubts against certainties of the risks of doing injustice; also referred to as the “balance of convenience”. See: ***Francome v. Mirror Group Newspapers [1984] IWL R 892.***

On the issue of a *prima facie* case; Counsel Kandebe, for the Applicant, argued that the Applicant’s right to property enshrined under Article 26 of the Constitution of the Republic of Uganda is being threatened. Counsel Kandebe submitted that the Respondents, with the aid of Kiboga District Resident Commissioner are threatening to evict the Applicant, the legal owner of the suit land to which she has made many developments thereto.

It was Mr. Kandebe’s submission that the Applicant and her predecessors in title have been in adverse possession of the suit property for fifty (50) years. Counsel Kandebe pointed out that Section 64 of the Registration of Titles Act Cap 59 provides for adverse possession. It states that the “land which is included in any certificate of title or registered instrument shall

be deemed to be subject to the reservations, exceptions, covenants, conditions and powers if any, contained in the grant of land, and to any right subsisting under any adverse possession of the land.....”

Mr. Kandebe referred to the case of ***Uganda Posts and Telecommunications Corporation vs. Abraham Kitumba & Anor SCCA No. 36 of 1995***, where Court observed that if a person purchases an estate which he knows to be in the occupation of another other than the vendor, he is bound by all the equities which the parties in such occupation may have in the land. Counsel Kandebe contended that the purported granting of a forty nine (49) year lease to one, Kafuluma, who sold the same to the Respondents on the land adversely possessed and occupied by the Applicant is a violation of the Applicant’s property. He further added that the Respondents have threatened to evict the Applicant from the suit property which violates the Applicant’s rights on her land. Mr Kandebe relied on the case of ***American Cynamaid Co. vs. Ethicon Ltd, (supra)***.

In his concluding submissions on this issue, Counsel Kandebe prayed this Honourable Court to find that there are triable issues to be determined in this matter and if the Respondents are not stopped from further interfering with the suit property, the developments of the Applicant on the suit land will be jeopardized.

On the other hand, Counsel Tumwesigye, for the Respondents, maintained the fact that the Respondents are the lawful owners

of the suit land and that the Applicant has no proof of legal ownership of the suit land. Counsel Tumwesigye asked Court to deny the Application since the Applicant has failed to show that she has a *prima facie* case against the Respondents.

Having considered the submissions of the Applicant *vis- a-vis* the Respondents submissions and the evidence on record, I find that there are triable issues raised by the Applicant. In the same vein, the Respondents also raise issues that need to be determined in the main suit. Thus, in my opinion, this is enough to give rise to serious triable issues raising a *prima facie* case for adjudication since the Applicant is facing threats of eviction from the suit land by the Respondents and the main suit that is still pending before me for final determination. In the result, the first condition for grant of a Temporary Injunction is met.

Issue 2:

That the Applicant will suffer irreparable injury which cannot be atoned for by award of damages.

The other cardinal consideration is whether in fact the Applicant would suffer irreparable injury or damage by the refusal to grant the Application. If the answer is in the affirmative, then Court ought to grant the order. See: ***Giella v. Cassman Brown & Co. [1973] E.A 358***. By irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or material one that is; one that cannot be adequately atoned for in damages. See: ***TonnyWasswa v.***

Joseph Kakooza [1987] HCB 79; NTCO Ltd.v. Hope Nyakairu [1992 - 1993] HCB 135.

Counsel Kandebe submitted that if the Respondents actions are not refrained by this Honourable Court, the Applicant will suffer irreparable loss that cannot be atoned by damages. Mr. Kandebe further submitted that the Applicant carries on a lot of economic activities on the suit land and rears animals such as cattle, goats and chicken and as such, if the Respondents are allowed to evict the Applicant from the suit land before the disposal of the main suit, the Applicant's economic activities will be fatally affected. It was Mr. Kandebe's prayer that this Honourable Court grants the Application.

On the other hand, Counsel Tumwesigye submitted that the Applicant has no proof that she will suffer irreparable loss/damage since in the absence of a Surveyor's report; it is difficult to determine the true owner of the suit land.

On irreparable damages, I find very instructive the words of **Lord Diplock** in the case of **American Cynamide Cov Ethicon [1975] 1ALL E.R. 504**. He states;

"The governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a Permanent Injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant's continuing to do what was sought to be enjoined between the time of the

Application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no Interlocutory Injunction should normally be granted...”

It was also held in the case of **Kiyimba Kaggwa**(supra) that:-

*“Irreparable damage does not mean that there must not be physical possibility of repairing injury, **but means that the injury must be a substantial or material one, that is, one that cannot be adequately compensated for in damages”**(emphasis added).*

It is my considered opinion that the said injury will not be able to be compensated for in damages and thus the prayer that the Respondent is restrained whether by herself, or through her authorized agents and or, servants or any other person from preventing the Applicant from the continuous use of the suit land for her economic activities and other activities like animal rearing pending the disposal of the main suit will in my view suffer irreparable injury which cannot be adequately compensated for in damages. Consequently, the Applicant have also met the condition on irreparable damages.

Issue 3:

Granting an Injunction on the balance of convenience.

It is trite law that if the Court is in doubt on any of the above three principles, it will decide the application on the balance of convenience. The term balance of convenience literally means that if the risk of doing an injustice is going to make the Applicant suffer then probably the balance of convenience is favorable to him/her and the Court would most likely be inclined to grant to him/her the application for a Temporary Injunction.

In the case of ***Victoria Construction works Ltd Versus Uganda National Roads Authority HMA No. 601 of 2010*** the High Court while citing the decision in ***J. K. Sentongo vs. Shell (U) Ltd [1995] 111 KLR 1***; by Justice Lugayizi observed that if the Applicant fails to establish a *prima facie* case with likelihood of success, irreparable injury and need to preserve the status-quo, then he/she must show that the balance of convenience was in his favour.

Counsel Kandebe submitted that on the balance of convenience, the Applicant is in occupation of the suit land. The Applicant has done so many developments on the suit land to which if the status quo is not maintained, the main suit will be rendered nugatory as her activities will have been destroyed by the Respondents. He relied on the case of ***Elisa Musoke vs. Kezaala (1987) HCB 81***.

On the other hand, Counsel Tumwesigye argued that the Applicant's suit has no probability of success in as far as her ownership of the suit land is concerned. Counsel Tumwesigye invited Court to find no merit in the Application seeking the

grant of a Temporary Injunction and to dismiss the same with costs to the Respondents.

I wish to state that the Applicants' have satisfied Court that all the three ingredients exist. This Application, therefore, ought to succeed. Although I have no doubt in relation to the two conditions, I must ensure that *status quo is maintained*. Therefore, given my finding above that the *status quo* need to be preserved, I conclude that the balance of convenience favours granting this Application. The Applicant has met the conditions for grant of a Temporary Injunction.

In the result and for the reasons given hereinabove in this Ruling the Applicant has demonstrated that this Application has merit. It ought to succeed. I am aware of the decision in 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. The Application before does not dispose off the main suit as it is still pending before me with different remedies sought therein. Accordingly, this Application is allowed. I therefore grant the orders sought in this Application. Costs are awarded to the Applicant.

I SO ORDER.

SIGNED

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HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGE

3RD NOVEMBER, 2014