

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA - NAKAWA CENTRAL CIRCUIT
MISCELLANEOUS APPLICATION NO. 152 OF 2015
(ARISING FROM MISC. CAUSE NO. 024 OF 2015)

ERIC TUGUME ::
APPLICANT

VERSUS

1. MADIINA NALWADDA
2. KAMPALA CAPITAL CITY AUTHORITY ::::::::::::::::::::::::::::::::::::::
RESPONDENT

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

RULING

This ruling is in respect of an application for a temporary injunction. The Applicant made the application under Order 41, rules (a) 1 and 9 of the Civil Procedure Rules (“CPR”); and Section 98 of the Civil Procedure Act (“CPA”) and S. 64 (e) & (e) CPA. The Application was accompanied by an affidavit that was sworn by the Applicant seeking that;

1. A Temporary Injunction issues against the Respondents to restrain them and their agents and/or anybody claiming under them from interfering/dealing with the suit property described as Kyadondo Block 213, Plot 2156 measuring approximately 0.25 decimals at Bukoto until the determination of the main suit.
2. Costs of this Application be provided for.

The background to the Application is very briefly as follows. The Applicant and the 1st Respondent are owners/proprietors of a neighbouring property

comprised in Kyadondo Block 213, plots 2156 & 2155 respectively. Sometime in 2006, the building plans with KCC as it was known submitted his now under control of KCCA, Directorate of Physical Planning. Before the Applicant commenced construction of his property, the Applicant and 1st Respondent individually employed services of Surveyors who opened up boundaries to ascertain the exact boundaries of their lands. Thereafter, the Applicant started building. The 1st Respondent fenced off her property. A new Survey shows that the Applicant inadvertently built in an area extending 0.8 decimals into 1st Respondent property. On 09th February 2015, the Applicant was shocked to receive a notice to vacate possession and a Notice of Intention to sue by the 1st Respondent's Lawyers claiming trespass and that he had erected an illegal building.

The 1st Respondent's Lawyers M/s Wegulo & Wandera Advocates sought for an offer to facilitate the settlement negotiations but 1st Respondent declined to have the Government Valuer. The 1st Respondent ignored this offer and just continued with his schemes with 2nd Respondent to cause a demolition of the Applicant's property. The Applicant has filed a Miscellaneous Cause against the Respondents which has higher chances of success and that the balance of convenience is in favour of the Applicant.

The Application is supported by the Affidavit of the Applicant, Eric Tugume attests to his ownership of Kyadondo Block 213, plot 2156 Bukoto measuring approximately 0.25 decimals. (See Annexure "A"). he reiterates the facts above relating to the 1st Respondent's fencing off the land and attached photographs (see Annexure "B" to Affidavit) once boundaries were set and agreed upon, Applicant engaged an Architect to draw plan based on the suit land and Applicant submitted the said plan to KCCA (2nd Respondent) for approval of the structural building plan (see Annexures "C", "D" & "E."

The 2nd Respondent under KCCA refused to approve Applicant's building plans for three (3) months. Later Applicant commenced construction of the

buildings. (See Annexure "F"). applicant confirms the notification he was served by 1st Respondent's Lawyers alleging that he had trespassed on 1st Respondent's land. [See Annexure "G" dated 09th February 2015]. This prompted Applicant to engage M/s Survey Tech. Solutions. They carried out another boundary opening to establish the demarcations. They found that Applicant had extended in 1st Respondent's land on plot 2155 by 0.8 decimals. (See Survey Report - Annexure "G"). The Applicant tried to get to the 1st Respondent through his Lawyers M/s Tumwesigye, Baingana & Co. Advocates in order to amicably settle the matter as good neighbours. (See letter of 13th February 2015 - Annexure "H"). the 1st Respondent through her Lawyers M/s Wegulo & Wandera Advocates replied requesting for an offer (See letters of 16th February 2015 and 18th February 2015 Annexures "I & J." applicant promptly replied through his Lawyers stating that there was need to engage a Government Valuer. The 1st Respondent did not agree with this. Consequently, the next thing that Applicant saw was a Notice No. 7317 from Vinney Agaba a Physical Planner with 2nd Respondent dated 25th February 2015 (Annexure "K") ordering him to remove illegal development within 28 days or else face a demolition of his buildings. The Applicant attests that, pursuant to the Physical Planning Act, there are mechanisms to solve such matters without necessarily demolishing his building. Applicant avers that he was condemned unheard. Applicant states that he stands to lose his property and suffer irreparable loss. Hence Applicant prays that it would be in the interests of justice and fairness that a Temporary Injunction doeth issue to prevent 1st Respondent and her agents from interfering in his land.

The Applicant prefers to maintain the *status quo* to protect his interest in the property until the main suit is determined. The Applicant posits that the balance of convenience lies in his favour.

In a nutshell, the 1st Respondent's side was supported by an Affidavit deponed by Madiina Nalwadda. Among her averments is the confirmation that she owns Kyadondo Block 213, plot 2155. She denies any suggestion

that she and Applicant ever carried out a joint survey. All she knows as advised by her Lawyers is that the Applicant trespassed on her land. (See Annexure "B"). She added that the Applicant received her offer for compensation through her Advocates and she also passed on the offer herself to the Applicant which he rejected.

1st Respondent's Affidavit

Ms. Madiina Nalwadda states that it is not her intention to demolish Applicant's house but that KCCA is carrying out its mandatory statutory duty.

In its supporting evidence, the 2nd Respondent filed an Affidavit in Reply through M/s Agaba Vinney Z, the Physical Planner in charge of Nakawa Division. He states that 2nd Respondent is mandated by Statute to do physical planning within Kampala, including approval of plans, alteration of buildings and maintenance of all buildings and structures to ensure that they are in good and tenantable repair for the enjoyment of all persons living in or transiting through the city as a public good.

Mr. Agaba avers that the Applicant is not the registered proprietor on the suit land and the building plans submitted to the Respondent are in the names of GWALIWA REBECCA [See Annexures "A", "B" & "C" respectively. That on 25th February 2015, the 2nd Respondent issued a notice to the Applicant because he had erected illegal structures on plot 2155, Block 213 Bukoto along Mulimira Road, Nakawa Division thereby encroaching upon planned road access. The Applicant was ordered to remove the illegal developments; avail approved plans and submit a Survey Report of his property. He was instructed to demolish the structures in the surveyed road access. Mr. Agaba's statements are buttressed by the advice from the Director, Legal Affairs of the 2nd Respondent (KCCA). Mr. Agaba was also advised that every city dweller must comply with the requirements of the physical planning Act

2010, Public Health Act Cap 281 Public Health (building) Rules SI 281-1 provided that the necessary notification is done.

That KCCA established that the Applicant has neither adduced approved plans for the structures on his land nor implemented any of the instructions contained in the Notices, particularly the requirement to remove illegal developments. Mr. Agaba also states that although the law permits a developer in certain circumstances to commence work before the building plans have been approved, this can only happen after notice of commencement has been issued to the local authority which the Applicant failed to do. Mr. Agaba avers that although the Applicant was notified about the illegal structures, he deliberately declined to comply on the basis that KCCA was acting *ultra vires* was abusing its powers and did not afford the Applicant an hearing. Mr. Agaba challenges the Applicant's assertions that his land is private so he and 1st Respondent can resolve their matter and disregard the 2nd Respondent (KCCA).

Furthermore, Mr. Agaba was advised that since the Applicant's structure is illegal and has no approved plans and partly encroaches on a surveyed access road which by law must be availed to the public for use, the Applicant structures cannot stand. Hence, the Applicant has no legal basis to lodge the present Application as he has a duty to comply with the physical Planning Act 2010; the Public Health Act and the building rules made thereof SI-281, which require the demolitions of the said structure which falls within the surveyed access road.

Rejoinder to the 1st Respondent

The Applicant admits that he was in the know when 1st Respondent fenced off her land. This was after both of them had surveyed their respective lands. That the structures were built with the actual knowledge of the 1st Respondent. Hence, 1st Respondent's paragraph 4 is not truthful. The

Applicant contends that it was only when the Parties failed to agree on the compensation that this matter was brought before Court for guidance. However, it was the 1st Respondent who was behind the demolition of the suit land because the Applicant refused to pay the compensation which the Applicant had wanted.

Rejoinder to 2nd Respondent's Affidavit in Reply

The Applicant contends that the 2nd Respondent has not made any surveys of the alleged public access road. KCCA is, however, being influenced by the Report unilaterally made by the field survey. This was influenced in turn by the 1st Respondent. The Applicant also states that he derives his title from one Gwaliwa Rebecca (see Certificate of Title Annexure "R1"). Additionally, Ms. Gwaliwa had submitted the building plans. Mr. Tugume, the Applicant was advised by M/s Twesigye, Baingana and Co. Advocates that the Physical Planning Act 2010 had not yet come into force. What prevailed at the time was the Country Planning Act Cap 246.

Discussion and resolution of matter

On behalf of the Applicant it was submitted that the applicable law is 041, r1 (a) of the CPR. The Applicant's Lawyers delved into the principles to be considered for the issuance of a Temporary Injunction. These are:

1. The *prima facie* rule

The Applicant has to make out a *prima facie* case. This according to the Applicant's Counsel connotes the existence of a serious question to be tried. The Applicant's Lawyers cited the case of ***Board of Trustees Kabale University vs. the Attorney General and Kabale District Local***

Government Council Misc. Application No. 393/14 (per monica K. Mugenyi J).

Balance of convenience

The above cited case refers to Halsbury's Laws of England, vol. 2009 and 5th Edition paragraph 385 and makes reference to the case of **American Cyanamid vs. Ethicon Ltd (1975) AC 396** which includes adequacy of damage to recompense either party and the balance of convenience among the matters to be considered whilst considering the issuance of a temporary injunction.

Applicant's Counsel cites at length the *dictum* of Lord Diplock on the purpose of an interlocutory injunction which is to protect the Plaintiff against any injury by violation of his right. On prima facie case, Counsel for the 1st Respondent submits that the available jurisprudence is to the effect that the Applicant has to satisfy Court that the case is meritorious not necessarily that it should succeed. There must be a triable issue or a serious question. 1st Respondent's Counsel cites the classicus case on temporary Injunction of **Kiyimba Kaggwa vs. Haji Abdu Nasser Kasule [1985] HCB 43** Counsel for the 1st Respondent recounts what the Applicant has stated in his Affidavit in paragraph 7 where the Applicant concedes to having entered on the 1st Respondent's land on Plot 2155 by 0.8 decimals. (See Annexure "G"). On behalf of the 1st Respondent, it is agreed that Miscellaneous Cause No. 24 of 2015 is based on estoppels yet this has never formed the basis of an action for which he could not be adequately compensated in damages. Mere inconvenience is not enough. Moreover the Courts are not expected to delve into the merits of the Affidavit evidence or resolve intricate legal questions that permeate the factual and legal basis of the Parties' claims (see **American Cyanamid vs. Ethicon** (supra)).

I have noted all the other written arguments of the Applicant most of which are based on the Affidavit deposed by the Applicant, which I have dissected in detail herein.

The 1st Respondent in his written submissions posits that the granting of a temporary injunction is an exercise of judicial discretion for the purpose of maintain the status quo until the main matter is disposed of (**see Noor Mohammed Janmohamed vs. Kassamali Virji (1953) 20 E.A.CA. 80**) which Counsel for 1st Respondent cites. The 2nd Respondent's written submission on prima facie case states that KCCA has just learned about the change in ownership when Applicant attached documents in proof of his registered title. However, the Applicant constructed part of his perimeter wall gate house in a surveyed access road which is an easement. Since KCCA is a custodian of the public good in the city, it notified the Applicant about this anomaly and ordered the Applicant to demolish the illegal structures erected within the access road as per law stipulated. Additionally, the Applicant submitted his Survey Report which was attached to 2nd Respondent's Affidavit as annexure "B" which is a Survey Report. Therein, it is clearly shown that an access road exists. The 2nd Respondent had no issues with the Applicant's pro-activeness to develop his property prior to obtaining an approval but he is required by law to notice the Local authority that he had commenced to build which Applicant failed to do. This was in contravention of the law. Since this illegality was brought to the attention of Court it overrides all matters of pleading including admission.

Consequently, in consonance with the case of **Sekitoleko vs. Mutabazi & Ors [2001-2005] HCB 79**, there are no legal rights pending over an access road since it's a public good and the structures erected therein are illegal. Resultantly, the Applicant has failed to show a prima facie case for the grant of a temporary injunction.

According to **Sarkar in his book Code of Civil Procedure, 11th Ed, Reprint 2012, at page 2303**, when a prima facie case is being considered, there must be an enforceable right otherwise it becomes an idle parade for a litigant to canvass his cause. The Petitioner cannot enforce his right in a proceeding in violation of statutory provisions. [See **Coastal Roadways Ltd & Anor. vs. State of West Bengal & Ors (1997) 2 CHN 215, 218**]. There has to be a substantive right which requires protection. Where no violation of the rights of the Plaintiff is involved, an injunction should not be granted. The Applicant has conceded to the fact that his plot is Kyadondo, Block 213, Plot 2156 whilst the 1st Respondent's plot is Kyadondo Block 213, plot 2155. The Applicant has admitted encroaching onto the 1st Respondent's land by 0.8 decimals is who of the two has a cause in trespass. The 2nd Respondent has deponed that the encroached upon piece of land straddles a public access road and it is KCCA's duty to ensure compliance to the Building Regulations.

Considering the facts stated herein, I find that the Applicant has no prima facie case. I am cognizant of the fact that the question of balance of convenience and inconvenience can be imported only when there is a prima facie case. Also the irreparable injury flows from prima facie case and balance of convenience. Since there is no enforceable right or violation of a substantive nature there is no necessity on these facts to afford immediate protection to the Applicant's alleged right.

I therefore **DECLINE** to exercise my discretion to issue the Temporary Injunction as prayed by the Applicant. **APPLICATION IS HEREBY DISMISSED WITH COSTS.**

Signed:.....

Hon. Lady Justice Elizabeth Ibanda Nahamya

J U D G E

22nd April 2015

Read by:.....

Date:.....

PRESENT:

For the Applicant:.....

For the Respondent:.....

Court Clerk:.....