

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

**HCT-04-CV-MA-0148-2015
(ARISING FROM CIVIL SUIT NO. 031-2015)**

- 1. OTIMONG DISMAS**
- 2. JOHN KAWUNYE**
- 3. GIMORO PETERO.....APPLICANTS**

VERSUS

EASTERN MINING LTD.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

Applicant applied for a temporary injunction to restrain the respondent's further entry or dealing with the suit land until final determination of the main suit.

The application is supported by the affidavit of **GIMORO PETERO**. Respondents opposed the application on grounds that it is not a deserving case for a grant of the sought orders. They relied on the affidavit of **Stella Achen**.

I have looked at, studied and internalized the pleadings and submissions by both parties.

In an application of this nature, the applicant must prove that (per *Kiyimba Kagwa v. Haji Abdu Nsasser Katende 1985 HCB 43*):

1. He has a prima facie case with a probability of success.
2. Applicant is likely to suffer irreparable damages which cannot be adequately compensated by an award of damages.
3. The balance of convenience tilts in favour of the applicants.

These grounds have been upheld by a number of authorities including *Godfrey Sekitoleko & Ors. V. Seezi Mutabazi & ors (2001-2005) HCB 80, Giela v. Cosman Brown & Co. Ltd (1973) EA 358, EA Industries v. Trufoods Ltd (1972) EA 420*.

From the above position of the law and in view of the facts before me, the following are my findings:

Status Quo:

The purpose of a temporary injunction is to preserve the status quo. (Order 41 rule 1 of the Civil Procedure Rules).

The property in question must be in danger of being wasted or damaged or alienated by any of the parties to the suit. This provision has been defined to mean that the court has a duty to protect the interests of the parties pending the disposal of the substantive suit. (See: **Godfrey Sekitoleko v. Sezzi Mutabazi (2001-2005) HCB 80**).

It has been held by courts that:

“status quo is purely a question of fact and simply denotes the existing state of affairs existing before a particular point in time and the relevant consideration is the point in time at which the acts complained of as affecting or likely to affect or threatening to affect the existing state of things occurred.”

Per **Legal Brains Trust Ltd v. AG (HCMA) 638/2014**.

From the pleadings (plaint and application it is clear that applicant and others (40) entered land transactions with the respondents, and also exchanged certain considerations which in the process altered the parties land rights at time of suit. (See paragraph 3, 4, 6, 7, 8, 9, 10, 11, 12, 19 of **Gimoro**'s affidavit) and paragraph 2, 3, 4, 5, 6 and 7 of **Stella Achen**'s affidavit in reply).

From the above evidence, by the time the parties came to court the respondents had entered land purchase agreements and leases over the land in dispute. (See paragraph 4 of the plaint). They had already entered the land, though the applicants alleged that the entry was illegal, fraudulent and in trespass.

Under paragraph 5 of the plaint it is clearly pleaded that plaintiff's had been driven out of their land and had been paid some sums of money.

The status quo to be protected by court by a grant of an injunction in these circumstances therefore appears illusory. The status quo on the land by time of suit was that applicants had left the land to defendants/Respondents. The holding in the cases of ***KAFERRO MAGODE OMONGIN V. OTABONG & ORS HCCA MT.11/186, HAJJI ABBASI NAMUJONGO & ORS V. TRUSTEES OF CHURCH OF UGANDA (MT. 45 OF 1995) & SENTONGO & ANR. V. SHELL LTD (1995) 11 KALR 1.***

The above cases point out that an injunction should be sought before the event. It cannot be sought basing on speculation. It cannot be granted where the status quo has changed or if its effect is to disrupt the same. See: ***JESSE J. ODAI OJARA & ORS V. BUSIA TOWN COUNCIL HCMA 458/2004 (HON. J. ARACH AMOKO).***

In this case the applicants have not shown that there is any danger of damage or alienation on the status quo. Counsel only speculates that there is a likelihood of setting up a factory, but no evidence of such actions is on record. The action of surveying was done, before the actions of taking possession. I therefore find no need to disrupt the existing status quo as it is currently.

Prima facie case:

The law does not require court at this stage to examine the merits of the case. All that applicant is required to show is that he has a plausible cause which is not vexatious or frivolous. The question is whether there is a serious issue to be tried at the trial. (Per ***Daniel Mukwaya v. Administrator General HCCS. 630/1993*** (unreported).

The applicant has shown in his pleadings that he has filed CS 30/2015 in which he seeks certain declarations premised on fraud.

The affidavits sworn by all parties indicate triable issues.

This ground is therefore proved.

Irreparable loss:

The guiding principle here is whether there is a likelihood of suffering damage by applicants which cannot be adequately compensated by an award of damages.

See ***American Cynamid Co. v. Ethicon (1975) ALLER 504; (Per Lord Diplock).***

Also *Kiyimba Kagwa v. Katende (1985) HCB 43*.

The arguments by counsel for applicants on this ground is that there is a likelihood that if the factory is constructed then the ground (status quo) would be altered and it will be next to impossible to compensate them by damages.

Counsel in rebuttal attacked the affidavit in support for being hearsay and incompetent.

The point raised by counsel for respondent regarding this affidavit by **GOMORO PETERO** is sustained. The deponent attempts to swear in paragraph I that he swears on behalf of 40 others, but does not name who they are; what they own, or what they complain of. The last paragraph 21, is also omnibus and contravenes the rules which governs affidavit evidence. The affidavit is to that extent hearsay, and does not offer evidence on this issue as argued by Counsel.

From the pleadings am therefore unable to conclude that if the injunction is not granted, the applicants would suffer irreparable damage. They are pleading for compensation (already) in the alternative in their plaint. They are also praying for damages arising out of this complaint so why does the applicant's counsel speculate that there will be non-payment of compensation/damages if the injunction is not granted. This ground is not proved.

Balance of Convenience

Counsel for applicant argues that the balance tilts in favour of applicants who are customary owners; and that refusing the grant would negate CS 31/2015:

Counsel for respondents argued that the balance would be in favour of respondent who is in occupation and ownership of the suit land.

Courts have held that the balance will be tilted in favour of the party who will bear much of the risk of the injustice in the event of not granting the injunction. (See *GAPCO U LTD V. KAWEEA BADRU HCMA No. 259/2013* (Unreported)).

In this case the pleadings show that the respondents paid some money to applicants in exchange for the lands on which they are currently in occupation. The applicants claim fraud, but have

surrendered constructive possession and are currently off the land. The balance of convenience therefore is in favour of respondents who have been shown to be in actual possession.

It is my finding therefore that the applicants in this application have not led sufficient evidence to warrant a grant of a temporary injunction.

For all reasons above, I find no merit in this application.

The application is dismissed with each party bearing their own costs. I so order.

There is however need to ensure that Justice is done to all parties. By virtue of section 98 of the Civil Procedure Act, though no evidence of any actual construction of the factory is shown; I will hold that Respondents do remain in possession of whatever they claim but do halt any construction thereon of permanent structures which have the capacity to alienate/damage or change the *status quo* of that land as at time of suit till the final disposal of the main suit. I so further order.

Costs in the cause.

Henry I. Kawesa

JUDGE

02.11.2016