

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT MPIGI

MISC. APPLICATION NO. 144 OF 2017

KIGONGO EDWARD NAKABALE:.....APPLICANT

VERSUS

KAKEETO ROGERS & ANOTHER:.....RESPONDENTS

BEFORE: HON. JUSTICE WILSON MASALU MUSENE

RULING

The Applicant, Kigongo Edward Nakabale, filed this application under Section 98 of the Civil procedure Act and O. 41 rules 1 (a) and order 50 rules 1 and 3 of the civil procedure rules. The Respondent is Kakeeto Rogers.

The application is for orders that:-

- a) A temporary injunction doth issue restraining the Respondents, their servants, agents, employees and or any other person who may be acting under their instructions from trespassing , mining sand, cutting down trees, evicting and or carrying out any dealings on the suit property at Lubanda, Lukonge, Mpigi District pending the disposal of civil Suit No. 105 of 2017.
- b) Costs of this application be provided for.

The grounds in support of the application are contained in the affidavit of kigongo Edward Nakabaale but briefly are:-

- 1 The Applicant is the lawful owner/occupant of land measuring approximately 15 acres and situate at Lubanda, Lukonge, Mpigi District.
- 2 The applicant has been in uninterrupted occupation, use and possession of the said land/kibanja for over 20 years and carried out developments thereon.
- 3 The Mpigi District land Board, without the knowledge and or consent of the applicant granted a free hold title comprised in Free Hold Register, Volume HQT 49 Folio 23, Block (Road) 267 Plot 36 at Lubanda, Lukonge Josephine Nantaba which included the applicant's kibanja/land.
- 4 That upon the illegal acquisition of the said Free Hold Register, Volume HQT 49 Folio 23, Block (Road) 267 Plot 36 at Lubanda, Lukonge, the said Josephine Nantaba transferred the same to the 1st Respondent.
- 5 The 1st and 2nd respondents or their agents entered unto or trespassed on the applicant's land.
- 6 The 1st and 2nd Respondent forcefully entered unto the Applicant's land cut the chain and some trees and are mining sand.
- 7 The acts of the Respondents unto to the applicant's land amount to trespass and fraudulent acquisition of land hence the subject of the main suit.
- 8 That the main suit shall be rendered nugatory if the temporary injunction order is not granted.

The Applicant is represented by M/s Nandaah wamukota & Co. Advocates, while the Respondent is represented by M/S Bbaale & Partners, Advocates and Legal Consultants. On record is an affidavit in reply by Kakeeto Rogers, opposing the application. The pertinent paragraphs are:- 3,5,6,7,10,11,12,14 and 15. For avoidance of doubt, I reproduce them here below:-

- 3) That in 2016 I purchased land comprised as Free hold register Volume 49 Folio 23 Mawokota Block 267 Plot 36 Land at Lukonge from Josephine Nantaba. A copy of the Certificate of Title is hereby attached and marked annexure P.
- 5) That the applicant thereafter instituted a suit against me

and the 2nd Respondent vide civil suit No. 93 of 2016 claiming that my said land was part of his land comprised as Block 267 Plot 8. A copy of the plaint is hereby attached and marked annexure . Q.

- 6) That in the said matter the applicant had also applied for an interim order vide Misc. application No. 36 of 2017 and before the same could be entertained court made directive to the effect that a joint survey be conducted to determine in whose land was the said mining being conducted from and the intended dam construction. A copy of the application is hereby attached and marked annexure R.
- 7) That whereas the applicant disobeyed the court order by refusing to be part of the joint survey we proceeded and conducted the survey which indicated that where the mining is being conducted and also where the applicant intended to construct a dam is in my land and not in the applicant's said land. A copy of the survey report is hereby attached and marked annexure S.
- 10) That my said land is totally different from the applicant's land comprised as Mawokota Bock 267 Plot8 and therefore he has no locus to carry out any activity in the land that doesn't belong to him.
- 11) That I bonafidely purchased the said land and I have no claim whatsoever in land comprised as Mawokota Block 267 Plot 8 which belongs to the applicant and I have never cut down trees in the Applicant's land as he alleges.
- 12) That I only use the access road which passes through the applicant's land to transport sand which access road also connects to the spring well and the same has for the long period been used by all the local people of the area to fetch water among other activities.
- 14) That the applicant has not demonstrated in any way that he will suffer any injury, damage or mental suffering that cannot be adequately compensated by an award of damages if this application is to be dismissed.

15) That the balance of convenience lies with keeping me in possession of my land and on that basis, this application ought to be dismissed.

The Advocates on both sides also filed written submission

Counsel for the applicant stated that applicant who is the lawful owner and occupant of land /kibanja for which he has been in occupation and use for over 20 years . He added that this land measures approximately 15 acres and is situate at Lubanda, Lukonge, Mpigi District, Mpigi District Land Board without the applicants knowledge or consent of the applicant granted a free hold title comprised in free hold Register , Volume HQT 49 Folio 23, Block (Road) 267 Plot 36 at Lubanda, Lukonge to Josephine Nantaba which included the Applicant's kibanja/land. Upon the illegal acquisition of the said free hold Josephine Nantaba transferred the same to the 1st Respondent. Further submissions were that the 1st and 2nd Respondents and/or their agents entered onto the applicants land and stoped his workers from constructing a dam claiming that Josephine Nantaba transferred the same to the 1st Respondent. The 1st and 2nd Respondents forcefully entered onto the applicants land and cut down some trees and are mining sand. It was further submitted that the Respondents and/or their agents destroyed the applicants dam which affects the value and use of the applicant's land and that the Respondents are still mining sand thus affecting the Applicant's land/Kibanja.

Counsel emphasized that the main suit will be rendered nugatory

if the sand mining continues, hence need for temporary Injunction. He quoted Order 41 rule (1) of the Civil Procedure rules which provides:-

“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 execution of a decree; or*
- (b) That the defendant threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors.*

The Court may 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.

Counsel also made reference to the principles to be considered when considering application for temporary injunction, namely:-

- 1) The Applicant must show that there is a substantial matter to be investigated with high chances of success.
- 2) That the applicant would suffer irreparable injury which damages would not be capable of atoning.
- 3) That the balance of convenience is in favour of the Applicant.

He added that since applicant has been in an interrupted occupation and use of land/kibanja in dispute for over 20 years, and planted Eucalyptus trees and a water dam, then he has established a prima facie case with a likelihood of success. On suffering of irreparable injury, counsel for the applicant quoted the case of Kiyimba Kaggwa versus Hajji Abdu Nasser Katende [1985] HCB, supra, court observed that irreparable injury does not mean that there must not be physical possibility of repairing the injury but means that the injury must be a substantial or material one that is one that cannot be adequately compensated for in damages.

He added that the applicant further avers in paragraph 7 that the vehicles used to ferry and transport pass through his land thus destroying the applicant's water dam as evidence in the pictures annexed to the application.

He concluded that the activities of the Respondent are affecting use of applicant's land, and leading to serious damage which calls for a temporary injunction.

In reply, counsel for the Respondent instead accused the applicant of encroaching on the suit land comprised in Free hold **Register volume 49 Folio 23, Mawokota, Block 267 Plot 36**. He added that the applicant was trying to clear part of the suit land in preparation to construct a water dam thereon without the consent of the Respondent claiming that the said land belongs to him and that it was created out of his mailo land comprised as Block 267 Plot 8 which is adjacent to the suit land whereas not.

Further that the applicant subsequently instituted Civil suit No. 93 of 2016 claiming that the Respondent's title was created out of his said mailo land and out of the said suit he instituted an interim and temporary applications vide Misc. applications No. 35 o and 36 of 2016 respectively .

It was further submitted that the applicant then before prosecuting Misc. application No. 35 of 2016 sought to have the same amended thus they filed Misc. application No. 53 of 2017 however this Honourable Court dismissed the application and implored the parties to focus on the head suit but since the applicant had not gotten what he wanted that is restraining the Respondent from utilizing what belongs to him he instead fo fixing civil suit No. 93 of 2016 for hearing he rather filed another suit vide civil suit no. 105 of 2017 over the same suit land and also instituted Misc. Application No.,1 44 of 2017 purposely to obtain a restraining order against the Respondent.

Counsel for the Respondent further stated that since the applicant subsequently sought to amend the main application No. 35 of 2016 by filing Misc. application No. 53 of 2017 which application was dismissed by this very court and directed parties to focus on the head suit but instead of having the head suit fixed for hearing the applicant instead instituted civil suit No. 105 of 2017 and also instituted therein Misc. application No. 144 of 2017 over the same piece of land but this time claiming that the is a lawful bonafide occupant of the suit land diverting

from his earlier position in Civil Suit No. 93 of 2016 that it forms part of his land comprised as Block 267 Plot 8.

It was maintained that the applicant's application is an abuse of court process to get a way of restraining the Respondent from using his land, hence two causes over the same land against the respondent.

Counsel for Respondent concluded that the present suit is misconceived and the causes of action in each case are totally different. He added that court should not change status quo by stopping the excavation of land. It was also submitted that the applicant has not demonstrated how he will suffer irreparable injury and so the application be dismissed on balance of convenience, counsel submitted that the applicant will not be put to a disadvantage if injunction is not granted. Counsel for Respondent concluded that granting of a temporary injunction will have the effect of determining the main suit and the Respondent will be evicted.

This court has considered the submissions on both sides in this application. The law on granting temporary injunction is an exercise of judicial discretion which must be exercised by Court judiciously. The case of **Sargat vs Patel 91949) 16 EACA 63** is in point. In this case court stated that an injunction is a prohibitive, equitable remedy issued or granted by a court at suit of a petitioner directed at a Respondent forbidding the Respondent from doing some act which the Respondent is threatening or attempting to commit or restraining a Respondent in continuance thereof, such act being unjust, inequitable or injurious to the petitioner and not such as can be addressed by action at law.

Section 38 of the 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 general principles governing the grant of temporary injunction are well settled as laid down in the case of **American Cyanamid Co. Vs Ethicon Ltd (1975) AC 396** which has been followed in **International SCCA NO. 8 of 1990** and **Kiyimba Kaggwa vs Hajji A.N. Katende (1985) HCB 43**.

The principles are:

- 1) The applicant must show that there is a prima facie case with a likelihood of success.
- 2) The applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and status quo maintained and
- 3) The balance of convenience is in favour of the applicant.

I will now proceed to look at these principles in relation to this case because each case must be considered upon its own peculiar facts.

Whether there is a prima facie case with a probability of success.

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

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** Wambuzi CJ as he then was emphatic and stated that the applicant is required at this state of trial, to show a prima facie case and a probability of success but not success.

As to whether the suit establishes a prima facie case with a 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 that there should be a triable issue, that is, an issue which raises a prima facie case for adjudication. The case of **Kiyimba Kaggwa (1985), HCB 43** is in point.

As far as the present case is concerned, the plaintiff/applicant's case under paragraph 3 of the plaint is that the respondent's title comprised in free hold Register, Volume HQT49 Folio 23, Block 267 Plot 36 at Lubanda, Lukonge contains 15 acres of applicant's land or Kibanja. The applicant claims to have been in possession of that kibanja for 20 years and that the respondent has forcefully entered the said land of Plaintiff/applicant, cut trees and is mining sand. In the written statement of Defence filed on 17.8.2017, the 3rd Defendant (Kakeeto

Rogers) under paragraph 5 (II) avers that in 2016, he purchased land in question, free hold Register volume 49 Folio 23 Mawokota Block 267 Plot 36 from Josephine Nantaba and he started utilizing it by excavating sand. Then under paragraph 7 of the written statement of defence, the 3rd Defendant, Kakeeto Rogers contends that the land of applicant/Plaintiff, though on the same Block 267, just borders his. So Kakeeto Rogers denies trespass. The merging issues are :

- (1) Whether the Respondent, Kakeeto bought land in dispute which contains 15 acres of applicant
- (2) Whether Respondent cut the trees of applicant and is excavating land thereon.
- (3) Whether the land in dispute is different from the one of applicant
- (4) Whether the suit land is a swamp and has never been used by Plaintiff/applicant as stated under paragraph 9 of the Written statement of Defence.

The above issues among others serve to illustrate that there are triable issues in the matter and therefore a prima facie case has been made out.

On irreparable damages, the crucial issue here is sand mining. Whereas counsel for the Respondent submitted that once sand mining is stopped, then the case will have been decided. I respectfully disagree because the case pending is ownership of the land where sand mining is taking place. That is what this Court will decide in HCCS NO. 105 OF 2017. As for stopping of sand mining by temporary injunction, that will be for a short time pending the decision on ownership of the area. And it will not be the Respondent only to stop, but even the applicant will not be allowed to do the sand mining. Both sides will be stopped. This is because excavation of said is a drain to the land and the value of sand keeps increasing, hence qualifying to be irreparable damage to the applicant. So it will be whoever wins the main suit who will then continue with sand excavation. Since I am satisfied that the two conditions of prima facie case and irreparable damage have been met, then I do hereby proceed to allow the application. A temporary injunction is hereby granted as prayed. Since main case is pending,

costs to be in the cause. Hearing of main suit to be fast trucked during the month of November, 2017.

Wilson Masalu Musene

Judge

28/09/2017