

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

CIVIL APPEAL NO. 0038 OF 2016

(Arising from Hoima Chief Magistrates Court Misc. App. No. 013/2016)

(Arising from Hoima Chief Magistrates Court Civil Suit No. 16 of 2016)

TUMUSIIME ROBERTAPPELLANT

VERSUS

BUSOBOZI STEPHEN.....RESPONDENT

BEFORE HO.JUSTICE RUGADYA ATWOKI

JUDGMENT

This appeal arises from the ruling and orders of the Grade I Magistrate sitting at Hoima, in which the learned trial magistrate dismissed the appellants application for a temporary injunction with costs. The brief background herein being that the appellant brought a suit against the respondent for trespass to an access road leading to his property. His complaint was that the respondent was constructing a perimeter fence which extended to and blocked the access road to his property by car. He applied for orders of temporary injunction to stop the respondent from continuing to build the wall till final disposal of the head suit.

The learned trial magistrate heard submissions from Counsel on both sides and dismissed the application with costs. The appellant was dissatisfied with that decision and appealed to this court.

Before going into the merits of the appeal, I noted that construction of the said wall, according to submissions from both sides has virtually been completed. When Counsel for the appellant was asked whether, in those circumstances, it would not be best for the parties to proceed with the trial of the head suit and, should it become necessary, to come to this court on appeal in respect of the main suit, he insisted that he wanted to be heard and a ruling given. I obliged.

Four grounds were set out in the memorandum of appeal as follows;

1. That the learned trial magistrate erred in law and fact⁵ when she wrongly ruled on the ground of irreparable damage.

2. That the learned trial magistrate erred in law and fact when she ruled that the balance of convenience can be reparable by way of damages.
3. That the learned trial magistrate erred in law and fact when she considered status quo as a ground for the grant of a temporary injunction in her ruling.
4. That the learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on court record and thus arrived at a wrong order.

Mr. Kobwemi represented the appellant while Mr. Baryabanza represented the respondent. I found that the complaint was that the appellant sought court orders that conditions existed to justify grant of a temporary injunction. I will therefore deal with the appeal in that manner.

This is a first appeal. The approach to be followed by a first appellate court is that it ought to subject the evidence adduced before the trial court to a fresh and exhaustive scrutiny so that it weighs the conflicting evidence and draws its own conclusions. It is not enough for the appellate court to merely scrutinise the evidence to see if there was some evidence to support the findings and conclusions of the lower court, it must make its own findings and conclusions. Only then can it decide whether the findings of the trial court should be supported. In so doing the appellate court must make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. Yosamu Kawule v. Erusania Kalule [1977] HCB 135, Sitefano Baraba v. Haji Edirisa Kimuli [1977] HCB 137, Ugachick Poultry Breeders Ltd. v. Tadjin Kara C.A., Civil Appeal No. 2 Of 1997.

Application for a temporary injunction is premised on O. 41 r.1 and 9 of the Civil Procedure Rules. Rule 1 provides that,

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

the court may by 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.”

There must be property in a suit before court, which is in imminent danger and requires urgent protection from the law. The danger includes alienation, damage, wasting, disposal by way of sale or transfer to defraud creditors, among others.

In the present application, it was shown by affidavit evidence that there is a civil suit No. 16 of 2016 in which the applicant herein seeks orders from court to hinder the respondent from building a perimeter fence wall which will deny him easy access to his property by car. The learned trial magistrate also found similarly.

The grant of an interim or temporary injunction is an exercise of judicial discretion. The principles upon which a temporary injunction will be granted were fully spelt out in the case of Noor Mohamed Janmohamed v. Karamali Virji Madhani (1953) 20 EACA 8. It was held that the whole purpose of a temporary injunction is that parties ought to be preserved in status quo until the question to be investigated in the suit can be finally disposed of.

Except in very exceptional circumstances, an injunction will not be granted if there is no likelihood of “irreparable” damage or injury. By irreparable injury is meant injury which is substantial and could not be adequately remedied or atoned for by damages.

Secondly, an applicant for a temporary injunction must show a prima facie case with a probability of success. There ought to be a triable issue, which ought to go to a tribunal for adjudication, not necessarily one that must succeed.

Thirdly, if the court is in doubt it will decide the application on a balance of convenience. See Giella v. Cassman Brown & Co. Ltd. [1973] EA. 358 (CA-U). This was cited with approval by the Supreme Court in Robert Kavuma v. Hotel International Ltd. [1993] 11 KALR 73.

Lord Diplock in American Cyanamid Co. v. Ethicon [1975] AC 396, put the matter succinctly when he said that, the court must be satisfied that the case is not frivolous or vexatious and that there is a serious case to be tried. Once that was established then the governing consideration is the balance of convenience.

In the present case, trial court was criticized for first deciding the status quo which it was required to preserve. The fault lay on the failure to show court what exactly was in danger, which required to be preserved. The plaintiff talked of an access road. The complaint was that it was had been blocked by the

construction of a perimeter wall fence. According to the affidavit in support of the application, it was deposed in paragraph 4 thus,

*‘That the respondent and his agents **have without colour of right unlawfully and forcefully constructed** a permanent structure on an existing access road used by the applicant, blocking the road to a distance of 5ft. ...’* (emphasis mine).

That was the state of affairs from which the applicant sought urgent protection from the law. The respondents had already constructed a permanent structure which blocked applicants easy access to his property. That was the complaint in the head suit.

If the construction was already done, what could court do as a temporary remedy to rectify or at least to ameliorate the situation. The applicant deposed that the situation prior to the filing of the suit ought to be maintained. The situation prior to the filing of the suit was set out in paragraph 4(e) of the plaint. It reads thus;

‘The defendant on or about January 2016 constructed a permanent structure on his plot and extended part of the structure onto the access road covering a distance of 5 feet in order to create more space for his house leaving only 4 feet on the access road thereby denying the plaintiff access to his house by car...’

By the pleadings of the plaintiff, the permanent structure was already in place when the suit was filed. It was the reason why the suit was filed. Therefore, the status quo sought to be maintained was with a permanent structure already in place. That was from the pleadings of the plaintiff. Since this was the situation, then its no wonder that the learned trial magistrate found that the status quo sought to be maintained was leaving the applicant to continue accessing his property as he had been doing.

The complaint in the plaint which required investigation was whether the plaintiff had a right of access to his house, and whether the defendant violated that right. Those were the triable issues which the trial court was being asked to determine. Those were not matters for determination in an application for a temporary injunction. On that ground alone I would dismiss the appeal.

However I will consider, albeit briefly, the other considerations for grant of a temporary injunction. The complaint was that the respondent had constructed a wall blocking applicants access road. Surely a wall could, if court was to so order, bring it down. Whatever damages the applicant would have suffered could be quantified in monetary terms. This would include the inconvenience seeking alternative access to the house.

As the cases have held, there ought to be a triable issue, which ought to go to a tribunal for adjudication, not necessarily one that must succeed. I have already held that there are indeed triable issues.

In American Cyanamid Co. v. Ethicon (supra), it was emphasised that the court should not embark on anything resembling a trial of the action. At the interlocutory stage, it is no part of the courts function to resolve conflicts of evidence on affidavit, nor resolve difficult questions of law. These matters are for the trial. At the interlocutory stage, facts may be disputed, the evidence incomplete, there is no cross-examination. The courts discretion would be stultified if on untested and incomplete evidence it could only grant the injunction if it were shown that there was a high likelihood of success. What is needed is a prima facie case, and from what I have stated above, this has been shown.

But from what I have stated that there was no subject matter in this application which, in the circumstances of this case and from the pleadings on the record, could appropriately qualify to be one for maintaining the status quo, I would have dismissed the application for temporary injunction. The appeal is accordingly dismissed with costs in this court and in the court below.

Rugadya Atwoki

Judge

24/10/2017.

Court: The Ass. Registrar of the court shall deliver this judgment to the parties.

Rugadya Atwoki

Judge

24/10/2017.