

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0011 OF 2017
(Arising from H.C.C.S. No. 0008 of 2017)

**1. RASHIDA ABDUL HANALI }
 2. MOHAMED ALLIBHAI } APPLICANTS**

VERSUS

SULEIMAN ADRISI RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

The application is made under the provisions of s 98 of *The Civil Procedure Act*, O. 41 rule 1 (a) of *The Civil Procedure Rules* and section 33 of The Judicature Act seeking a temporary injunction order restraining the Respondent from selling, transferring, disposing off or in any other manner alienating property comprised in plot 2 New Lane, Arua, until final disposal of the main suit. It also seeks a mandatory injunction order restraining the respondent from collecting rent from the commercial building situate on that plot but rather require the rent to be deposited in court or with a court appointed bailiff, until final disposal of the main suit.

The application is supported by the affirmation of the second applicant in which he avers that the first applicant claims interest in the disputed property by repossession. Despite being issued with a repossession certificate in 1999, the respondent has prevented them from taking over the property and instead has continued to collect rental income there-from in the region of shs. 5,000,000/= per month to-date, on basis of a contested lease over the same property granted to him by Arua District Land Board, which the Board has since revoked. It is therefore necessary to restrain the Respondent from selling, transferring, disposing off or in any other manner alienating property and at the same time from collecting rent from the premises until final disposal of the main suit, since he has no capacity to refund it in the event of losing the suit.

In his affidavit in reply, the respondent opposes the application and instead avers that he is the lawful proprietor of the property having been granted a lease by the Arua District Land Board. He refutes the cancellation of his title and states he has sued both the Uganda Land Commission and Arua District Land Board for its wrongful cancellation. He constructed the buildings now situated on the land and has lawfully collected rent from the tenants thereon since 1993. He has never been served with the applicants' certificate of repossession and had quiet enjoyment until sometime during October last year when they began interference with the property prompting his filing of the now pending civil suit. As owner, he poses no danger of damage, waste or alienation of the property. The applicants are unlikely to suffer any irreparable damage but rather it is him likely to, because he invested all his money in developing that land and his family depends on the rental income. He prayed that the application be dismissed with costs.

In his submissions, counsel for the applicant Mr. Ambrose Tebyasa argued that it was necessary to issue the injunction in order to preserve the *status quo*. He argued that the purpose of the temporary injunction was to preserve the *status quo* until the head suit is finally determined. That in order for the application to be granted, the applicant must show that he has a prima facie case, which has the probability of success and that if it is not granted, the applicant would suffer irreparable injury, which damages cannot atone and finally that if the Court remains in doubt after considering the above three requirements of the law, it would decide the application on the balance of convenience. There is a likelihood of success in the underlying suit in that the property had been expropriated and was repossessed in 1999. The respondent now occupies it and there is need to stop the threatened disposal. The respondent has no title to the property since it was cancelled by the Arua District Land Board. Although his title has been revoked, he can create encumbrances. The tenants should deposit the money in court because the respondent will not have capacity to pay the money once judgment is delivered against him. In his affidavit in reply he discloses that he has no other source of sustenance, and if he lost the suit, the money will have been lost. The purpose of the mandatory injunction order therefore is to preserve the rental income since none of the parties is occupying the premises. He prayed that the court grants the two orders with costs as well.

In response, counsel for the respondent Mr. Samuel Ondoma argued that there is no proof that the respondent will not be able to pay. The main consideration is that applicant must prove that there will be irreparable damage yet the applicants in the instant application have failed to do so. Even the balance of probabilities is in favour of the respondent since he is in constructive possession and placed the tenants thereon since 1991. Under Order 41 r (1) (a) of *The Civil Procedure Rules*, there is need to prove wasting the property or damage or wrongful sale in execution if the injunction is to be granted. The issue of ownership and alleged cancellation of the respondent's title is still to be decided and therefore should not sway the court at this stage. He prayed that the application be dismissed with costs.

It has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties pending the disposal of the main suit. The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have been well laid out as the following:-

1. The Applicant has shown a *prima facie* case with a probability of success.
2. The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.
3. Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (see *Fellowes and Son v. Fisher [1976] I QB 122*).

These principles can be found in such cases as *American Cyanamid Co v. Ethicon Limited [1975] AC 396*; *Geilla v Cassman Brown Co. Ltd [1973] E.A. 358* and *GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013*.

What amounts to a *prima facie* case, was explained in *Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others, C.A. Civil Appeal No. 65 of 2011 [2001 – 2005] HCB 80* that what is required is for the court to be satisfied that the claim is not frivolous or vexatious, and that there are serious questions to be tried. In the present case, the first applicant claims to be in possession of a repossession certificate dated 13th August 1999 while the respondent claims to have acquired a lease over the same property following a lease offer dated 31st February 2013.

He however appears to have undertaken developments on the land as far back as 1991 and the respondent has since acquisition of the title deed, mortgaged the property to Finance Trust Bank Limited. Therefore, there are serious questions to be tried as to whether the first applicant or the respondent is the rightful owner of the land in those circumstances.

The next question for court to determine is whether the applicants will suffer irreparable damage if the injunction does not issue. Irreparable damage has been defined by *Black's Law Dictionary*, 9th Edition Page 447 to mean “damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement.” It has also been defined as “loss that cannot be compensated for with money” (see *City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000*). The purpose of granting a temporary injunction is for preservation of the parties, legal rights pending litigation. The court doesn't determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants' ability to assert their claimed rights over the land, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money. In this case, the possibility of irreparable loss has been established as a real probability rather than a mere possibility in the event that the property is sold, transferred, disposed off, encumbered or in any other manner alienated before determination of the suit. Such eventuality will compromise the first applicant's ability to assert her claimed rights over the land.

Since the above two conditions have been met, it is not necessary to consider the last factor which is the balance of convenience except for purposes of determining how extensive the ambit of the restraint imposed should be. I have considered the threat posed by the respondent's activities on the land which threat is largely limited to selling, transferring, disposing off or through other ways alienating or creating encumbrances over the property. I consider this to be the extent of damage or injury which cannot be readily quantified in monetary terms or which cannot generally be cured by an award of damages. For purposes of preserving the status quo, a temporary injunction is hereby issued restraining the respondent, his agents, workers, tenants or persons claiming under him, from engaging in any of act of selling, transferring, disposing off or

through other ways alienating or creating encumbrances over the property until the final disposal of the suit.

As regards the prayer for a mandatory injunction order restraining the respondent from collecting rent from the commercial building situate on that plot and requiring him instead to cause the rent to be deposited in court or with a court appointed bailiff, until final disposal of the main suit, I have considered the decision in *Pacific Television Inc. v. 147250 Canada Ltd. (1987)*, 1987 2653 (BC CA), 14 B.C.L.R. (2d) 104, [1987] B.C.J. No. 1262 (C.A.), where an interlocutory mandatory injunction for the transfer of certain shares was sought. The action in which the application was brought sought specific performance of an alleged sale of the shares, so the injunction, if granted, would provide to the plaintiffs the remedy they sought in the action. Observing that such orders, apart from certain exceptions, will not be granted, Justice McLachlin, as she then was, at p 108–109, listed the following exceptions;

1. Orders for the preservation of assets, the very subject matter in dispute, where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute;
2. Where generally the processes of the court must be protected even by initiatives taken by the court itself;
3. To prevent fraud both on the court and on the adversary;
4. *Qua timet* (because he fears) injunctions under extreme circumstances to prevent a real (threatened) or impending threat (though not yet commenced) of removal of the assets from the jurisdiction.

In this application, it is contended that the respondent has no means of payment of the accruing rent and possible *mesne profits* once the case is decided against him save the property in dispute itself and such an eventuality would practically constitute a fraud on the applicants resulting into a deprivation of income from the property. Such eventuality, it is argued, poses a real danger of compromising the final decision if delivered in favour of the applicants.

On the other hand, during the hearing of the application it became apparent that such an injunction in the circumstances of this case has the potential of preventing the applicant from

deriving his livelihood and sustenance for his family from the land in dispute until the final determination of the suit, as well as undermining the respondent's financial ability to sustain his prosecution of the suit.

A temporary mandatory injunction is not a remedy that is easily granted. It is an order that is ordinarily passed in circumstances which are clear and the *prima facie* materials clearly justify a finding that the *status quo* has been altered by one of the parties to the litigation and the interests of justice demand that the *status quo ante* be restored by way of a temporary mandatory injunction. In circumstances of that nature, the essential condition is that the party claiming it must be shown to have been in possession on the date of the order directing the parties to maintain the *status quo* and it must be further shown that the party was dispossessed when the order was impending or after such an order was passed. It may also be granted where the respondent attempts to forestall an interim or temporary injunction, such as where, on receipt of notice that an interim or temporary injunction is about to be applied for, the respondent hurries on the work in respect of which complaint is made so that when he or she receives notice of an interim or temporary injunction it is completed. Court should be careful though not grant an injunction that will have the effect of virtually deciding the suit without a trial (see *Cayne v. Global Natural Resources PLC* [1984] 1 All ER 225).

Grant of an interlocutory mandatory injunction is in the discretion of the Court, taking into consideration the facts and circumstances of a particular case and more specifically the extent of injury or inconvenience caused to the applicant by the conduct of the respondent and the extent of injury or hardship that will be caused to the respondent by the grant. It is always open to the Court to grant an alternative remedy such as security for costs or damages instead of a mandatory interlocutory injunction. The question for consideration is, whether it also applies to cases of this nature, whether on principle or of any authority.

In *Nottingham Building Society v. Eurodynamics Systems plc*, [1993] FSR 468, Chadwick J laid down tests for the granting of mandatory interlocutory injunctions, thus;

In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong'.....Secondly, in considering whether to

grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the *status quo*. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.

The other factor that is relevant is the extent to which the determination of the application at an interlocutory stage will amount to a final determination of the rights and obligations of the parties. That point was addressed in *NWL Limited v. Woods* [1979] WLR 1294. Lord Diplock said there that cases where the grant or refusal of an injunction at the interlocutory stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, were exceptional “but when they do occur they bring into the balance of convenience an important additional element.” He concluded:

Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm which will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Court is also required to demand a heightened level of proof. In *Morris v. Redland Bricks Ltd*, [1970] AC 652, [1969] 2 WLR 1437, [1969] 2 All ER 576, Lord Upjohn held that the requirement of proof is greater for a party seeking a *quia timet* injunction than otherwise. He said: “A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave danger will accrue to him in the future.” As Lord Dunedin said in 1919 it is not sufficient to say “*timeo*” (see *Attorney-General for the Dominion of Canada*

v. Ritchie Contracting and Supply Co Ltd [1919] AC 999). “It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly” and that “[T]he court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.” The applicant must therefore not only aver but must also prove that what is going on is calculated to infringe his or her rights.

Bearing those principles in mind, it is necessary to determine whether in the case at hand, the court is justified in granting this remedy. Mandatory injunctions are ordinarily remedies in finality. The question before this court is whether in strictness a mandatory injunction can properly be made on interlocutory applications. In England whatever doubts may have existed on this point were removed by section 25 of *The Judicature Act*, and it has long been a common place in the treatises that the Courts have the power to make mandatory injunctions on interlocutory motions. In our case, under Order 41 of *The Civil Procedure Rules*, it will be observed that the issue of injunctions upon interlocutory applications is confined to temporary injunctions of a restrictive character. At the same time, I take cognisance of what the accepted practice of the Courts and principles are, according to the reported cases. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the *status quo* and not granted to establish a new state of things, differing from the state which existed at the date when the suit was instituted.

Nevertheless, injunctions are a form of equitable relief and they have to be adjusted in aid of equity and justice to suit the facts of each particular case. Although the Civil procedure Rules are silent on this type of temporary injunctions, and the court practice has tended to restrict them only to situations requiring restoration of the *status quo* but not to establish a new state of things, the rules generated by practice are neither exhaustive, complete nor absolute, and there may be exceptional circumstances needing action. No Court therefore ought to lay down absolute propositions that temporary injunctions can only assume a restrictive character when such is not necessary and thereby forge fetters for itself. Where appropriate, the Court may resort to its inherent jurisdiction to grant an interlocutory mandatory injunction. However, because of the

potential for practically prejudging the suit, and there may be other practical inconveniences of a lesser degree, it is clear that the discretion to grant it must be exercised with great caution.

The grant of temporary mandatory injunctions is at the discretion of the Court and taking into account the facts and circumstances of a particular case, more specifically any delay or laches on the part of the applicant, the extent of injury or inconvenience caused or posed to the applicant by the conduct of the respondent and the extent of injury or hardship that will be caused to the respondent by the grant, it is always open to the Court to grant the interlocutory mandatory injunction or alternative relief instead. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result at the end of the trial. If there is a serious issue to be tried and the applicant could be prejudiced by the acts or omissions of the respondent pending trial and the cross-undertaking in damages would provide the respondent with an adequate remedy if it turns out that his or her freedom of action should not have been restrained, then an injunction should ordinarily be granted (see *National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica)* [2009] 1 WLR 1405).

I am persuaded in this regard by the decision in *AMEC Group Ltd v. Universal Steels (Scotland) Ltd*, [2009] EWHC 560 (TCC); BLR 357 (TCC); 124 Con LR 102, [2009] All ER (D) 305, where the claimant sought an interlocutory mandatory injunction requiring the respondent to deliver up quality assurance documentation, as there was a serious issue to be tried as to whether there was a binding agreement between the parties with regard to conditions to be fulfilled before the documents were released. The respondent objected to the prayer arguing that if the documentation was handed over to the applicant, the court would have decided the case. Among other factors, the court considered the serious financial loss likely to be caused to the applicant in consequence of delay in delivery the quality assurance documentation, as well as the fact that the respondent was an extremely modest company without any significant assets such that it would be wholly unable to meet any sort of significant judgment ordered against it yet damages would be an adequate remedy for the respondent if the temporary mandatory injunction order was

granted and it subsequently transpired that it should not have been granted. The court thereby overruled the respondent's objections and granted the interlocutory mandatory injunction.

The basic principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in *American Cyanamid Co v. Ethicon Ltd [1975] AC 396* at page 408. In the instant application, the respondent claims to have been granted a lease over the property in dispute in 1991 and has been collecting rent there from since 1993. The current rental income is said to be in the range of shs. 5,000,000/=. Grant of the interlocutory mandatory injunction would deprive him of that income for the duration of the litigation, a period estimated not to exceed six months (hence income approximated at shs. 30,000,000/=) which in any event will be recovered by him in the event of a decision in his favour. On the other hand, the applicants claim to have been granted a certificate of repossession to the same property in 1999. In the event of the suit being decided in their favour, they would be entitled to recovery of the rental income accruing from the property or mesne profits of up to a maximum of twelve years to-date, inclusive of the period of litigation (hence income or mesne profits approximated in the region shs. 750,000,000/= at the current rate of rental income), exclusive of other monetary remedies.

In his affidavit in reply, the respondent has not allayed what appear to be well founded fears that in event of losing the suit he will be too impecunious to meet the award. He instead heightened these fears in his paragraph 9 where he states that he invested "all" his money in developing the property. Annexure "A29" to his affidavit further discloses that he has already mortgaged the property to Finance Trust Bank Limited. He is therefore likely to suffer some financial hardship if the injunction is granted but this will be short-lived, for only the duration of the litigation. Losses he may suffer as a result would be capable of compensation as costs or damages.

Considering the balance of convenience, it is plain to me that damages would not be an adequate remedy for the first applicant if I did not grant the injunction, and it turns out that I should have done so, yet conversely, damages would be an adequate remedy for the respondent if it transpires that the injunction should not have been granted. I consider that the balance of justice is very much in the first applicant's favour. The respondent will be incapable of compensating the

applicant's disadvantages in damages, whereas the respondent's disadvantages, because of their relatively short duration, are capable of being compensated in damages and costs. I conclude that the balance of convenience favours the granting of the injunction.

Since courts are charged with the responsibility of safeguarding the fundamental rights of citizens, I consider this to be a fit and proper case for the grant of an interlocutory mandatory injunction order. The respondent is to deposit all rental income accruing from the property in dispute as from the month of August 2017 into a bank account designated by the Assistant Registrar of this court, until the final disposal of the suit or until further orders of this court. In the final result, the application is allowed. The costs of this application shall abide the result of the suit.

Dated at Arua this 20th day of July, 2017.

.....
Stephen Mubiru
Judge.
20th July 2017.