

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CIVIL MISC. APPEAL NO. 001 OF 2021

(ARISING OUT OF MISC. APPLICATION NO. 80 OF 2020)

(ARISING OUT OF DIVORCE CAUSE NO. 02 OF 2020)

JOYCE KAAHWA ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REV. JOSHUA BUKYANAGANDI::::::::::::::::::::::::::::::::: RESPONDENT

RULING

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

[1] This Appeal was brought under **Section 98 of the CPA Cap 71** and **O.50 r. 8 of the CPR** seeking orders;

1. That the appeal be allowed and the orders of Misc. Application No. 80 of 2020 be set aside.
2. Costs of the suit be provided for.

Facts of the appeal:

[2] The Appellant and the Respondent are husband and wife who got married on the **28th April, 1990** at St. Peters Cathedral Hoima. The Respondent filed for divorce vide **Divorce Cause No. 2 of 2020** and the Appellant also filed a cross petition for divorce both based on the fact that the marriage has irretrievably broken down. The Respondent further filed an interlocutory application for a temporary injunction, for orders that titles and agreements of the family properties be deposited at court for safe custody pending the determination of the divorce cause, which application was allowed and the Appellant being dissatisfied with the Registrar's decision, appealed against the ruling hence this appeal.

[3] The grounds of appeal briefly are as follows;

- a. The learned Registrar erred in law when he failed to evaluate the evidence on record as a whole leading him to a wrong conclusion.*

- b. The learned Registrar erred in law and fact when he failed to consider the evidence of the respondent during cross examination.*
- c. The learned Registrar erred in law and fact when he held that the Respondent had satisfied court on ingredients for grant of a temporary injunction.*
- d. The learned Registrar erred in law and fact when he allowed and considered the respondent's evidence produced as annexures on submission in court.*
- e. The learned Registrar erred in law and fact when he allowed the application for grant of a temporary injunction and orders sought therein.*

Counsel Representation

- [4] The applicant was represented by **Marvin Asiimwe** of **A. Marvin & Co. Advocates, Hoima** and the Respondent was represented by **Mugabi Jim** of **Muhajia & Co. Advocates Kampala**. Both counsel filed written submissions.

Duty of appellate court

- [5] This is an appeal under **O.50 r.8 CPR**, from the ruling and order of the learned Assistant Registrar of this court dated **09/03/2021**. 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 conclusion. In so doing the appellate court must make allowances for the fact that the trial court had the advantage of hearing and seeing the witnesses. **UGACHICK POULTRY BREEDERS LTD VS TADJIN KARA CIVIL APPEAL NO. 2 OF 1997**.

Submissions

- [6] Counsel for the Appellant opted to argue grounds **1, 2 and 3** jointly and grounds **4 and 5** separately while counsel for the Respondent argued all the grounds together. However in my view, grounds **1, 2, 3 and 5** ought to be resolved together because they all relate to how the learned Registrar evaluated the evidence on record and came to the conclusion allowing the application for grant of temporary injunction and the orders therein. Then ground **4** can be resolved separately. I move to resolve the grounds of appeal **1, 2, 3 and 5** together and ground **4** separately.

Grounds 1, 2, 3 and 5

[7] Before the learned Registrar, the application by Notice of motion was brought under **O.41, O.51 CPR** and **Section 98 CPA** as an enabling provision for the following orders;

1. **The Respondent deposits land titles and agreement of the family property in the custody of this honourable court.**
2. **Temporary injunction restraining the respondent from further collection of the rent from the tenants.**
3. **That it is just and lawful that this application be granted to allow the Applicant protect his properties and businesses.**
4. **That the costs of this application be provided for.**

[8] The application was supported by the affidavit of **Rev. Joshua Bukyanagandi** wherein there are the grounds of the application which he relied upon in this application. The relevant grounds as deponed by the Applicant in his supporting affidavit are as follows;

1. **Para 4:** *“That I used my savings and grants from my friends to build rentals to support the family and the establishment of the produce store.”*
2. **Para 5:** *“That I generated receipt books and opened a bank account with **Finca Bank** where the tenants would deposit the money and issue them with receipts.”*
3. **Para 6:** *“That the Respondent has since developed different receipt books which she issues to the tenants and ordered them not to deposit money on the account.”*
4. **Para 9:** *“That I locked a room of the tenant who had failed to pay rent and acted violently to me, but the **respondent** broke the padlocks to give free entry to him. He has since refused to pay rent since February, 2019.”*
5. **Para 16:** *“That if the Certificate of title and the agreements for other plots of land are not deposited with the custody of this honourable court, there is fear that the respondent may dispose off the properties because of the fear that arise from the divorce/petition and further more put the properties in eminent (sic) danger of alienation.”*

- [9] In her affidavit in reply, the Respondent **Joyce Kaahwa** denied the Applicant's allegations and stated that she is the sole owner of the land and the developments thereof having acquired the same by way of purchase in 1997, 1998 and 2005 respectively and she attached copies of the sale/purchase agreements and letter of donation/authority. That two of the titles registered in her names are currently mortgaged as security in the bank to secure a loan for her business to look after the family which the applicant has unjustifiably abandoned.
- [10] That the applicant's affidavit is full of baseless speculations as she has no intention of alienating and or disposing off the matrimonial property whatsoever and that it would be unjust to have the titles and agreements deposited in this honourable court some of which are currently held as security by the bank.
- [11] This court has the duty to evaluate the above excerpts of the affidavit evidence of both the Applicant and the Respondent and make a finding on whether the learned Registrar justifiably and rightly reached the conclusion to allow the application and make the impugned orders;
1. That the Respondent deposits her land titles and agreements of the family property in the custody of this honourable court.
 2. Temporary injunction doth issue restraining the Respondent from further collection of rent from the tenants.
 3. That costs of this application be in the main cause.
- [12] **O.41 CPR** under which this application before the learned registrar was brought provides thus;
- "1) Cases in which temporary injunction may be granted.***
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)...
the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of justifying 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."
- [13] The law on granting of temporary injunctions in Uganda was well settled in the classic case of **E.L.T KIYIMBA KAGGWA VS HAJJI ABDU**

NASSER [1985] HCB 43 where Odoki J (as he then was) laid down the rules for granting a temporary injunction as follows;

*1. The granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to **preserve the matters in the status quo** until the question to be investigated in the main suit is finally disposed of.*

2. The condition for the grant of the interlocutory injunction are;

(i) Firstly that, the applicant must show a prima facie case with a probability of success.

(ii) Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

(iii) Thirdly, if the court is in doubt, it would decide an application on the balance of convenience.

[14] In the instant case, on whether the applicant has shown a *prima facie* case with a probability of success, the Applicant was duty bound to show that there is a prima facie case in the substantive suit/petition with a probability of success. At this stage, court does not extend deep into the merits of the case, but rather, whether there is a serious issue to be determined at the trial; **DANIEL MUKAYA VS ADMINISTRATOR GENERAL H.C.C.S NO.630 OF 1993.**

[15] The perusal of the pleadings of the petition indicate that the petitioner, **Rev. Joshua Bukyanagandi** is seeking inter alia a divorce order and the Respondent, **Joyce Kaahwa** in her cross petition is also seeking inter alia, an order that the marriage between the Respondent and the petitioner be dissolved.

[16] In my view, the above is sufficient proof of a *prima facie* case with a probability of success on the part of the applicant. Both parties are seeking for orders of divorce. The petition is therefore neither frivolous nor vexatious; **AMERICAN CYNAMIDE VS ETHICON [1975] ALL ER 504** and **ROBERT KAVUMA VS M/S HOTEL INTERNATIONAL S.C.C.A NO. 8 OF 1990.**

[17] On whether the Applicant might suffer irreparable injury which would not adequately be compensated by an award of damages, the applicant in his affidavit evidence deposed that:

a) He used his savings and grants from friends to build rentals to support the family.

- b) He generated receipt books and opened a bank account with **Finca Bank** where the tenants would deposit the money.
- c) The Respondent has since developed different receipt books which she issues to tenants and ordered them not to deposit money on the account, and
- d) If the certificate of title and the agreements of the other parts of land are not deposited with the custody of this court, there is fear that the Respondent may dispose off the properties.

[18] The learned Registrar on his part ruled agreeing with counsel for the Applicant that the Applicant has not been working since government closed government institutions and he has not been earning, not even from the rentals since the Respondent instructed the tenants not to deposit money on the bank account which he has access to and therefore, in his considered opinion, such injury is irreparable as it cannot be adequately compensated for in damages if the properties are alienated.

[19] I think, this was a misdirection on the part of the Registrar.
First, there is no evidence in form of annexures that the applicant built or owned the rentals whose rent he has failed to access. The **Finca Bank** claimed bank account opened for tenants to deposit rent was also not disclosed at all for court to appreciate his claim.
Secondly, neither did the applicant name, attach nor describe the certificates of title and sale/purchase agreements of plots he required court to have for safe custody so that the court is able to appreciate about their existence. On the other hand, the Respondent disclosed her sale/purchase agreements by way of annexures to her affidavit in reply and that two titles in her possession are registered in her names and were currently held as securities for a loan in the bank. The Applicant did not adduce any contrary evidence. The applicant instead attached to his affidavit in support receipts indicating that the rent was being paid by tenants to **“Rev.Joshua & Mrs Joyce Bukyanagandi Estates”** which in my view, does not support his claims.
Thirdly, there is none of the Applicant’s evidence that points to the claim that any of the family property is under any imminent danger of alienation.

[20] As a result of the learned Registrar’s misdirection, he made ambiguous and vague orders which are incapable of implementation and execution.

Without naming and describing the titles and agreements to be deposited in court, it is impracticable for the Respondent to comply and deposit in court unknown, if not none existent titles and agreements for its custody. Secondly, restraining the Appellant from further collection of the rent from tenants without appointing the rightful person to collect the rent and or naming the bank account on which rent is to be deposited is in my view, an order in futility. It has the implication of rendering the tenants to occupy and stay in the rentals without paying rent. It follows therefore, that it cannot be just and lawful that this application be granted as a way to protect the family properties and business.

- [21] On the balance of convenience, I find that it would go in favour of the Respondent who is in possession of the certificates, sale/purchase agreements and is collecting rent for the support of the family if the application is not granted.
- [22] The purpose of granting a temporary injunction is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of. The status quo considered by court is one prevailing at the time of filing the application (**O.41 r.1 CPR**). The status quo sought to be maintained and preserved in this case, was in possession of the titles and agreements of the family properties. In this case, it is therefore apparent that the learned Registrar's orders instead upset it for no good reasons given and as I have already found, no evidence was led that the certificate of titles and agreements if any, were in danger of being wasted and alienated.
- [23] Lastly, upon carefully and critically perusing the Applicant's affidavit in support of the Application before the learned Registrar, I find that it was neither endorsed nor commissioned/sealed by any commissioner for oaths.
- [24] In **TIME TRADER TRANSPORTERS VS PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY & ANOR H.C.M.A. NO. 02 OF 2016**, the affidavit did not inter alia bear the seal of the commissioner for oaths or the magistrate before whom the attestation was made. It was held that for someone to fail to comply with the requirement to fill in the names of the commissioner, sign and seal the document went to the root of the matter and was not merely a technicality of the law. The affidavit was incurably defective.

- [25] In the instant case, the affidavit in support of the Notice of motion before the learned Registrar was neither endorsed nor sealed by the commissioner for oaths. It was incurably defective as it contravened **Section 5 of the Commissioner's for Oaths (Advocates) Act** and **Section 6 of the Oaths Act** which require **affidavits** to state truly in the jurat or attestation the place at which and the date on which the oath or affidavit is taken or made; See also **TEDDY NAMAZZI VS SIBO [1986] HCB 58**. It is a clear case that the Applicant/deponent never appeared before any commissioner for purposes of the oath before making the purported affidavit in support of the Application. The purported affidavit is therefore in the premises a nullity.
- [26] It follows therefore, the application was not supported by any evidence. The Applicant had therefore not adduced any evidence to support any of his claims.
- [27] The learned Registrar therefore, erred in law and fact to grant the application and order that the titles and agreements be deposited in court and that the Respondent be restrained from further collection of the rent from the tenants until the disposal of the petition.
Grounds 1, 2, 3, and 5 accordingly succeed.
- [28] As correctly submitted by counsel for the Respondent **Joyce Kaahwa** before the learned Registrar, evidence in applications of this nature is by way of affidavit evidence and whatever a party is interested in relying on in proof of any fact, is to be attached to the supporting affidavit as an annexure. It followed therefore, **annextures "A" - "K"** that were attached to Counsel for **Rev. Joshua Bukyanagandi's written submissions** were of no evidential value as they amounted to adducing evidence from the bar. They were improperly produced in court. The annextures ought to have been attached to the affidavit in support of the application and not to submissions at submissions stage.
- [29] The learned Registrar however did not base his findings and ruling on these annextures. As a result, I find that the Registrar's failure to reject them and or expunge them from the record and or denounce them in his ruling did not in any way prejudice or lead to any miscarriage of justice on the part of the Respondent, **Joyce Kaahwa**. In the premises, this particular ground of appeal accordingly fails.

[30] As a result of the foregoing, this appeal generally succeeds. The appeal is allowed and the orders of the Registrar are accordingly set aside with no order as to costs.

Dated at Masindi, this 13th day of December, 2021.

Byaruhanga Jesse Rugyema

JUDGE