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The Republic of Uganda

High Court of Uganda Holden at Soroti

Miscellaneous Application No 0187 of 2021

(Arising out of Civil Suit No.0039 of 2021)

10 Ochom Elias and Anor ::: Applicants

Vs

Etyang Stanilus Stanley ::: Respondents

Before: Hon. Justice Dr Henry Peter Adonyo

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Ruling:

The plaintiffs and defendants are sons of the late Okoche Wilson who died
intestate leaving behind three widows, namely Kulume Joyce Mary a.k.a
20 Iduwan (who did not bear any child), Abeja Alibina (second wife who bore
7 children including the plaintiffs) and Atyang Anna (third wife who bore
6 children including the defendant).

The late Okoche Wilson’s estate comprised of 10 big gardens, measuring
approximately 50 (fifty) acres, which upon his passing, were placed under
25 the usage and control of his three widows who later on passed on and were
inherited by their respective children.

5 The plaintiff and defendant are claiming to be the beneficiaries of the estate of the late Kulume Joyce Mary especially for one (1) garden which they state is under the control of the defendant hence this application.

Issue:

Whether the applicants are entitled for grant of the temporary injunction.

10 Resolution:

This application is brought under sections 38 and 98 of the Civil Procedure Act, Order 41 rule 1 & 2 of the Civil Procedure Rules seeking for a temporary injunction restraining the respondents, their agents and anybody acting on their behalf from selling or in any way disposing off of
15 the suit land until the disposal of the main suit.

Order 41 rule 1 of the Civil Procedure Rules provides for cases in which temporary injunction may be granted. It 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,
20 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 by order grant a temporary injunction to restrain such act, or make such
25 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.

Order 41 rule 2 of the Civil Procedure Rules provides for injunction to restrain repetition or continuance of breach. It provides thus;

5 (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the
10 breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court thinks fit.

15 (3) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of the disobedience or breach to be attached, and may also order the person to be detained in a civil prison for a period not exceeding six months unless in the meantime the court directs his or her release.

20 (4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled to it.

25 Grounds of this Application:

Grounds of the application are in the affidavit in support of Okello Samuel stating that;

The 1st applicant and Okello Samuel are stated to be the beneficiaries of the late Kulume Joyce Mary a.k.a. Iduwan's estate and have a right to
30 protect the land measuring approximately five acres located in Bukedea

5 Town Council, Bukedea District which comprises the estate of the deceased.

That, the late Okoche Wilson's estate comprised of 10 big gardens, measuring approximately 50 (fifty) acres, which upon passing, were placed under the usage and control of his three widows as follows:

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- i. Kulume Joyce Mary (4 gardens measuring 20 acres),
 - ii. Abeja Alibina (3 gardens, measuring approximately 15 acres) and;
 - iii. Atyang Anna (3 gardens, measuring approximately 15 acres).

15 That the land was owned and controlled in that very manner up to the year 2007.

That on 4th December 2007, the children of the Late Okoche Wilson, including the 1st Applicant held a meeting with his widows where they discussed a number of issues pertaining the general development of the family, survey the land and the proposal for each widow to relinquish
20 possession of their parcels of land to the younger generation and remain each with one (1) garden.

That the proposal was allowed, the clan was briefed about the proposal and the decision taken by the family. The clan leaders consulted the widows and approved of the decision.

25 Kulume Joyce a.k.a Iduwan gave out one of her gardens for sharing among the sons of the late Okoche Wilson and herself, the garden was plotted and shared accordingly. Of the 3 gardens she gave out 2 to the families of the children of her co-wives, Abeja Alibina and Atyang Anna respectively.

5 That the two widows passed on leaving behind Kulume Joyce Mary a.k.a. Iduwan as the only surviving widow.

The two gardens retained by and belonging to the two widows naturally reverted to their respective biological children upon their demise.

10 That due to Kulume's poor health, she could not continue to cultivate her garden, whereupon, the 1st applicant planted eucalyptus on part of the garden as his wife cultivated seasonal crops on the other part.

On 4th May 2015, Kulume Joyce died intestate, leaving the 1st plaintiff in possession of her garden. The 1st plaintiff's wife deserted him leaving most of the suit land unused or redundant.

15 On realizing that the land was redundant, the respondent requested to be allowed to cultivate the same and he was so permitted by the 1st applicant.

The respondent cultivated the bigger portion of the suit land while the 1st applicant's eucalyptus occupied the other portion.

20 That it was the state of the land till 2022 when the 1st applicant proposed that the suit land be distributed among the surviving children of the late Okoche Wilson but along maternal lines.

25 That to their shock, the respondent with the support of the clan head claimed ownership of the whole suit land on the basis that he was entitled to the same as the next of kin of the late Kulume Joyce Mary. That the respondent has continued to forcefully claim ownership of the suit land.

That on 16th and 17th November 2021, the respondent caused subdivision of the land into plots and planting of mark stones.

5 That the 1st applicant and Okello Samuel have instituted Civil Suit No. 0039-2021 against the respondent for recovery of the suit land and a permanent injunction.

That the said suit discloses triable issues with a high likelihood of success.

10 That there exists a threat of the suit land being disposed of or wasted by the respondent and if not stopped, the suit shall be rendered nugatory.

That they will suffer irreparable injury which cannot be atoned by any monetary value.

Seeking orders that;

15 i) That a temporary injunction doth issue restraining the respondents, their agents, servants or any other persons acting under his authority from selling, procuring any registration, leasing, transferring, mortgaging, renting out or disposing of the suit property until the main suit is disposed of.

ii) Costs of this application be provided for.

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Whether the applicants are entitled to the grant of a temporary injunction?

25 In *Noor Mohammed V Jamma Hussein [1953] 29 EACA* a temporary injunction is a remedy which aims at protecting the status quo until the matter to be determined by court is disposed of.

Section 38 (1) of the Judicature Act empowers the High Court to grant an injunction, it provides that;

5 **The High Court shall have power to grant an injunction to restrain any person from doing any act as may be specified by the High Court.**

Section 64(c) of the Civil Procedure Act permits the High Court to grant a temporary injunction and it states;

10 **In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed**

(c) grant a temporary injunction and in case of disobedience commit the person guilty of it to prison and order that his or her property be attached and sold;

15 The law on granting of temporary injunctions in Uganda is well settled as it was concluded by the classic case of ***E.L.T Kiyimba Kaggwa V Haji Abdu Nasser Katende [1985] HCB 43*** where Odoki J (as he then was) laid down the rules for granting a temporary Injunction; thus: -

20 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 conditions for the grant of the interlocutory injunction are;

25 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.

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

Therefore, first and foremost, it is necessary to identify the existence of *status quo*.

10 “***Status quo***” as defined as in **Black’s Law Dictionary at page 4418** means the existing state of things existing before the particular point in time; and in determining whether or not to maintain the status quo other surrounding circumstances have to be taken into account.

The Court of Appeal in ***Godfrey Sekitoleko & Ors Vs Seezi Mutabaazi & Ors [2001 – 2005] HCB 80*** as cited ***Emorani v Nakendo & 2 Ors (Misc. Application NO. 478 OF 2014) [2014] UGHCLD 131*** made the position clear by stating as follows; -

20 “***The court has a duty to protect the interests of parties pending the disposal of the substantive suit. The subject matter of a temporary injunction is the protection of legal rights pending litigation.***”

The conditions for grant of a temporary injunction include the following:

1) *Prima facie* case with a probability of success:

A *prima facie* case with a probability of success was defined in the case of ***Kigongo Edward Nakabale Vs Kakeeto and Anor MA 144 of 2017 [2017] UGHCCD 146*** as 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.

30 According to the facts at hand, the applicants filed a suit CS. No. 39 of 2021 against the respondents for recovery of the same land. The applicant stated that, due to Kulume’s poor health, she could not continue to

5 cultivate her garden, whereupon the latter planted eucalyptus on part of the garden as his wife cultivated seasonal crops on the other part.

On 4th May 2015, Kulume Joyce died intestate, leaving the 1st plaintiff in possession of her garden. The 1st plaintiffs' wife deserted him leaving most of the suit land un used or redundant.

10 On realizing that the land was redundant, the respondent requested to be allowed to cultivate the same and he was so permitted by the 1st applicant. The respondent cultivated the bigger portion of the suit land while the 1st applicants' eucalyptus occupied the other portion.

15 That it was the state of the land till 2022 when the 1st applicant proposed that the suit land be distributed among the surviving children of the late Okoche Wilson but along maternal lines.

That to their shock, the respondent with the support of the clan head claimed ownership of the suit land claiming that, he was entitled to the same as the next of kin of the late Kulume Joyce Mary.

20 According to the respondent, Kulume Joyce chose him to be the care taker of her estate as she didn't have biological children and was therefore using the four gardens for cultivating, that he distributed part of the land to the applicants and the remaining part he has been in sole control of the land since the demise of Kulume Joyce the owner.

25 However, much it is evident that there are triable issues, the applicants have failed to prove to court the likelihood of success of the suit as required by the law.

5 2) Irreparable injury:

In ***Giella v Cassman Brown & Co Ltd [1973] 1 EA 358 (CAK)*** it was stated by Spry V.P that an interlocutory 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.

10 Irreparable injury is therefore that which cannot be compensated by damages.

The applicants have not shown any where that the actions of the respondent will cause them irreparable damage which cannot be compensated in monetary value and have only stated that the land has
15 already been surveyed and subdivided at the instance of the respondent. This means the action has already been done and the injunction would not stop it since the act has already been done. However, this can be compensated monetarily after the final disposal of the suit.

3) Balance of Convenience:

20 In ***Jover Byarugaba Vs Ali Muhoozi and Anor (Misc. Application 215 of 2014) [2014] UGHCCD 173***, Hon. Lady Justice Elizabeth Ibanda Nahamya stated that,

25 ***“It is trite law that when Court is in doubt on any of the above principles, it will decide the application on the balance of convenience. The term balance of convenience literally means the if the risk of doing injustice is going to make the applicant suffer then probably the balance of convenience is favourable to him /her and court would most likely be inclined to grant to him or her the application for a***
30 ***temporary injunction.”***

According to the facts, the respondent has been in sole control of the land and therefore, if this application is granted, he will be the most

5 inconvenienced and not the applicant. Accordingly, this application is rejected as it lacks merits.

Order:

- This application is dismissed as it lacks merits
- Each party to bear their own costs.

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Hon. Justice Dr Henry Peter Adonyo

Judge

19th August 2022

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