The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Miscellaneous Application No.173 of 2022

(Arising from Civil Suit No. 4 of 2022).

Jembrace Paul Erongot (Administrator of the estate of the late Paulo Erongot) :::::::::::::::::::::::: Applicant

Versus

Anguria Paul (Administrator of the estate of the late Isiraili Anguria) :::::::::::::::::::::::::::::::::: Respondent

Before: Hon Justice Dr Henry Peter Adonyo

Ruling

1. Introduction

This application was brought by Chamber Summons under Section 98 of the Civil Procedure Act, Cap 71 and Order 41 Rules 1 and 9 of the Civil Procedure Rules, SI 71-1 for orders that;

a) A temporary injunction doth issue restraining the family of the late Isiraili Anguria, to which the respondent is the administrator by himself, their agents, servants and all other persons acting under their authority or those deriving benefits, whether directly or indirectly from that estate from alienating, disposing of, selling, transferring or further encroachment beyond the 16.875 acres trespassed by the defendants until disposal of the main suit.

b) The costs of this application be provided.

The grounds of the application are set out in the application and enhanced in the supporting affidavit deposed by Jembrace Paul Erongot, the Applicant. Paragraphs 1,2,3,4,5,6,9,10,11,12,15,17, and 20 thereof are reproduced here and they show the following;

a) The applicant has been the administrator since 8th February 2011 (Administration Cause No. 0034 of 2010) of the estate of the late Paulo Erongot, who died in 1985.

b) The late Paulo Erongot is the lawful and beneficial owner of the land comprised in Lease Hold Register Volume 1234, Folio 21, Plot 22 Block 5 at Kakere, Bukedea, and it is located at present-day Gagama parish, Kocheka sub-county, Bukedea district measuring 16.875 acres that form part of the entire land measuring 76 hectares.

c) Before the death of Paul Erongot, he was granted a 49-year lease over the suit land by Uganda Land Commission in 1983, which he had customarily occupied since the 1920s.

d) The late Paul Erongot enjoyed quiet ownership of the suit land, occupied it, and utilized it undisturbed by anyone. The rights over the land were also enjoyed by the estate administrators of the late Paul Erongot; the late Charles Peter Okia, a brother to the applicant and an elder son to the late Paulo Erongot, who died in 2009.

e) Around 2011, the applicant discovered that the respondent's family (estate of the late Isiraili Anguria) had trespassed on the part of the suit land measuring about 2 acres, and this trespass was progressively going beyond the 2 acres claiming that the suit land is for the respondent held under customary tenure whereas not.

f) The applicant filed a land suit No. 006 of 2020 against the respondent for trespass at Bukedea Magistrates Court, which ordered a boundary opening to establish the extent of the trespass.

g) Whereas the results of the boundary opening show that the extent of trespass is 16.875 acres and the respondent's family (estate of the late Isiraili Anguria) has threatened to further trespass beyond the 16.875 acres of the suit land whose boundaries were opened on 15/07/2022 and the same form the subject matter of the main suit from which this application arises.

h) If the respondent is not restrained, the *status quo* of the suit land will have changed by the time the main suit is determined, thereby depriving the estate of the late Paulo Erongot interests on the 16.875 acres.

i) The applicant has a *prima facie* case in the main suit pending hearing before this Honourable Court in which one of the prayers sought is for a permanent injunction restraining the respondent's family from further trespassing on the land belonging to the estate of the late Paulo Erongot.

j) The balance of convenience of this matter is in favour of the applicant.

k) The interests of justice demand that a temporary injunction be granted to preserve the *status quo* so as not to cause further trespass beyond the already established 16.875 acres.

l) It is just and equitable that this application is granted for the interest of justice to prevail.

The application was opposed by Anguria Paul, the respondent, in his affidavit in reply wherein he states that;

a) Save for the location described, the suit land is not a Leasehold Register Volume 1234, folio 21, plot 22, block 5, but customary land. It has devolved to my family and me from time immemorial from one generation to

another for over 300 years for my late father's and our use, occupation, utilisation and possession.

b) There was no problem in the suit land when Okia Charles Peter was an administrator since he respected the correct boundary.

c) I am advised by my lawyers that the grounds for maintaining the *status quo* have not been put before this Honourable court.

d) The respondent shall seek for the applicant's affidavit to be struck out with costs for being argumentative in nature and not pointing out the requirements of issuance of an injunction.

2. Representation:

The applicant was represented by M/s Waluku Mooli & Co. Advocates, while the respondent was represented by M/s Ogire & Company Advocates.

The parties filed written submissions which have been considered accordingly.

3. Issues:

a) Whether the case is a proper one for the grant of a temporary injunction?

b) What remedies are available to the parties?

4. Resolution:

a) Issue One: Whether the case is a proper one for the grant of a temporary injunction?

The legal regime by which this application is presented is **Section 98 of the Civil Procedure Act, Cap 71** which provides for the inherent powers of this court thus; **Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.**

Further, this application is brought under **Order 41 Rule 1 (a) of the Civil Procedure Rules SI 71-1** which provides for cases in which the grant of temporary injunctions by the court can be done. It states 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 execution of a decree;**

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.

Section 38 of the Judicature Act, Cap 13 which empowers this court to grant an injunction to restrain any person from doing any act as may be specified is also cited by Counsel for the applicant in his submissions in addition to Section 64(c) of the Civil Procedure Act, Cap 71 which provides that;

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

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;

The respondent opposes this application and under paragraphs 3, 4 and 5 of his affidavit in reply he states that this application which is brought by way of notice of motion and the affidavit in support contain matters of law, is argumentative and irrelevant to matters to be replied to.

In the affidavit in reply, it is averred by the respondent as follows;

That I have been advised by my lawyer advice I have verily believed to be true and correct that the use of the words "The facts pertaining" in paragraph 3, "that prior to his death" in paragraph 4, "during" in paragraph 5, "the rights continued" in

paragraph 6, "during the time" in paragraph 7, "this prompted" in paragraph 10, "during the pendency" in paragraph 11, "by virtue of the legal title" in paragraph 16, "if not restrained" in paragraph 17, are a pointer to affidavit being argumentative.

Counsel for the respondent in his submissions reiterated the respondent's contention that the application attempts to make arguments for the main suit as can be seen from the averments in paragraphs 3, 4, 5, and 6 of the affidavit supporting the application yet these were not conditions precedent for the grant of an injunction.

Counsel for the respondent cited the case of ***Nakiridde vs Hotel International Limited [1987] HCB 85*** to support his prayer that the affidavit be struck off with costs for being argumentative. Counsel asserted that in *Nakiridde vs Hotel International Limited* (supra) it was held that;

> ***"Where an affidavit in reply contains matters of law, is argumentative and irrelevant to matters to be replied to, such an affidavit is incompetent, oppressive and abuse of court process and ought to be struck out with costs."***

Accordingly, the respondent prayed that the affidavit in support of this application ought to be struck out with costs because it is incompetent, oppressive and an abuse of court process.

The applicant did not submit on this preliminary point of law in his submissions or otherwise.

The issue formulated for the resolution of the respondent's preliminary point of law is whether the affidavit of the applicant in support of the instant application is argumentative and prolix?

Order 19 Rule 3 of the Civil Procedure Rules provides for two things, that is matters to which affidavits shall be confined and for matters the consequence of

an affidavit which unnecessarily sets forth matters of hearsay or argumentative matter. It provides that;

Order 19 Rule 3 of the Civil Procedure Rules:

(1) **Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.**

(2) **The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit.**

According to the **Black's Law Dictionary 6th Edition at, page 107**, the word **"Argumentative"** is defined as *"...characterized by argument; controversial; given to debate or dispute. A pleading is so called in which the statement on which the pleader relies is implied instead of being expressed, or where it contains, in addition to proper statement of facts, reasoning or arguments upon those facts and their relation to the matter in dispute, such as should be reserved for presentation at trial."*

Upon perusal of the affidavit in support of the application, juxtaposed with Order 19 Rule 3 of the Civil Procedure Rules, I would be inclined, in light of the definition of the word "argumentative" above, to partly agree with the counsel of the respondent that the affidavit in support of the application in paragraphs 3, 4, 5, 6, 7, 10, 11, 16 and 17 contains some opening words; such as "whereas", "by virtue of legal title", "I told the respondent to reconcile" etc. which are borderline belligerent matters but not in fact argumentative matters when consideration of the full sentences by the applicant are taken into account which I do see merely resulting from the poor drafting of the affidavit in support of this application

which is theoretically required to be only full of facts and evidence and not borderline or actual arguments.

In making this conclusion, I find refuge in the observation by the Supreme Court of Uganda which when faced with affidavits that contained argumentative in *Male Mabirizi v Attorney General (Miscellaneous Appeal No. 7 of 2018) [2018] UGSC 50,* went on to hold that;

> *"In the instant application, the affidavit in support contains 94 paragraphs and the supplementary affidavit contains 67 paragraphs. The affidavit in rejoinder contains 103 paragraphs. This makes a total of 264 paragraphs. The length of the affidavits by itself is not the issue but we find that the contents are argumentative and prolix. An affidavit as we understand it is meant to adduce evidence and not to argue the application.*
>
> *We find that the affidavits of the applicant fall short of meeting this standard. They argue the case instead of laying down the evidence to be relied on in deciding the application.*
>
> *We also observe that the affidavit in reply suffers from the same defect. Prolixity is defined in the Black's Law Dictionary, Ninth Edition at page 1331 as "The unnecessary and superfluous stating of facts and legal arguments in pleading or evidence." In the case of Re: Bukeni Gyabi Fred HCMA 63/99, [1999] KALR, 918 the Court in interpreting this rule held that the order is very clear. An affidavit should contain facts and not arguments or matters of law. In Rohini Sidipra vs Freny Sidipra & Ors HCCS 591/90, [1995] KALR 724 Mpagi Bahigeine J as she then was held: "I think I first desire to make an observation about the applicant's supplementary affidavit. It appears not to have been skillfully drawn. It is prolix in the extreme. It contains 11 rather lengthy paragraphs covered on 7 pages. Much of this is argumentative narrative, not strictly relevant to the application before me." The learned Judge quoted*

Order 17 Rule 3(1) of the Civil Procedure Rules which is now Order 19 rule 3(1). She said: "In this regard, the court has the power to take an affidavit off the file for prolixity or to order scandalous matter to be struck out of an affidavit. The Registrar should not have allowed it on record. I proceed to strike it out." We cite that reasoning with approval. It is further noted that under Order 19 Rule 3 of the Civil Procedure Rules, the deponent who makes the argumentative affidavit which is incurable can be penalized by paying costs of the application. While we do not find anything scandalous in the affidavits of the applicant, we find that they are prolix and non-compliant with Order 19 Rule 3 of the Civil Procedure Rules and we strike them out. The consequence of striking out the affidavits is that there is no competent application before this Court." (emphasis mine)

Furthermore, in ***Kasaala Growers Co-operative Society v Kakooza & Anor (SCCA 19 of 2010) UGSC 29,*** the Supreme Court of Uganda indicated that a distinction must be drawn between a defective affidavit and failure to comply with a statutory requirement.

A defective affidavit is, for example, where the deponent did not sign or date the affidavit. However, the failure to comply with a statutory requirement is where a statutory requirement is not complied with, and that is fatal.

From the above, I would find and conclude that paragraphs 3, 4, 5, 6, 7, 10, 11, 16 and 17 of the affidavit in support of the application do not contain argumentative matters when the whole sentences therein are considered though only individual words and phrases appear so but which in any case do not add to the robust meaning of the sentences.

In ***Col (RTD) Dr Besigye Kizza v Museveni Yoweri and Electoral Commission Supreme Court Election Petition Number 1 of 2001 (UR),*** Justice Tsekooko (as he then was) was of the view that;

"Affidavits which offend the provisions of Order 19 rule 3 can, however, be relied on by the court at its discretion, the court can accept and act on parts of an affidavit which are valid and reject what is considered to be defective just as it does with oral evidence from witnesses. Whenever possible, a court which is faced with an affidavit containing some inadmissible matter that are deliberately intended to mislead and that can be severed and discarded without rendering the remaining part of the affidavit meaningless, court would be justified in severing the offending part and using the rest of the affidavit."

I do associate myself with the above authority in relations to the instant application and proceed to severe the offending words which would thus leave the supporting affidavit remaining with facts concretely related to this application. That being the case, the preliminary objection on the point of law would fail and as such I would then proceed to resolve this application on its merits.

Counsels representing parties in their submissions discussed the principles on which the grant of is anchored.

Lord Diplock, in ***American Cyanamid Co. Vs Ethicon Ltd [1975] AC 396,*** laid down the principles for the grant of temporary injunctions, which have been readily followed in our Courts. See, for example, ***Francis Babumba and 2 others vs Erusa Bunju HCCS No. 679 of 1990, Kiyimba Kaggwa vs Katende [1985] NCB 44*** and ***Robert Kavuma Vs M/s Hotel International SCCA No. 8 of 1990***.

In an application for a temporary injunction the interest must be to maintain the *status quo* obtaining until the main suit is disposed of. Hon. Mr Justice G. M. Okello clarified this position in ***Francis Babumba and 2 others vs Erusa Bunju HCCS No. 679 of 1990,*** where the held that;

"It is a well-settled principle that grant of a temporary injunction is an exercise of a judicial discretion for the purpose of preserving the status quo of a subject matter in dispute under threat of being wasted, damaged or alienated until the investigation being carried out by Court or until the dispute is finalised. For authority See: Sergeant v. Patel (1949) 16 EACA 63, Giela v. Cosman Brovm Co. Ltd (1973) EA 358."

Accordingly, the Court must be satisfied that: -

a) The applicant has by his pleadings, demonstrated a prima facie case with a probability of success in the main suit.

b) The applicant is likely to suffer irreparable damage if the injunction is denied.

c) If the court is in doubt as to the above considerations, it will decide the application on the balance of convenience.

Temporary injunctions are also discretionary orders with flexibility allowed for as long as it remains in the realm of that which is judicious with the Court not attempting to resolve issues related to the main suit at that particular stage.

See, for example, ***Prof. Peter Anyang Nyongo & Others Vs the Attorney General of Kenya & Others; East African Court of Justice Case Ref. No. 1 of 2006*** (unreported)).

i. *The applicant has to show that he has a prima facie case with a probability of success in the main suit:*

In the instant case, the applicant stated /submitted that he is a plaintiff in Civil Suit No. 41 of 2022 that he filed against the respondent pending before this court. The applicant stated that the cause of action in the head suit is for trespass to his 16.875 acres of the 76 hectares of land by the respondent. The suit land is said to belong to the estate of the late Paulo Erongot and is comprised in Lease Hold Register Volume 1234, Folio 21, Plot 22 Block 5 at Kakere, Bukedea located at present-day Gagama parish, Kocheka sub-county, Bukedea district.

The applicant also stated that one of the prayers sought in the main suit is for a permanent injunction restraining the respondent's family from further trespassing on the land belonging to the estate of the late Paulo Erongot to which he is an administrator.

In view of the inference that the *prima facie* case must have a probability of success, the applicant states and contends that the results of a boundary opening that was ordered by the Magistrate's Court at Bukedea vide Civil Suit No. 006 of 2020 showed that there is an active encroachment on the titled land that measures 16.875 acres.

The respondent in reply states and contends in his affidavit in reply and the submissions that the suit land is customary and has devolved to the respondent and his family from time immemorial from one generation to another for over 300 years for my late father's and our use, occupation, utilisation and possession. Counsel for the respondent contends that the applicant's claims in the plaint are speculative with no merits.

Further, the respondent reiterates that the applicant's land is distinct from that of his family, and because the applicant is unaware of the time of entry, the uncertainty of his claim makes the plaint disclose no cause of action. The respondent thus, in the long and short contends that he is in possession of the suit land.

As the applicant's counsel submitted, there has to be a pendency of a main suit which must be proved by affidavit or otherwise upon which an application for a temporary injunction is hinged. This is so for in the case of ***Mwine Nyakayima & Company Advocates Vs Departed Asians Property Custodian Board [1987] HCB 91,*** the Court observed that the right to obtain an interlocutory injunction is not a cause of action, it is dependent upon there being a pre-existing cause against the defendant, arising out of the invasion, actual threatened by him of legal or

equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The pendency of a head suit helps court twig whether the applicant has a *prima facie* case that is not frivolous or vexatious and whether there are in the said main suit triable severe issues.

What amounts to a *prima facie* case was explained in ***Godfrey Sekitoleko and Four Others vs 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. If the legal right sought to be enforced is doubtful, either in point of law or of fact, the court is always reluctant to take a course, which may result in material injury to either party. However, if the applicant's legal right is plain and free from doubt, then interlocutory relief would be more clearly appropriate. By finding that there exists a prima facie case in favour of the applicants, the court does not profess to anticipate the determination of the suit but merely gives as its opinion that there is a substantial question to be tried and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime in *status quo*. The Court will not, therefore, except under very special circumstances, grant an interlocutory application before the decree, an injunction which virtually directs the defendant to perform an act. An interlocutory injunction is merely provisional and does not conclude a right.

A *prima facie* case with a probability of success is no more than that the Court must be satisfied that there is a serious question to be tried. See, for example, ***Mirembe Matovu vs. Standard Chartered Bank (U) Ltd & Anor (M/A No. 456/2012) [2013] UGHCCD 114 (13/9/2013.***

The rationale for the applicant to show a *prima facie* case and a probability of success was observed in the per curium of ***Kiyimba Kaggwa vs Hajji Abdul Nasser***

Katende (1985) HCB page 43 that the evidence at this point (being affidavit evidence) is incomplete and not contested by arguments and cross-examination. To my mind, both the applicant and the respondent agree that a *prima facie* case exists vide Civil Suit No. 41 of 2022 between themselves on a trespass claim pending determination. As to whether that case is with a probability of success, I find that there are serious questions to try, as evidenced by the contentions between the applicant and the respondent as to whether the suit land is the one trespassed upon or not.

In the case of ***Digital Solutions Ltd vs MTN (U) Misc. Application No. 546 of 2004*** it was held that the applicant must show a prima facie case and the court must be satisfied based on the material availed to it at this stage that there are serious questions to be tried between the parties with the probability that the questions will be decided in favour of the applicant.

On the face of this application, I would find and concluded that there is a genuine dispute between the parties. The ground of the existence of a prima facie case with a probability of success is thus proved.

ii. Status quo:

The applicant states the suit land belongs to the estate of the late Paulo Erongot's land comprised in Lease Hold Register Volume 1234, Folio 21, Plot 22 Block 5 at Kakere, Bukedea, which is located at present-day Gagama parish, Kocheka sub-county, Bukedea district. To lay credence to this assertion, the applicant attached to his affidavit in support a certificate of title issued on 25/04/1983 concerning the suit land marked as "H".

Under letters of administration marked as "A" (of the estate of the late Paulo Erongot, who died in 1985) dated 8th February 2011 vide Administration Cause No. 0034 of 2010 granted to the applicant, he has an interest in the suit land.

The applicant states under paragraphs 10, 11, 12 and 15 of the affidavit in support that around 2011, he discovered that the respondent's family (estate of the late Isiraili Anguria) had trespassed on the part of the suit land measuring about 2 acres and this trespass was progressively going beyond the 2 acres claiming that the suit land is for the respondent held under customary tenure whereas not.

The applicant states under paragraphs 5 and 6 of the affidavit in support that the late Paul Erongot enjoyed quiet ownership of the suit land, occupied it and utilized the suit land undisturbed by anyone and that the rights over the land were also enjoyed by the administrators of the estate of the late Paul Erongot; the late Charles Peter Okia, a brother to the applicant and an elder son to the late Paulo Erongot who died in 2009.

The applicant further states under paragraph 17 that if the respondent is not restrained, the *status quo* of the suit land will have changed by the time the main suit is determined, thereby depriving the estate of the late Paulo Erongot's interests on the 16.875 acres.

The applicant states that the interests of justice demand that a temporary injunction be granted to preserve the status quo so as not to cause further trespass beyond the already established 16.875 acres.

In reply, the respondent, under paragraphs 7, 9, 10 and 14 of his affidavit in reply denies and contends that the suit land is not comprised in Leasehold Register Volume 1234, folio 21, plot 22, block 5 as stated by the applicant but that the suit land is customary land and has devolved to the respondent and his family from time immemorial from one generation to another for over 300 years for my late father's and our use, occupation, utilisation and possession.

The respondent further states under paragraphs 11 and 15 of his affidavit in reply that there was no problem in the suit land when Okia Charles Peter was an

administrator of the estate of the late Paulo Erongot (now administered by the applicant) since he respected the correct boundary. The respondent contends that his lawyers have advised him that the grounds for maintaining the *status quo* have not been put before this honourable court.

In resolving this matter, it is essential to reiterate the case of ***Kiyimba Kaggwa Vs. Hajji Abdul Nasser Katende [1985] HCB page 43*** on temporary injunctions. The most important purpose for the grant of temporary injunctions is to preserve the matters in status quo until the question to be investigated in the main suit is finally disposed of.

In the case of ***Ndema Emanzi Rukandema v Mubiru Henry MA No. 225 of 2013,*** the learned Justice Tuhaise defined the status quo at length and expressly stated;

> ***"Court's duty is only to preserve the existing situation pending the disposal of the substantive suit. In exercising this duty, the Court does not determine the legal rights to property but merely preserves it in its actual condition until legal title or ownership can be established or declared."***

Also, according to the case of ***Jakisa & Others versus Kyambogo University; Misc. Application No. 549 of 2013,*** *status quo* was defined to denote the existing state of affairs before a given point in time at which the acts complained of as affecting or likely to affect the existing state of things occurred. The Court, in its ruling, applied a similar definition and found that the *status quo* was that both parties had access to the disputed area, a reason why it ordered that they continue to have access to the same.

From the facts as deposed in the various affidavits, the applicant's family are said to hold a certificate of title to the suit land, which the respondent denies and avers that the suit land is customary. The applicant states that upon engaging a surveyor as ordered by the Chief Magistrate's Court of Kumi at Bukedea vide Miscellaneous Application No. 006 of 2021, the survey report annexed to the

affidavit in support as "L", it was concluded on page 5 that there is an active encroachment on the titled land standing at 16.875 acres as of 15th July 2022. The maker of the report did not appear in court to ascertain the authenticity or credibility of the report; however, the report, as averred by the applicant, was the basis of the head suit against the respondent.

The applicant states under paragraphs 15 and 17 of the supporting affidavit that if the respondent is not restrained, the *status quo* of the suit land will have changed by the time the main suit is determined, thereby depriving the estate of the late Paulo Erongot interest on the 16.875 acres and that the attitude of the respondent's family is intended to cause further trespass beyond the already established 16.875 acres.

The import of the application concerning the preservation of the *status quo* is for the court to restrain the respondent from further trespass beyond the 16.875 acres in consideration of the 76 hectares of the suit land.

The dispute between the parties notwithstanding, by virtue of the applicant's averment that the respondent has trespassed on 16.875 acres of land out of 76 hectares and also the respondent's contention that his family is in occupation of the suit land and has been so for the last 300 years, and also the applicant's averment that around 2011, the applicant discovered that the respondent's family (estate of the late Isiraili Anguria) had trespassed on the part of the suit land measuring about 2 acres, and this trespass was progressively going beyond the 2 acres, to me emphasises that the whereas the legal ownership is in dispute, the respondent is in actual possession of part of the suit land whose location the respondent is agreeable to but not the particulars of the suit land on the certificate of title.

In support of the point that the respondent is in occupation of part of the suit land, counsel for the applicant submitted that the activities of the respondent's

family of cutting down trees, clearing bushes for cultivation and construction of houses on the 16.875 acres of land and refusing to settle the matter once requested to do so by the applicant are indicative of the respondent's further intention to go beyond the 16.875 acres that form part of the subject matter of the main suit and that unless stopped, the respondent's actions may result to an injury which is not likely compensatiable by damages.

In reply, the respondent averred that no picture of cut trees or a stump has been attached to confirm the allegations.

The averments that the respondent's family is cutting down trees, and clearing bushes for cultivation on the 16.875 acres of the suit land are facts that are showing up in the submissions and not found in the application itself or affidavit in support and thus is a departure from pleadings and amounting to leading evidence from the bar.

In the case of ***Twiga Chemical Industries versus Viola Bamusedde (T/A Triple B. Enterprises) SCCA 16 of 2014,*** Kanyeihamba JSC as he then was stated, ***"I think that the rule that parties are bound by their pleadings has remained the same...."***

Be that as it may, no other cogent evidence was attached to the application to prove the assertion that the respondent's family is cutting down trees and clearing bushes for cultivation on the suit land.

Hon. Justice Lugayizi, in the case of ***J.K Sentongo and Anor v Shell (U) Ltd HCCS 31 of 1993,*** held that since the *status quo* as per the affidavits of the parties was that the respondents were building on the suit premises, the *status quo* to preserve in the circumstances was for the building to continue till the giving of the final order.

Since my finding is that the respondent is in physical occupation of the 16.875 acres, this is the *status quo* obtaining. The prayer for the applicant is that the

respondent be restrained from further trespass beyond the 16.875 acres of the suit land that the respondent is already in physical possession of.

Therefore, on a balance of probabilities, the applicant has proved this ground for the court to form an opinion/observation that the respondent should be restrained from further trespassing beyond the 16.875 acres that they are already in physical possession of until the court disposes of the head suit.

iii. ***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:***

Counsel for the applicant submitted that the activities of the respondent's family of cutting down trees, clearing bushes for cultivation and construction of houses on the 16.875 acres of land and refusing to settle the matter once requested to do so by the applicant are indicative of the respondent's further intention to go beyond the 16.875 acres that form part of the subject matter of the main suit and unless stopped, their actions may result to an injury which the respondent is not likely to compensate the applicant with damages. I reiterate my observation that these averments were not pleaded in the application or supporting affidavit, and like counsel for the respondent also asserts, there are no photos to evidence the same.

I will therefore restrict myself to the averments of the applicant that the respondent trespassed onto his land, that is, 16.875 acres and the prayer that the respondent be restrained by the court from further trespass beyond the suit land. The question is whether, if the application is not granted, there will be an irreparable injury to the applicant that an award of damages would not adequately compensate.

The case of ***Giella vs Cussman Brown and Co. [1973] E. A 358*** defined irreparable damage that ***"it does not mean that there must be the substantial or material***

physical possibility of repairing the injury, but it means that the injury or damage must be substantial or material one, that is, one that cannot be adequately atoned for in damages".

The respondent submitted that the respondent will suffer irreparable damage because the land in issue houses his family members and is being used for agriculture.

Irreparable injury, according to the case *of* ***Kiyimba Kaggwa vs Katende [1985] HCB 43,*** does not mean that there must not be a physical possibility of repairing the injury but means that the injury must be a substantial or material one that cannot be adequately compensated for in damages.

In ***American Cyanamid v Ethicon Limited [1975] AC 396,*** the court held that the injunction would not be granted;

> ***"if damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."***

Such damage is usually not reversible and cannot be quantified. An injunction is, therefore, necessary to protect the parties from such harm, according to The Uganda Civil Justice Bench Book, 1st edition, 2016, on page 56.

Regarding the averments of the applicant and the submissions that the respondent's family is cutting down trees and clearing bushes for cultivation on the 16.875 acres of the suit land and also the threat to further tress pass beyond the 16.875 acres, I would find that these are facts from the bar.

Also, there was no cogent evidence led that the anticipated further tresspass shall lead to the applicant suffering injury that cannot be atoned in damages. Therefore, the applicant has failed to prove this ground on a balance of probabilities.

iv. ***Thirdly, if the court is in doubt, it would decide on an application on the balance of convenience:***

Counsel for the applicant submitted that the applicant has a title to 76 hectares of land that are part of the disputed 16.875 acres since 1983, when the same was titled but had occupied the same under customary tenure during the lifetime of the late Paulo Erongot as early as 1920. Counsel further submitted that the temporary injunction is not intended to stop activities on the 16.875 acres but, if granted to prevent further trespass beyond the already established extent.

Counsel for the applicant submitted that not granting a remedy would sanction the respondent to continue further encroachment beyond the 16.875 acres, the consequence of which shall be that the subject matter of the main suit will have materially changed in size hence affecting the applicant's main suit. He further submitted that since the estate of the late Paulo Erongot is still the registered owner of the 76 hectares where the 16.875 acres are found, the balance of convenience favors the applicant to ensure that the interests of the estate are protected.

Counsel for the respondent, in reply, submitted that the balance of convenience favors the respondent to ensure that his interests are protected.

If, after evaluating whether the applicant has a *prima facie* case, whose possible injury cannot be adequately compensated for in damages, the court is still in doubt as to whether to grant or deny the injunction, it will decide the application on the balance of convenience – (see: **The Uganda Civil Justice Bench Book 1st edition 2016 at page 56**).

"Balance of convenience" was defined in the case of ***Gapco (U) Ltd vs Kaweesa Badru HCMA No. 259 of 2013,*** thus

> ***"...that if the risk of doing injustice is going to make the applicants suffer then probably the balance of convenience is favourable to him/her and the***

court would most likely be inclined to grant to him/her the application for a temporary injunction."

The applicant's submission is persuasive in that that since the estate of the late Paulo Erongot is still the registered owner of the 76 hectares where the 16.875 acres are found, and yet still it is the applicant's interest for the respondent to be restrained from extending further than the 16.875 acres which he since the estate of the late Paulo Erongot is still the registered owner of the 76 hectares where the 16.875 acres are found, the balance of convenience would favour the applicant as such would ensure that the interests of the estate are protected. Accordingly, I would find that the balance of convenience favors the applicant to ensure that the interests of the estate are protected.

All in all, the applicant has fulfilled three of the four conditions for the grant of a temporary injunction and since the purpose of the grant of a temporary injunction is to preserve the status quo, pending the disposal of the suit, I would consider that in the interest of the justice of the matter the same should issue in the terms that favor the applicant.

b) <u>What remedies are available to the parties in the circumstances?</u>

Since the application has been allowed, a temporary injunction would thus be issued to the applicant against the respondent with the costs shall be in the cause.

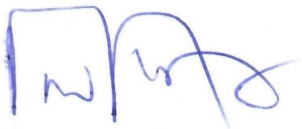
5. <u>Orders:</u>

a) A temporary injunction doth hereby issue restraining the family of the late Isiraili Anguria to which the respondent is the administrator by himself, their agents, servants and all other persons acting under their authority or those deriving benefits, whether directly or indirectly from that estate from alienating, disposing of, selling, transferring or further encroachment

beyond the 16.875 acres trespassed by the defendants until disposal of the main suit.

b) Costs of the application.

I so order



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Hon. Justice Dr Henry Peter Adonyo

Judge

26th April 2023