

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISC.APPLICATION NO. 61 OF 2023
ARISING FROM MISC.APPLICATION NO. 334 OF 2022
ARISING FROM MISC.APPLICATION NO. 265 OF 2022
(ARISING OUT OF CIVIL SUIT NO. 50 OF 2022)

**DEPARTED ASIANS PROPERTY
CUSTODIAN BOARD..... APPLICANT**

VERSUS

**1.MUSA BALIKOWA
2. GAMWANGA EMMA MOSES..... RESPONDENTS**

BEFORE: HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA

NTAMBI

RULING

Background

This Application is brought under Sections 64(b) & (c), and 98 of the Civil Procedure Act Cap 71 and O. 41 rules 1, (1) (c) & 9 of the Civil Procedure Rules S.I 71 - 1, seeking for orders that: -

1. A temporary injunction doth issue restraining the Respondents and their agents/ servants of Plot 54 Main Street LRV 154 Folio 17 at Butembe Jinja Municipality from sale, mortgage, transfer, alien, dispose, eviction, demolition, threats, intimidation or other form of interference until final disposal of the Application No. 334 of 2022 and main suit No. 50 of 2022 or until further orders of court.
2. A temporary injunction be issued to preserve the suit property and maintain the status-quo pending the determination of Application No. 334 of 2022 and Civil Suit No. 50 of 2022 or until further orders of court.
3. Costs of this Application be provided for.

The Application is supported by the affidavit of Hirome Sabbehe Mayanja on behalf of the Applicant dated 20th March 2023, which states the grounds of the application as follows;



1. That the applicant filed Civil Suit No. 50 of 2022 to challenge among others, the transfer of the suit property to the respondent on grounds of fraud.
2. That the respondent filed M.A No. 265 of 2022 for security for costs which was granted by Deputy Registrar hence applicant's appeal in M.A No. 334 of 2022 pending before this Honorable Court.
3. That the contested suit property on Plot 54 Main Street LRV 154 Folio 17 managed by the applicant was allocated to among others, Mr. Hamya Wilson Mulongo on 28th January 2021 at a consideration and he is in actual possession of the suit property.
4. That the enjoyment of the suit premises has been disturbed by the Respondents and through their agents, are demolishing part of the building, making eviction attempts and also denying the Applicant's tenant Mr. Hamya Wilson Mulongo access.
5. That the applicant's tenants are in actual, constructive and physical possession of the suit property and that the said allocatee/ occupant is duly paying rent to the applicant. That the applicant's tenants are in physical control of the suit property as herein described, the balance of convenience is in its favour and the applicant will suffer irreparable damages when government property is demolished.
4. That the applicant has been informed by his lawyers which information he believes to be true that the application is seeking for among other orders, restraining the respondents its agents/ servants, allocates of Plot 54 Main Street LRV 154 Folio 17 at Butembe Jinja Municipality from sale, mortgage, transfer, alien, dispose, eviction, demolition, threats, intimidation or other form of interference until final disposal of Miscellaneous Application No. 334 of 2022 and main suit No. 50 of 2022.
6. That the applicant has a valid and substantive claim against the respondents jointly and severally in the main suit with a high probability of success which will be rendered nugatory once this application is not granted.
7. That the applicant deponed the affidavit in support of an application for a temporary injunction pending the hearing the appeal in Misc. Application No. 334 of 2022 and the Civil Suit No. 50 of 2022.

The respondents field an affidavit in reply sworn by Gamwanga Emma Moses, the 2nd Respondent dated 6th April 2023, premised on the grounds below;

1. That in reply to paragraph 2 and 3 of the said affidavit, the applicant filed Civil Suit No. 50 of 2022 and that by virtue of Miscellaneous Application No. 265 of 2022, the applicant was ordered to pay security for costs within a period of 30 Days from 14th November 2022 failure of which Civil Suit No. 50 of 2022 would be struck off with costs. That due to non-compliance by the Applicant to pay the security of costs as ordered by Court, Civil Suit No. 50 of 2022 was struck out. That Civil Suit No. 50 of 2022 where this



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application for temporary injunction should arise was struck off and an application of this nature cannot stand alone in court without a substantive suit from which it originates.

2. That the purported MA. No. 334 of 2002 pending in court cannot stand because there is no suit on which it is premised.
3. That at the hearing the respondent intends to raise points of law to have this application for temporary injunction struck off on the basis that it is incompetent without a substantive suit in court, that the affidavit in support of the application is sworn by Hirome Sabbehe Mayanja who lacks locus to swear the affidavit on behalf of the applicant, that the lawyers representing the applicant were not legally procured and that the Applicant did not comply with the PPDA guidelines to solicit private legal representation.
4. That Paragraph 4 of the applicant's affidavit is false as the suit property was repossessed and that the former owners sold the suit property to the 2nd respondent who later sold to the property to the 1st respondent who is the current registered proprietor of the same and is in possession.
5. That paragraphs 5,6,7 and 8 of the applicant's affidavit are false and in reply, the Respondents state that the applicant has never occupied the suit property and a one Hamya Wilson Mulongo has never been a tenant of the applicant but was his tenant who used to pay rent and when he defaulted he issued an eviction notice to him to vacate the property which he has now been handed over to the 1st respondent and that the balance of convenience is in favor of the 1st respondent.
6. That in reply to paragraphs 8 and 9 of the applicant's affidavit in support of the application, this application is frivolous as there is no suit from which it arises and the same does not meet the conditions for grant of temporary injunction as there is no status quo to preserve since even the structures have already been demolished.

Brief facts

The Applicants filed Civil Suit No. 50 of 2022 in this court. The Respondents then filed a Misc. Application No. 265 of 2022 wherein they requested court for the applicant to furnish security for costs of UGX 200,000,000 before the hearing of Civil Suit No. 50 of 2022. His Worship Waninda Fred K.B the Deputy Registrar while hearing the application ruled in favor of the respondents and ordered that the applicant deposits UGX 70,000,000 as security for costs within 30 days on the Registrar High Court Account in Bank of Uganda. The applicant then filed Misc. Application No. 334 of 2022 for setting aside Misc. Application No. 265 of 2022 and also later filed Misc. Application No. 61 of 2023 for a temporary injunction doth issue restraining the respondents and their agents/servants of plot 54 main streets LRV 154 Folio 17 at Butembe Jinja Municipality from sale, mortgage, transfer, alien, dispose, eviction, demolition, threats,


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intimidation or other form of interference until final disposal of the Application No. 334 of 2022 and main suit Civil Suit No. 50 of 2022 or until further orders of court.

Representation


The Applicant was represented by Counsel Bwire John together with Counsel Ssemaganda Sharif of M/s Wafula & Co. Advocates and Kian Associated Advocates respectively while the Respondents were represented by Counsel Guma Davis of M/s Guma & Co. Advocates.

Submissions

When this application came up for hearing on 11th April, 2023, Court invited the Respondents' Counsel to make a submission on the incompetence of this application since Civil Suit No. 50 of 2022 on which it was premised had been struck off the court record on 5th January, 2023.

The Respondents' Counsel submitted that the preliminary objection is premised on O.41 R1 (a) of the Civil Procedure Rules (CPR) which is to the effect that for any application for a temporary injunction, there should be a subsisting suit. That Civil Suit No.50 of 2022 was struck off on the 5th January 2023 on the basis that the applicant had not complied with the Order for security for costs in M.A No. 265 of 2022. It was the Respondent's contention that there cannot be a substantive application for a temporary injunction when the substantive suit was struck off. That the applicant should have filed an application to reinstate Civil Suit. No.50 of 2022 before filing an application for a temporary injunction premised on a non-existent suit. Counsel prayed for the application to be struck off the Court record for being incompetent with costs to the Respondent.

Counsel for the Applicant submitted that Section 2(x) of the Civil Procedure Act (CPA) defines a suit to mean all civil proceedings commenced in any manner and that MA 61/2023 was commenced arising out of a suit specifically MA 334/2022. He argued that a miscellaneous application premised on another miscellaneous application is supported under section 2(x) of the CPA and is therefore a suit under the meaning of Section 2(x) of the CPA. That the claim by the Respondents that O.41 R.1 (a) is not applicable in the instant application appears to restrict the powers of Court to instances where there is a main suit. He further submitted that Section 98 of the CPA gives Court powers to make such orders necessary for parties to achieve justice. Council prayed for the application to be heard and orders granted under the said law together with Section 64 (e) of the CPA. It was the Applicant's contention that M.A 334 of 2022 was filed on 7th December 2022 before Civil Suit No. 50 was struck off on 5th January in 2023. That since the decision of Court in M.A 334 of 2022 would have a bearing on Civil Suit No. 50 of 2022, the Applicant did not find it necessary to reinstate Civil Suit No. 50 of 2022.


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Counsel Sharif Semaganda argued that O41 r1(b) of the CPR provides that for an application for a temporary injunction, there should be a pending suit. That the Applicant, being dissatisfied with the Ruling of the Deputy Registrar in MA 265 of 2022 moved under Order 50 r 8 of the CPR and filed MA 334 of 2022. That MA 334 of 2022 on which MA 61 of 2023 (the instant application) is premised is covered within the provisions of O41 r1(b) of the CPR and Section 2(x) of the CPA and therefore qualifies as a suit. He prayed that the preliminary objection raised by the Respondent be dismissed with costs since it was redundant.

In Rejoinder, Counsel for the Respondents submitted that Section 2(x) of the CPA as cited by the Applicant's Counsel to support the Applicant's argument that MA. 334/2022 which arises out of M.A 265/2022 qualifies as a suit is false. He argued that there cannot be stand-alone suits before this Court and that the Applicant is barred from departing from their pleadings since MA. 61/2023 was specifically indicated to arise from Civil Suit No. 50 of 2022 as the main suit.


That although Counsel for the Applicant had argued that it was not necessary to file an application for the reinstatement of CS.50/2022 which was struck off since MA. 334/2022 was sufficient as it provided a remedy the applicant was seeking, Counsel argued that MA.334/2022 is an appeal specifically against security for costs and therefore does not address the issue of Civil Suit No. 50/2022 which was struck off.

That at the time the Respondents applied to strike off C.S 50/2022, M.A 334/2022 had not been brought to the attention of the Respondents by the Applicant. That although the Applicant's Counsel sought to move Court under Section 98 of CPA to exercise its inherent powers to grant the temporary injunction, Counsel for the Respondents argued that a temporary injunction is an equitable remedy and discretionary in nature which is granted at the discretion of court. That the Applicant must satisfy the principles governing the grant of temporary injunction of which the existence of a substantive suit is paramount and further that such substantive suit is likely to succeed. That in the instant case, Civil Suit No. 50 of 2022 is non-existent therefore the Applicant had failed to fulfill the requirements for a grant of a temporary injunction.

Counsel for Applicant prayed to Court to visit the locus and also grant an interim order pending the determination of the main suit. Counsel for respondents did not object. An Interim order was granted by this Court by consent of the parties.

Consideration of Court

Before proceeding into the merits of the application. I wish to first handle the preliminary objection raised by the Respondents' Counsel that the Applicant's


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application is incompetent since the Civil Suit No. 50 of 2022 on which it is premised was struck off.

Order 41 Rule 1 of the Civil Procedure Rules provides that: -

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in 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 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 2(x) of the Civil Procedure Act defines suits to mean *all civil proceedings commenced in any manner prescribed.*

In the case of Japan Auto World Limited v Magala & 2 Ors (Civil Suit No. 73 of 2016) [2017] UGHCCD 73 (13 March 2017) Hon. Justice Stephen Musota in determining whether there was a suit stated that: -

Relying on the case of Matco Stores Ltd & 2 Ors Vs Muhwezi CA No. 9 of 2012, Ms. Nabuuso contended that the matters before the Execution Division were not suits within the meaning of section 2 of the Civil Procedure Act because they could not result in a decree, but only in an order. Therefore, their determination could not result into the application of the doctrine of res judicata. Learned counsel for the 3rd defendant submitted to the contrary.

I do not agree with the submissions by Ms. Nabuuso. My considered view is that all Miscellaneous Applications are indeed suits within the meaning of section 2 of the Civil Procedure Act. This is in fact is the position that the Court of Appeal in Uganda has taken and pronounced itself upon.

A suit means all Civil Proceedings commenced in a manner prescribed. Section 2(x) of the Civil Procedure Act defines a suit to mean all Civil Proceedings commenced in a manner prescribed. This implies and means any form of action a party may institute against another in a Civil Court of Law. Therefore, a suit means all Civil Proceedings (proceedings concerning all ancillary or provisional steps, all motions in the action and proceedings supplementary to the execution) commenced in a prescribed manner.



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Therefore, the application for objector proceedings and stay of execution like the ones brought by the plaintiff herein in MA No. 1834 and No. 2870 of 2015 respectively were Civil Proceedings supplementary to execution or motions made in an action. They fell within the meaning of "all Civil Proceedings" as stated in the definition of a suit under section 2(x) of the Civil Procedure Act.

In the instant case, Counsel for the Respondents argued that the Applicants application for temporary injunction cannot stand because the Civil Suit No. 50 of 2022 was struck off. On the other hand, the Applicant contends that Section 2(x) of the CPA defines a suit to mean all civil proceedings commenced in any manner and thus MA 61/2023 was commenced arising out of a suit being MA 334/2022 which falls within the meaning of a suit under Section 2(x) of the CPA.

I do agree with Counsel for the Applicant that MA 334 of 2022 from which this instant application MA.61 of 2023 arises is a suit as defined under S.2 (x) of the CPA. The Applicant has clearly demonstrated a chronological order to show that MA 61/2023 arises from MA 334/2022 and that MA 334/2022 arises from MA 265/2022 and that MA 265/2022 arises from CS. 50/2022. It is wrong for the Respondents' Counsel to claim that MA.61/2023 directly arises from C.S 50/2022. A suit is not limited to a Plaint filed in court under S.2(x) of the CPA which the Respondents seem to purport. I therefore find that MA 61/2023 for the temporary injunction arising from MA 334/2022 was properly brought before this Honourable Court.

Therefore, from the foregoing, I don't find merit in this preliminary objection and overrule the same.

Now looking at the merits of this application, the applicant applied for a temporary injunction doth issue restraining the respondents and their agents/servants of plot 54 main streets LRV 154 Folio 17 at Butembe Jinja Municipality from sale, mortgage, transfer, alien, dispose, eviction, demolition, threats, intimidation or other form of interference until final disposal of the Application No. 334 of 2022 and main suit No. 50 of 2022 or until further orders of court.

Order 41 Rule 1 (supra) provides for cases in which temporary injunction may be granted.

In the case of **Ndema Emanzi Rukandema v Mubiru Henry MA No. 225 of 2013, the Hon.Lady Justice Tuhaise held that:**

"Court's duty is only to preserve the existing situation pending the disposal of the substantive suit. In exercising this duty, 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."

The criteria for granting a temporary injunction was decided in the case of in **Kiyimba Kaggwa v Katende 1985 HCB 43**, in which the Court noted that the

granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve matters in the status quo until the question to be investigated in the main suit is finally disposed of. The Court further laid down conditions for the grant of an interlocutory injunction;


1. Firstly, the applicant must show that a prima facie case with a probability of success exists;
2. 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;
3. Thirdly if the Court is in doubt, it would decide an application on the balance of convenience.

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 Applicant claims to challenge among others, the transfer of the suit property to the Respondents on grounds of fraud. That the Respondent filed M.A 265 of 2022 for security for costs which was granted by Deputy Registrar hence applicant's appeal in M.A. 334 of 2022 pending before this Honorable Court. That the contested suit property on Plot 54 Main Street LRV 154 Folio 17 is managed by the Applicant and was allocated to among others Mr. Hamya Wilson Mulongo on 28th January 2021 at a consideration and he is in actual possession of the suit property. That his enjoyment of the suit property has been disturbed by the Respondents and through their agents who are demolishing part of the building making eviction attempts and also denying the applicant's tenant, Mr. Hamya Wilson Mulongo access. From the foregoing, the Applicant has sufficiently demonstrated that there exists a prima facie case which raises serious questions to be determined as to the ownership of the suit property.

The next question for court to determine is whether the Applicant will suffer irreparable damage if the temporary injunction is not granted. 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.*" In the case of **City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000** irreparable damage was defined as "*loss that cannot be compensated for with money*"

In the case of **Rashida Abdul Hanali v Suleiman Adrisi (Miscellaneous Civil Application No. 11 of 2017) [2017] UGHCCD 96 (20 July 2017)** Justice Stephen Mubiru stated that: - "*The purpose of granting a temporary injunction is*


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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 the instant case, the Applicant states that her tenants are in actual, constructive and physical possession of the suit property and that the said allocate/occupant is duly paying rent to the Applicant. That since the Applicant's tenants are in physical control of the suit property as herein described, the balance of convenience is in the Applicant's favour who will suffer irreparable damages when the suit property is demolished. That the Applicant is seeking to restrain the Respondents, her agents/ servants, allocates of Plot 54 Main streets LRV 154 Folio 17 at Butembe Jinja Municipality from sale, mortgage, transfer, alien, dispose, eviction, demolition, threats, intimidation or other form of interference until final disposal of the Application No. 334 of 2022.

I am inclined to agree with the Applicant that in the event that the Respondents sold off, mortgaged, transferred, alienated, disposed of, evicted and demolished the suit property, the Applicant will suffer irreparable damage.

Regarding the balance of convenience as a prerequisite for the grant of a temporary injunction, **Black's Law Dictionary, 9th Edition Page 163**, defines balance of convenience to mean "*a balancing test that court uses to consider whether or not to grant an injunction weighing benefits to the plaintiff against the burden on the defendants...*"

In Rashida Abdul Hanali v Suleiman Adrisi (supra), Justice Stephen Mubiru stated that:

"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."

In Kiyimba Kaggwa v Haji A.N Katende (supra) Court held that the balance of convenience lies more on the one who will suffer more if the Respondent is not restrained in the activities complained of in the suit.


In this case the applicant contended that the contested suit property on Plot 54 Main Street LRV 154 Folio 17 was managed by the applicant and was allocated to among others Mr. Hamya Wilson Mulongo on 28th January 2021 at a consideration and he is in actual possession. That his enjoyment of the suit premises has been disturbed by the Respondents through their agents who are demolishing part of the building making eviction attempts and also denying the

applicant's tenant, Mr. Hamya Wilson Mulongo access. I believe the balance of convenience favors the Applicants who stands to be prejudiced if the disputed land is sold off, mortgaged, transferred, alienated, disposed of, evicted and demolished by the respondents. Basing on the locus visit that was conducted by Court on 12th April 2023, Court observed that part of the structures on the suit property had been demolished hence the need to maintain the status- quo.

I therefore allow this application and make following orders;

1. A temporary injunction is hereby granted restraining the Respondents and their agents/ servants of Plot 54 main streets LRV 154 Folio 17 at Butembe Jinja (suit property) from sale, mortgage, transfer, alien, dispose, eviction, demolition, threats, intimidation or other form of interference on the suit property until final disposal of M.A. 334 of 2022 or until further orders of court.
2. A temporary injunction be issued to preserve the suit property and maintain the status-quo pending the determination of Miscellaneous Application No. 334 of 2022 or until any further orders of this Court.
3. Each party shall bear its own costs.

I so order.


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HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI
JUDGE

Judgment delivered on 14th September, 2023.