

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
FAMILY DIVISION
MISCELLANEOUS APPLICATION NO. 225 OF 2013
ARISING OUT OF CIVIL SUIT NO. 143 OF 2013

NDEMA EMANZI RUKANDEMA.....APPLICANT

VERSUS

MUBIRU HENRY.....RESPONDENT

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under section 234(e) of the Succession Act cap 162, section 98 of the Civil Procedure Act cap 71, and Order 41 rules 1(a) & 9 of the Civil Procedure Rules (CPR). It seeks orders that a temporary injunction be granted restraining the respondent, his agents/attorneys/workmen/employees from using the letters of administration obtained vide HCT – OO – CV 1227 - 2006, pending the determination of the main suit; and that costs of the application be provided for.

The application is supported by the affidavit of **Ndema Emanzi Rukandema** the applicant. It was opposed by the respondent who filed an affidavit in reply to which the applicant filed an affidavit in rejoinder. At the request of the respondent’s counsel, the applicant was cross examined on his affidavits, after which Counsel filed written submissions.

The gist of a temporary injunction is the preservation of the suit property pending disposal of the main suit. In addressing this, courts have set out conditions to be fulfilled before the discretion of granting the temporary injunction is exercised. These are that the applicant must show that there is a *prima facie* case with probability of success; and that the applicant might otherwise suffer irreparable damage which would not easily be compensated in damages. If court is in doubt, it will decide the question on the balance of convenience. In addition, Order 41 of the CPR requires the existence of a pending suit. It provides that where it is proved to court that in a suit the property in dispute is in danger of being wasted, damaged or alienated by any party to a suit, the court may grant a temporary injunction to restrain, stay, and prevent the wasting, damaging and alienation of the property. See **Kiyimba Kaggwa V Haji Katende [1985] HCB 43**.

The pendency of a suit, in this case civil suit no. 143 of 2013 filed by the plaintiff/applicant against the defendant/respondent, is not in issue.

On whether there is a *status quo* to be preserved, the applicant avers in his supporting affidavit that the respondent is using letters of administration and a fake death certificate to compel the Commissioner Land Registration, through a mandamus order, to process for the respondent a title over the applicant's land comprised in LRV 2687 Folio 19 plot 9 Naguru Hill Drive, Kampala (suit land).

The *status quo* the applicant/plaintiff seeks to maintain is that the respondent/defendant or his agents/attorneys/workmen/employees should be restrained from using the respondent's letters of administration to transfer the applicant's land into his names. The respondent averred in reply that the applicant forcefully entered the suit property and dispossessed him. His counsel submitted that the *status quo* is that the respondent is the administrator of the estate of Ndema Emanzi Rukandema who is not the applicant in the instant case.

The *status quo* is not about who owns the suit property but the actual state of affairs on the suit premises prior to the filing of the main suit. The subject matter of a temporary injunction is the preservation of the existing state of affairs pending litigation. It is aimed at protecting property from being wasted, damaged, alienated, sold, removed, or disposed of, regardless of the litigant's rights or claims to such property. 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. See **Commodity Trading Industries V Uganda Maize Industries & Anor [2001 – 2005] HCB 118; Sekitoleko V Mutabaazi & Ors [2001 – 2005] HCB 79.**

In the instant case, the actual state of affairs, as stated in the application and paragraph 10 of the applicant's affidavit in rejoinder, is that the applicant is in possession of the suit land. This is confirmed in paragraphs 25 and 26 of the respondent's affidavit in reply which state that the applicant is in possession. The respondent challenges his dispossession as illegal, but this is a matter to be determined when the main case is heard on the merits. It is not for court at this stage to delve into the merits of the main suit.

This indicates that there is a *status quo* to preserve in that the actual state of affairs should remain as they are, that is, the applicant to remain in possession of the suit land until the main suit is disposed of. I do not therefore agree with the respondent's counsel's submissions that the *status quo* is that the respondent is the administrator of the estate of Ndema Emanzi Rukandema. The *status quo* is not about who owns the suit property but the actual state of affairs on the suit premises prior to the filing of the main suit.

As to whether the suit establishes a *prima facie* case with probability of success, case law is that though the applicant has to satisfy court that there is merit in the case, it does not mean that one should succeed. It means the existence of a triable issue or a serious question to be tried, that is, an issue which raises a *prima facie* case for adjudication. See **Kiyimba Kaggwa, supra.**

The applicant avers in his supporting affidavit that he has filed a case against the respondent pending before this court where he pleads that he is the lawful and equitable owner of the suit property, and that the respondent used fraudulently obtained letters of administration to obtain an order of mandamus compelling the Commissioner Land Registration to transfer the suit land into his names. This is denied by the respondent who maintains he lawfully obtained letters of administration of his deceased uncle **Ndema Emanzi Rukandema** entitling him to administer the suit land he claims falls under his late uncle's estate. The pleadings also raise issues on whether the applicant is dead or alive, or whether the letters of administration are in respect of the same applicant or a deceased person holding the same names as the applicant.

In my opinion, the foregoing situation gives raise to serious triable issues pointing to a *prima facie* case for adjudication. It is not for court at this stage to go into the merits of the main suit. This will be done when the main suit is heard on the merits. Thus this court has refrained from addressing all that affidavit evidence and submissions on who is the rightful owner of the suit property.

The applicant avers in paragraph 17 of his affidavit supporting the application that he will suffer irreparable loss and damage if the injunction is not granted. It has been held that irreparable injury does not mean that there must be physical possibility of repairing injury. It means that the injury must be substantial or material, that is, one that cannot be adequately compensated in damages. This depends on the remedy sought. If damages would not be sufficient to adequately atone the injury an injunction ought not to be refused.

The applicant's affidavit evidence is that that he is in possession of the suit land with his security guards guarding the same, and that the respondent has obtained mandamus orders against the Commissioner Land Registration to have the land transferred in his names. If the injunction was not granted, in the event that the applicant/plaintiff is successful in establishing their rights on the suit land, he would incur irreparable loss to regain possession of the same and guarding it. Financial compensation would not be adequate solace to atone his being evicted from the property since he is in possession of the same. I am satisfied that the applicant will suffer irreparable loss and damage if the injunction is not granted.

Even the balance of convenience is in favour of the applicant who is in possession of the suit land.

I do not agree with the respondent's counsel's submissions that this court lacks jurisdiction to give orders which have the effect of staying the implementation of orders given by a Judge of the same jurisdiction in a different matter. First, counsel did not raise any preliminary objection to this court's lack of jurisdiction at the time of hearing this application. He freely subjected his client and himself to this court's jurisdiction. In addition to responding to the application by filing affidavits in reply, he participated in the entire hearing, including cross examining the applicant at his request, and making submissions. Second, as deduced from annexures **E**

attached to the respondent's affidavit in reply, the applicant was not party to ***HCMC 33 Mubiru Henry V Commissioner Land Registration*** where the mandamus order was issued against the Commissioner Land Registration. Third, the orders sought in this application are for temporary relief to preserve the *status quo* pending determination of the main suit by this court. This court has unfettered powers to grant such temporary relief under the provisions cited above. Fourth, section 38 of the Judicature Act empowers this court to grant injunctions to prevent threatened or apprehended waste or trespass whether or not the person against whom the injunction is sought claims a right to do the act under any colour of title, among other situations.

In the premises, I allow this application.

Costs of this application will be in the cause.

Dated at Kampala this 28th day of April 2014.

Percy Night Tuhaise

JUDGE.