

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 175 OF 2014

ARISING OUT OF CIVIL SUIT NO. 49 OF 2013

NYAIKA SAMUEL.....APPLICANT

VERSUS

- 1. THE ADMINISTRATOR GENERAL**
- 2. H.R.H RUKIRABASAIJA SOLOMON IGURU**
- 3. ESTATE OF RUGABA MUSA GAFABUSA**
- 4. GODFREY KWIRIGIRA MAGEZI**
- 5. JOAN KABAHANIKA GAFABUSA**
- 6. SAMUEL HARRISON KINTU.....RESPONDENTS**

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under Order 41 rules 1, 2 & 9 of the Civil Procedure Rules (CPR). It seeks orders that a temporary injunction be issued against the respondents, their agents, delegates and all those claiming under them from receiving, distributing or in any way alienating any property or part thereof forming part of the estate of Sir

Tito Winyi Gafabusa who died testate in 1971 until final disposal of the main suit; and that costs of and incidental to this application be provided for.

The application is supported by the affidavit of **Nyaika Samuel** the applicant. It is opposed through the 2nd respondent's affidavit in reply, to which the applicant filed an affidavit in rejoinder. The applicant's counsel filed written submissions within time schedules set by this court but the respondents did not file any submissions. The 4th defendant/respondent filed an affidavit in reply after the applicant's written submissions were already on court record, and this court did not address them. The court nevertheless proceeded to dispose of the application under Order 17 rule 4 of the Civil Procedure Rules.

A temporary injunction preserves the suit property pending disposal of the main suit. Before court issues a temporary injunction, 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. See **Kiyimba Kaggwa V Katende [1985] HCB 73; Ibrahim Buwembo V Utoda Ltd MA 670/2003 Arising From Civil Suit 664/2003.**

In the instant case the pending suit is civil suit no. 49 of 2013 filed by the plaintiff/applicant against the defendants/respondents.

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.**

In the main suit, the applicant/plaintiff seeks court to revoke the grant of letters of administration issued to the 1st defendant in **AC 158/1972**, to order for accountability of how the estate was managed, and to nullify the purported renunciation of the letters of administration issued to the 1st defendant, including the issuance of a certificate of no objection to the 2nd 5th and 6th defendants. The 2nd respondent, in his pleadings and affidavits, denies being an administrator of the estate of Sir Tito Winyi Gafabusa; or having the capacity to grant the applicant any of the matters mentioned from the said estate; or ever pursuing restitution of properties of the said estate save for restitution of Bunyoro Kitara Kingdom properties. The applicant rebuts this in paragraphs 10 and 11 of his affidavit in rejoinder. He avers that the 2nd respondent has from the beginning held out as heir apparent to the estate who has benefitted from the distribution of the estate and has instructed his lawyers to represent Bunyoro Kingdom and himself in all matters concerning the grant of letters of administration for the estate of the late Sir Tito Winyi Gafabusa, among other things.

In my opinion, the foregoing 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 8 of his supporting affidavit 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 has not adduced any evidence to show that he will suffer irreparable loss not atonable in damages if the injunction is not granted. His counsel has not submitted on the matter either, other than stating that it is a matter to be proved by the applicant, which submission I agree with, based on the above case decisions. If there is anything to go by, the applicant has prayed for damages in the main suit, which means the injury he claims he has suffered can be atoned by damages.

On whether there is a *status quo* to be preserved, the applicant avers in his supporting affidavit that the 1st respondent has renounced letters of administration to the estate of the late Sir Tito Winyi and has already issued a letter of no objection to the 2nd respondent who has, together with two others, applied for letters of administration to the said estate. He seeks this court to restrain the respondents from receiving, distributing or in any way alienating any property or part thereof forming part of the estate of Sir Tito Winyi Gafabusa who died testate in 1971 until final disposal of the main suit.

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.

The affidavit evidence of the applicant mainly dwells on estates which the 1st and 2nd respondents have allegedly disposed of, which would mean there is no *status quo* to preserve. He has not informed this court as to which part of the estate is in danger of alienation or wastage and therefore needs to be preserved. In **Clovergen Fish & Foods Ltd V International Finance Corp & 7 Others [2002 – 2004] UCLR 132 at 137**, Arach Amoko J, as she then was, stated that the court needs to know the *status quo* intended to be preserved.

In the premises I am inclined to dismiss this application on grounds that the applicant has not shown that he will suffer irreparable injury not atoned by damages if the injunction is not granted, and has not indicated which property is in danger or needs to be preserved.

The application is accordingly dismissed with costs.

Dated at Kampala this 21st day of May 2015.

Percy Night Tuhaise

Judge.