

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 1083 OF 2012

ARISING OUT OF HCCS No. 212 OF 2011

1. **ALOZIOUS MUKIIBI**
2. **MARGARET NANKINGA**
3. **NABATANZI JOYCE (acting through their attorney HOPE BABIRYE KATUMBA).....APPLICANTS**

VERSUS

1. **THE COMMISSIONER LAND REGISTRATION**
2. **ZAWEDDE ROSE**
3. **NVULE EMMANUEL**
4. **KAWEESA EMMANUEL**
5. **SAMUEL NTEGE.....RESPONDENTS**

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application for temporary injunction brought under Order 41 rr. 1, 2 and 9 of the Civil Procedure Rules (CPR) and section 98 of the Civil Procedure Act to restrain the 2nd, 3rd, 4th and 5th respondents and or their agents, servants and any other person acting for or under them from destroying the suit land at Kyadondo Block 90 Plot 1 by cultivating, making bricks, excavating murram and sand and cutting trees from the suit land until the hearing and determination of civil suit no. 212/2011; and that costs of the application be provided for.

The application is supported by the supporting affidavit of **Hope Katumba**, which is briefly that:-

1. The applicants have filed HCCS No. 212/2011 in the Land Division at Kampala and the same is pending hearing.
2. The applicants claim rights over Kyadondo Block 90 Plot 1.
3. The respondents have started destroying the suit land at Kyadondo Block 90 Plot 1 by cultivating, making bricks, excavating murram and sand and cutting trees from the suit land described above.
4. It serves the ends of justice for the respondents to be restrained from trespassing and/or cultivating, making bricks, excavating murram and sand and cutting trees until the determination of the main suit.

The application was opposed by the respondents who filed an affidavit in reply deponed to by **Zawedde Rose** the 2nd respondent.

The applicants' case is briefly that they claim rights over Kyadondo Block 90 Plot 1, and that the respondents have started destroying the suit land at Kyadondo Block 90 Plot 1 by cultivating, making bricks, excavating murram and sand and cutting trees from the suit land. They aver that it serves the ends of justice for the respondents to be restrained from carrying out the said activities until the determination of the main suit. The applicants have filed HCCS No. 212/2011 pending hearing before this court.

The respondents deny the allegations through the affidavit in reply deposed to by **Zawedde Rose** the 2nd respondent.

The gist of a temporary injunction is the preservation of the suit property pending disposal of the main suit. Courts have set out conditions to be fulfilled before the discretion of granting the temporary injunction is exercised. The applicant must show 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. Order 41 of the CPR also requires the existence of a pending suit. 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. Also see **Kiyimba Kaggwa V Haji Katende [1985] HCB 43**.

The pendency of a suit is not in issue, namely civil suit no. 212 of 2011 filed by the applicants/plaintiffs 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 to the instant application, the applicants' claims over Kyadondo Block 90 Plot 1 are denied by the respondents who contend that the suit land initially belonged to their late father who purchased it from Erinesti Mukasa Katumire. It is also the respondents' case, as is evident in the pleadings and the affidavit evidence, that they were granted letters of administration to their late father's estate and are currently registered as proprietors of the land which they have utilised uninterrupted. In my opinion, this gives rise to serious triable issues raising a *prima facie* case for adjudication.

On the question of the applicant otherwise suffering irreparable injury not sufficiently atoned for by damages, regard is had to the situation under which the application is brought. According to decided cases, irreparable injury does not mean that there must not 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. See **Kiyimba Kaggwa, supra**.

The applicants claim in the application that they will suffer irreparable damage if the respondents are not restrained from conducting the activities they have been conducting on the land for years. It was submitted for the applicants that the respondents' acts or destruction on the land cannot be given a monetary value and it would be difficult to attach monetary compensation on them, and the only fair way is to stop them. It was submitted for the respondents however that granting the application will paralyse the respondents' livelihood and well being, and that planting crops, firewood and occasionally

excavating sand by people born and bred on the suit land does not degrade it as to amount to irreparable damage.

The affidavit evidence as adduced by the respondents is that the the suit land was purchased from Ernesti Mukasa Katumire and duly registered in the names of the respondents' late father Yusuf Kamyia since 28th March 1949 under instrument no. 74301. A copy of the certificate of title is attached to the affidavit in reply as annexure **A** and the agreements and transfer forms are attached as annexures **B** and **C**. They respondents aver that the applicants will suffer no loss and can be compensated in damages as the respondents are in occupation of the suit land where they have crops, cultivate, excavate some sand and get firewood.

In my opinion, the nature of activities being conducted by the respondents on the suit land, which is more to do with sustaining their livelihoods on the land they occupy, would if they cause any damage, it would be atonable in damages.

On the question of preserving the *status quo*, it was submitted for the applicants that preservation of the *status quo* would benefit both parties. On the other hand, it was submitted for the respondents that the injunction would not benefit the respondents who should continue with their activities on the suit land.

In exercising the discretion of whether or not to grant the temporary injunction, court does not determine the legal rights to property, but merely preserves it in its actual condition until the main suit is disposed of. See **Godfrey Sekitoleko & Ors V Seezi Mutabaazi [2001 – 2005] HCB Vol. 3 p. 80**

In the instant case the respondents are in occupation of the suit land. Though the applicants are challenging their status on the land, it will not be the subject of this application, which is seeking to preserve the *status quo* pending the hearing of the main suit. The issue will be addressed when the court is hearing the main suit on the merits. I find that in a case like this where the respondents have been engaged in a number of economic activities on the suit land as a source of their livelihood, preserving the *status quo* would be to preserve the situation as it is, that is, the respondents continuing to occupy and use the land pending the determination of the rights of the parties in the main suit. I find the *status quo* to be in favour of the respondents, who are in actual possession of the suit land rather than the applicants. As such, restraining the respondents would alter the *status quo* rather than maintain it.

On the balance of convenience, it was submitted for the applicants that it is in favour of the applicants in that if the injunction is not granted the suit land would be degraded and useless to them if they won the case. It was submitted for the applicants that even the respondents would benefit in that they will find the land intact. Counsel for the respondents, however, argued that the applicants will not be inconvenienced by the ongoing activities, and that stopping the respondents from digging on the land would inconvenience them and affect their well being and livelihoods.

It is evident that the respondents are in occupation of the suit land, having derived sustenance from it for years, as opposed to the applicants, who are not in possession of the land. It would cause more hardship and inconvenience to the respondents than to the applicants if this injunction was granted, since it is aimed at stopping them from engaging in activities that ensure their sustenance and livelihood on the suit land, that is, "*cultivating, making bricks, excavating murram and sand and cutting trees from the suit land*" on the suit land they occupy, even before their rights are determined in the main suit. The balance of the risk

of doing an injustice through grant of the injunction, in the given circumstances, lies more against the respondents than the applicants.

In the given circumstances, and on basis of the foregoing authorities, I decline to grant this injunction. I dismiss this application with costs.

Dated at Kampala this 18th day of April 2013

Percy Night Tuhaise

JUDGE.