

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 658 OF 2013

(Arising From Misc. Application. No. 657 of 2013)

(Arising From Civil Suit No. 326 of 2013)

MAKERERE UNIVERSITY ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

OMUMBEJJA NAMUSISI FARIDA NALUWEMBE NAMIREMBE

BWANGA *also known as*

NAMIREMBE BWANGA BWAMIREMBE (NBBM)::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K.ANDREW

R U L I N G.

Makerere University (*hereinafter referred to as the “Applicant”*) brought this application under **Order 41 r.1 (a) Civil Procedure Rules (CPR) and S.98 Civil Procedure Act (CPA)** seeking for orders that:-

- (a) A temporary injunction be issued against the Respondent and her agents from entering the Applicant’s land comprised in FRV 52 Folio 25 at Makindye measuring approximately 14 acres until the hearing of and determination of the pending suit.**
- (b) An order restraining the Respondent or her agents from cutting the Applicant’s trees and or destroying the Applicant’s remaining property on**

the said land pending the hearing and determination of the pending suit between the Applicant and the Respondent.

(c) *The costs of this application be in the cause.*

The grounds of the application are that;

- (i) *The Applicant is the owner of the land comprised in FRV 52 Folio 25 measuring approximately 14 acres at Makindye.***
- (ii) *The Applicant and its predecessors in title have owned the said land without any disturbance since 1938 until April 2013 when the Respondent made adverse claims on the said land.***
- (iii) *The Respondent has since April 2013 entered on the said land with armed Uganda Police Officers and muscular men commonly known as “kanyamas” without any consent of the Applicant and cut the Applicant’s trees, uprooted the Applicant’s fence and the Applicant’s concrete boundary pillars.***
- (iv) *On 5th July, 2013 the Respondent again entered the said land without the consent of the Applicant and destroyed one of the Applicant’s houses on the said land;***
- (v) *The Respondent has threatened to enter the said land again to cut more trees and destroy the rest of the houses on the said land with an intention of alienating the said land to herself which will thereby cause irreparable damage to the Applicant.***
- (vi) *The Applicant’s remaining property on the said land is in danger of being destroyed by the Respondent and the said land alienated by the Respondent.***

- (vii) ***It is in the interest of justice that an order of temporary injunction is issued to restrain the Respondent from further trespass on the said land until the hearing and determination of the pending suit against the Respondent.***

Evidence.

MR. DAVID KAHUNDHA MUHWEZI, the Applicant's University Secretary, more or less restates the grounds above deposing that the Applicant is the successor in title to Makerere College Council, and the owner of the land comprised in *FRV 52 Folio 25 Makindye* estate measuring approximately 14 acres, which was vested in the Applicant under the provisions of the ***Makerere University (Interim Provisions) Act, 1970***. He attached to his affidavit a copy of the certificate of title for the said land and a copy of the letter from Commissioner Land Registration confirming the validity of the said title.

Further, that the said land is developed with four bungalows occupied by the Applicant's tenants, staff and a hall, and is grown with various trees of over sixty years old. That the Applicant and its predecessors in title have owned the land since 1938 without any disturbance until April, 2013 when the Respondent started to make adverse claims, and destroying the property thereon. That on 26/04/ 2013 the Respondent in the company of armed Uganda Police Officers together with muscular men commonly known as "kanyamas" entered the suit land and uprooted the Applicant's concrete pillars making the boundary of the said land and bearing signposts warning to intruders. The Applicant reported a case of criminal trespass against the Respondent at Katwe Police Station, but that that the Respondent who is under heavy escort of armed Uganda Police Officers has not been arraigned in any court of law.

Again, that on 27/04/2013 the Respondent in the company of armed Police Officers and lamber jacks (tree cutters) entered the said land and cut ten trees, and cut the said trees into timber and ferried it away. Once more, that on 5/07/ 2013 the Respondent entered the said land in a similar manner and removed windows and doors from the Applicant's houses and damaged the said houses. The Applicant attached to its affidavit copies of the photographs as evidence showing the said destruction, and stated that unless the Respondent is restrained, she will destroy the said houses and cut the rest of the trees thereby causing irreparable damage to the Applicant.

On her part, *OMUMBEJJA NAMUSISI FARIDA NALUWEMBE BWANGA alias NAMIREMBE BWANGA BWAMIREMBE* swore a lengthy affidavit in reply opposing the application. She denied that the suit land belongs to the Applicant, but rather to the estate of the late Princess Namirembe Hilda Bwanga Bwamirembe (1), and that it is comprised in *Kyadondo Block 253 Plot 261 (formerly MRV 1810 Folio 16)* which is *mailo* and not freehold land as claimed by the Applicant.

That the suit land has at material times been and still is home to '*Dundu Heritage*' site and is currently under her guardianship and care as the successor and administratrix of the late Princess Namirembe Hilda Bwanga Bwamirembe (1), and that all the trees on the suit land belong to her as the care taker of the site. Furthermore, that the old houses on the suit land are traditional houses, and are currently occupied by her servants, and that she is in occupation and using the land for spiritual and traditional rituals for the Kingdom of Buganda, and that if she is stopped from accessing the said land, the Buganda tradition and herself would suffer irreparable injury.

The Respondent also generally denied committing any of the acts complained of stating that she has no intention of destroying any property on the suit land, but that she is rather taking care of the heritage site. She also denies that the Applicant will suffer any irreparable damages/injury and that the Applicant has no activity on the suit land. Furthermore, that a restraining order against her accessing the site would have the effect of an eviction order, yet the purpose of a temporary injunction is to maintain the *status quo*.

Submissions of Counsel.

Mr. John Fisher Kanyenibwa, Counsel for the Applicant, submitted that the suit land belongs to the Applicant having acquired it from its predecessor in title, the Makerere College Council, by the operation of the provisions of the ***Makerere University (Interim Provisions) Act, No. 19 of 1970***. Under ***Section 2(I)*** thereof, all of the said College Council's assets were vested in the Applicant.

Further, that the suit land has a history of ownership dating back to 1938, but that the Respondent does not feature anywhere in it. Counsel also submitted that the claim that the suitland is *mailo* land is incorrect because according to the copy of the certificate of title and records at the Lands Registry the suit land is under freehold title. Further, that the Respondent's claim that the suit land is *Kyadondo Block 253 Plot 261* is unsupported since she did not attach the copy of the title as proof of the same.

Counsel further submitted that under ***Section 59 of the Registration of Titles Act***, once a certificate of title is adduced in court it is received as conclusive evidence of ownership; and that the Applicant has adduced the same to show its ownership of the suit land.

Regarding the principles of a temporary injunction, Mr. Kanyenibwa submitted that the grant of an order of a temporary injunction is in the court's discretion, and that the purpose is to preserve the *status quo*. That the Applicant has demonstrated that it has a *prima facie* case with high chances of success by showing that it owns the suit land.

On the principle of balance of convenience, Counsel argued that the Respondent is attacking the Applicant's staff with hooligans commonly known as "Kanyamas", and also is vandalizing the property on the suit land. That the balance of convenience lies more to the Applicant which will suffer more if the Respondent is not restrained in her activities complained of on the suit land.

Counsel maintained that the Applicant would suffer irreparable injury if the application is not granted because the Respondent has shown all the intentions of alienating the suit land as she has cut down trees of more than sixty years standing, and destroyed the houses thereon. Counsel relied on the case of ***Kiyimba Kaggwa v Haji A.N. Katende [1985] HCB 43*** to buttress his submissions regarding the stated principles.

Mr. Wameli Anthony, Counsel for the Respondent opposed the application, and submitted that the suit land belongs to the Respondent by virtue to her being the administratrix and caretaker of the Estate of late Bwanga Mirembe; and that the land is not freehold but under *mailo* title. Counsel argued that the issue of whether there is a *prima facie* case is highly contentious and can only be disposed of in the main suit.

Regarding irreparable injury, Counsel submitted that the Respondent is in occupation of the suit land, using it for spiritual and ritual affairs of the Kingdom of Buganda, and that the site has been there since time immemorial. Further, that apart

from exhibiting photos of very old dilapidated buildings, there is nothing in the application which shows that occupation is by the Applicant or that the suit land is being used in anyway.

Counsel further submitted that the Respondent is not destroying or wasting the property, and even has no intention to do so, but rather that she is taking care of the same as a heritage site. That the Respondent has over ten servants taking care of the site and has not cut any trees but, that she only tends the forest on the suit land. Furthermore, that the Respondent has not at any one time come to the suit land with “*Kanyamas*”, but only has VIP protection granted by Police and Government.

Counsel also submitted that there is no irreparable injury the Applicant will suffer; but that on the contrary, it is the Respondent who would suffer if she is restrained from accessing the age old heritage site which she oversees, and that such a restraining order would ineffect be an eviction order granted before hearing the case on merit. Counsel also submitted in the alternative that should the court be inclined to grant the application, the order should be qualified so as to provide for preservation of the property and the access of the Respondent to the heritage site.

Issues.

The issues for determination are whether the circumstances of the case warrant the grant of an order for a temporary injunction, and whether the Applicant has satisfactorily demonstrated and / or met the conditions for the grant of the temporary injunction. They have been resolved concurrently since one is naturally the result of the other.

The applicable law.

Section 38 Judicature Act gives this court power to grant orders of a temporary injunction in all cases in which it appears to the court to be just and convenient to do so to restrain any person from doing acts. The grant of a temporary injunction is invariably in the discretion of the court.

The general considerations for the granting of a temporary injunction under **Order 41 r. (1) (2) CPR** are 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”

The purpose of the order for temporary injunction is primarily to preserve the *status quo* of the subject matter of the dispute pending the final determination of the case, and the order is granted in order to prevent the ends of justice from being defeated. See: ***Daniel Mukwaya v. Administrator General, H.C.C.S No. 630 of 1993; Erisa Rainbow Musoke v. Ahamada Kezala [1987] HCB 81.***

“*Status quo*” simply denotes the existing state of affairs existing before a given particular point in time. In case of land, *status quo* is purely a question of fact, and the relevant consideration is the point in time at which the acts complained of as affecting or likely to affect or threatening to affect the existing state of things occurred. *Status quo* may thus be in retrospect, as in case of trespass, or *ex post facto* as in case of a threatened action. Depending on the facts of the case, a party may apply for an injunction in order to preserve the *status quo*.

The other cardinal consideration is whether in fact the applicant would suffer irreparable injury or damage by the refusal to grant the application. If the answer is in the affirmative, then court ought to grant the order. See: ***Giella v. Cassman Brown & Co. [1973] E.A 358***. By irreparable injury it does not mean that there must not be 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. See: ***Tonny Wasswa v. Joseph Kakooza [1987] HCB 79; NTCO Ltd.v. Hope Nyakairu [1992 – 1993] HCB 135***.

Further, the applicant must demonstrate that there are serious issues to be tried. See: ***Daniel Mukwaya v. Administrator General, H.C.C.S No. 630 of 1993 [1993] IV KALR I***. In event the court is in doubt as to any of the above factors, the case ought to be decided after weighing doubts against certainties of the risks of doing injustice; also referred to as the “balance of convenience”. See: ***Francome v. Mirror Group Newspapers [1984] IWL R 892***.

Consideration.

The Applicant in the instant application lays claim of ownership over the suit land through registration; by virtue of the provisions of ***Section 2(1) of Makerere University (Interim) Provisions Act (Supra)*** which vested the Applicant with

ownership of all the assets previously owned by Makerere College Council, including the suit land. In effect, the Applicant's claim over the suit land is premised on being a successor in title.

The Respondent also lays a similar claim of ownership over the suit land by virtue of being the administratrix and as caretaker of late Bwanga Mirembe's estate, to which the suit land is said to belong. The claims and counter-claims notwithstanding, the well-known fact in an application for a temporary injunction is that it is not intended for determining of the proprietary rights of the parties, but the purpose is the preservation of the *status quo* of the suit property pending the determination of the main suit. Therefore, it would be rather futile for any party to argue ownership issues in the present application.

It is noted from the record that the Respondent neither denies entering nor having been on the suit land and carrying on the activities complained of; even though she only tends to categorize them generally and differently from how they are described in the affidavit in support of the application. Whereas the Applicant complains that the Respondent has cut down of old trees on the suit land, the Respondent deposes that she is just "tending the forest" and "pruning" trees. Similarly, whereas the Applicant complains of demolition of its structures and vandalism of its houses, the Respondent argues that the houses are old dilapidated structures, and that there is no evidence of the Applicant using the suit land.

On a critical examination of both versions, it would appear clearly that the Applicant has evidently demonstrated that the Respondent indeed committed the acts complained of; even though the Respondent down-plays them semantically in general terms. The affidavit in support of the application bears attachments of

photographs of cut/fallen mature trees, and there is no explanation by way of rebuttal from the Respondent on this particular point. Such activity, if true, could not just be ordinary pruning exercise as claimed by Respondent.

Similarly, the vandalized houses in the photographs, if true, could not be evidence of spiritual/ritual activities of the Kingdom of Buganda, or that the houses are just old dilapidated and disused as stated by the Respondent; needless to restate that where facts are sworn to in an affidavit and these are not specifically denied or rebutted by the opposite party, the presumption is that such facts are accepted. See: ***Massa v. Achen [1978] HCB 297.***

It would follow that the *status quo* which ought to be preserved in the instant case is that prevailing before the activities complained of. In particular, the cutting of trees and the destruction of the houses, the threat to waste, or alienating or altering the status of the suit land in any way whatsoever must stop pending the final determination of the case. This court is, however, unable to pronounce itself on the issue as regards the alleged trespass by Respondent on to the suit land given that she too claims ownership; and that is a matter to be decided in the main suit.

Regarding the issue whether the damage or injury is irreparable, the Applicant in its affidavit in support of the application deposes that the Respondent has cut down mature trees of over sixty years old, and cut them into timber which was ferried away and demolished structures and vandalized the houses of the Applicant's staff on the suit land. As noted earlier, there is no specific denial of these activities, but the Respondent mainly asserts her proprietary rights over the suit land. Therefore, in event the Applicant is adjudged the owner of the suit land, it would not be possible to replace the damage occasioned, especially for the mature trees that would have been cut down.

On the other hand, if the Respondent is eventually adjudged the owner of the suit land she would not have suffered more injustice by the grant of a temporary injunction; which would have served only as a temporary halt on the specific activities complained of. Nothing would have altered the *status quo* of the suit land as a heritage site. It should be emphasized that to allow the Respondent's activities to go unfettered would amount to granting a mandatory injunction against the Applicant; and circumstances for such an injunction do not exist in the instant case.

Overall, the Applicant has satisfactorily demonstrated that there are serious issues to be tried. Accordingly, the application is granted, and an order for a temporary injunction is issued restraining the Respondent and/ or her agents from carrying out the specific activities complained of; i.e., cutting trees and destroying the houses or any other property of the Applicant on the suit land. The Respondent is further restrained from wasting or threatening to waste, alienating or altering the *status quo* of the suit land pending the final determination of the main suit. Costs of the application will be in the cause.

BASHAIJA .K. ANDREW

JUDGE

29/08/2013