THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISC APPLICATION NO. 015 OF 2014

(ARISING OUT OF CIVIL SUIT NO. 634 OF 2013)

1. **ASTONE MUHWEZI**
2. **KIBIRYANGA YORAMU**
3. **APOLLO BARUNGI**
4. **MPORA DAVID KABIMBIRI ……**
   APPLICANTS
5. **NYAMUGABO JOHN**
6. **KUYUNGA JASON**
7. **KANYAMUKAMA KOSIA**
8. **MUHIKIRA TOM**
9. **MAJURA JOHN**

VERSUS

ATTORNEY GENERAL ……RESPONDENT

RULING
BEFORE LADY JUSTICE EVA K. LUSWATA

This is an application for a temporary Injunction presented by Ngaruye Ruhindi Boniface for the applicant and Kukunda Clare for the respondent. As part of her submissions, counsel for the applicant raised an objection against the manner through which the respondent presented her submissions and prayed for the court to reject them. He contended that instead of presenting his preliminary objection to the suit as prayed, counsel instead chose to abandon the objection and without notice to them or the court, filed her submissions in response to the application.

I do agree with counsel's submissions. At the last sitting of 26/3/14, counsel for the respondent indicated to court that she intended to raise an objection that the suit was *res judicata*. She requested and court permitted her to file written submissions by 10/4/14. The applicant was to respond to the objection by 24/4/14 and a rejoinder filed by 30/4/14. It is evident that counsel for the respondent did not comply with the schedules given by court as she filed her submissions late on 6/5/14. Worse still, therein she indicated that she had, with reasons, abandoned the preliminary objection and then proceeded to present her submissions in response to the present application. As counsel for the applicant contends, there was no prior notice to, or leave from this court to allow the respondent to proceed as she did and even then, had she sought such leave, the applicant had the right to present his submissions first, and then invite a response from her.

In my view, the procedure followed by the respondent is irregular and in contravention of Order 18 Rule 1 and 2 CPR which gives the plaintiff (now applicant) the right to begin especially in

circumstances as this one, where the defence has no point of law to raise. In the circumstances, I am constrained to reject the submissions of the respondent and they are struck off the record. I will therefore make a decision on this application, the two affidavits in reply and the submissions presented for the applicant only.

The brief facts of the application are that the applicants have filed a suit against the respondents seeking *inter alia* a injunction order. That although that suit is still pending in court, the respondents have embarked upon destroying the respondent's crops and homes and have threatened them with eviction from the suit land a result of which they will suffer irreparable loss and damage. The application is supported by the affidavit of Astone Muhwezi the 1st applicant in which he generally adopts the facts of the plaint in the main suit which he claims has a high likelihood of success. In that suit, the applicants claim to be the owners of different interests in land in Marembo and Ngulwe Villages in Hoima District and thereby present this application seeking orders to restrain the respondents from destroying the homes and crops of the applicants and evicting the applicants from the suit land pending the hearing and determination of the main suit.

The law on temporary injunctions is contained in **Order 41 rules 1(a)** of the **Civil Procedure Rules**. The principles governing the grant of a temporary injunction are well settled and have been well argued by counsel for the applicants. In the case of **American Cyanamid Co. Vs Ethicon Ltd [1975] AC 396** Lord Diplock laid down guidelines for the grant of temporary injunctions that have been followed in the Ugandan cases of **Francis Babumba and 2 others Vs Erisa Bunjo HCCS No. 697 of 1999** and **Robert Kavuma Vs M/s Hotel International SCCA No.8 of 1990** they include;

1. The applicant has to show that he has a prima facie case with a probability of success in the main suit.
2. The applicant has to show that he is likely to suffer irreparable damage if the injunction is denied.
3. If court is in doubt as to the above considerations, it will decide the application on a balance of convenience.

In considering the above principles, the court should also bear in mind that temporary injunctions are discretionary orders and always that the court should not attempt to resolve issues related to the main suit: See: **Prof. Peter Anyang Nyong'O & Others Vs The Attorney General of Kenya & Others; East African Court of Justice Case Ref. No. 1 of 2006 (unreported)**

In my view *aprima facie* case is not necessarily a tight case. It is a case in which the court need only be satisfied that there is a serious question to be tried. Wambuzi C J (as he then was) in the case of **Robert Kavuma (supra)** explained it well when he stated that the applicant is required at this stage of the trial to show a prima facie case and a probability of success but not success. (Emphasis mine)

It is not in dispute that the applicants have filed HCCS No.634 of 2013 against the respondents and it is from that suit that this application originates. The claim in the main suit is that the applicants own land situate in Marembo and Ngulwe villages, Hoima District in varied interests either as registered proprietors and or as owners of customary tenure in specifics well laid out in paragraphs 6-10 of the plaint. That during July 2013, agents of the state during the course of their employment and in the service of the Government of Uganda (GOU) entered upon the suit land, wrongfully declared it to be part of Kyangwali Refugee Settlement (hereinafter KRS) and chased away the applicants, their families and their livestock, destroyed their crops and their homes and settled refugees on approximately 40 hectares on the 1st applicant's land held under customary tenure and approximately 10 hectares of the 9th applicant's land and threatened to settle more refugees on the remaining part of the suit land. That the applicants did with the assistance of various government ministries manage to regain possession of the suit land but that refugees are still settled on part of the suit land belonging to the 1st and 9th applicants. Agents of the state have continued to harass the applicants and threaten to settle more refugees on the suit land which the applicants contend is unlawful, for as they contend, the suit land belongs to them and is not part of the KRS. That despite all this, the threats of eviction by agents of the state have been continuous since 2013 placing the applicants in fear and uncertainty.

I have already stated that for the applicants to succeed in this application, they need at least to satisfy court that they have a case whose facts constitute a serious question that merits judicial consideration. According to the affidavit of Kiirya Moses in opposition to the application, the applicants have not presented a *prima facie* case with high chances of success. He depones that the suit land comprises the KRS and is the property of the GOU. That it was given to the UPDF by the office of the Prime Minister to establish a military barracks in 2009 and a refugee settlement. That the applicants are neither the owners and nor in occupation of the suit land and have no land titles in respect of it.

I do agree with the respondent on this point. This is because although the 1st and 4th applicants claim ownership of part of the suit land as registered owners of freehold interests, nothing has been placed before the court in their pleadings to support that ownership. This is so even after the respondent in their affidavits in reply raised the red flag that the applicants have no titles and that the suit land in dispute, is actually the property of the GOU and accommodates KRS and a UPDF battalion. Although the freehold land was well described in the plaint, at the minimum, those particular applicants should have presented certificates of title or similar proof to confirm their ownership, for how will they in the main suit put the respondent and the court into knowledge of

that ownership to give the latter mandate to begin considering their interest? For the rest of the applicants and again for the 1st applicant, it has been stated that they own interests under customary tenure. I am aware that proof of a customary interest may require expert or other evidential proof that should not be a matter to be considered at this point in the suit. However, in both cases, again the applicants mentioned but omitted to place before the court the document containing IS MM 2956 or a copy of the certificate of Buhaguzi Block 3 plot 6 which they claim shows the boundaries of the KRS in order to lay foundation for the alleged trespass into the suit land which they claim to own. For that reason, I am in doubt that the applicants have at this point shown a prima facie case.

Secondly, the applicants need to prove that that the suit property is in the danger of being wasted or alienated and that they will suffer irreparable damage if the application is not granted. It is argued for the applicants that they managed to regain possession of the suit land after a one time eviction but that since July 2013, the threat of eviction is imminent and real leaving them in constant fear of their survival. They further argue that they and their families derive their livelihoods from the suit land and being owners, they will suffer irreparable damage if not protected by an injunction. Ms Kiyingi in contest, states that the applicants will not be prejudiced or suffer irreparable damage if the court denies the injunction. Further, Kiirya Amos also states that, the applicants have never been evicted and are not in occupation since the land is currently in occupation by the UPDF and refugees. I have already found that the boundaries of the KRS vis avis the suit land or at least that part which is in dispute are not clear in the plaint. However, it will still be an issue that requires and needs to be addressed in the suit whether the applicants are in occupation and own the suit land. For now I do believe it is imperative as such evidence is given and considered in the main suit, that their occupation is preserved until the rights of each party are ascertained and a final judgment given.

Having found that the applicants have not raised a prima facie case but that their occupation ought to be preserved during the hearing of the main suit, I am in doubt as to whether the applicants are entitled to an interlocutory relief of a temporary injunction. I must therefore consider into whose favour the balance of convenience should be tilted if this application is allowed or disallowed.

I have found that without presenting certificates of title or similar proof, the 1st and 4th applicants do not have a *prima facie* case before court. I have similarly found that without ascertaining their boundaries vis avis that of the KRS, the other applicants have also not presented *a prime facie case*. However, the 2nd 3rd 5th, 6th, 7th, 8th and 9th applicants (as well as the 1st applicant in part) claim to hold their part of the suit land under customary tenure. Customary tenure is recognized by both the Constitution and the Land Act and would require a different kind of proof than that of registered land. The presence of the applicants on at least part of the suit land has not been strictly rebutted by the respondent. This is evident in paragraph 5 of Kiirya's affidavit where he states that it was only part of the suit land that was given to the UPDF

to establish a military barracks and a refugee settlement and in paragraph 7 in which he claims that the applicants have never been evicted. On the other hand, it is presented for the applicants that the GOU has taken over only part of the suit land to accommodate the KRS and that they are in occupation of the rest of it. That they are content to remain in that portion and have no intention to interfere with the occupation of the refugees until a decision is reached in the main suit on whether or not the presence of the GOU and settlement of the refugees was lawful.

An important principle that would guide this court is that, the purpose of an injunction is to preserve the status quo in respect of the matter in dispute until determination of the whole dispute: See for example **E.L.T. Kiyimba Kaggwa Vs Haji A.N,. Kateride (1985) HCB 43 and** Commodity **Trading Industries Vs Uganda Maize Industries and another [2001-2005] HCB 118.** I believe that thisprinciple is very important because it is important for the court and the litigants to be given time and space to exhaustively handle the matters in issue in the main suit with no interference by the respondent, their agents or any other party claiming under their title, to disrupt the status on the ground but this however has to be weighed against facts of the case in the form in which it is presented by the applicant.

I am conscious of the fact that the applicants should be allowed to prosecute this case whilst still in occupation of the suit land and with their livelihoods secured and the threat of eviction in the interim curtailed. That said however, in my view, without presenting proof of their ownership of freehold interests in part of the suit land, I am unable to be persuaded that there is an interest of the 1st and 4th applicant to be protected at this point. The danger would be to make an order in respect of registered land that has not been shown to be their property. I therefore decline to grant a temporary injunction with respect to the land stated to be owned by the 1st and 4th applicants in paragraphs 6 and 10 of the plaint.

However, I am convinced on a balance of probabilities that the applicants still do occupy part of the suit land which is held under customary tenure and their occupation should be protected until this suit is resolved. This needs to be balanced against the need of the Government to accommodate its armed forces and refugees under its mandate. In my view, the balance of convenience is in favour of the applicants because even in the interim their constitutional rights to land should be protected as the case is being investigated. Further, this is only an interim measure and as their counsel submitted, should they succeed it may prove difficult and expensive to relocate the refugees, but should they lose the suit, they will be able to leave the suit land to the GOU. I therefore grant a temporary injunction in favour of the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th and 9th applicants that henceforth restrains the respondent and/or her agents from destroying their homes and crops, evicting them or sanctioning and carrying out **new** settlements of refugees. For the avoidance of doubt, this order is made in respect of the following land:-

1. 400 acres of land held by the 1st applicant under customary tenure in Marembo village, Kasonga Parish, Hoima District

2. Land held by the 2nd and 8th applicants at Ngulwe Village, Kasonga Parish, Kyangwali sub county, Buhaguzi County, Hoima District
3. Land held by the 3rd, 5th, 6th, 7th and 9th applicants at Marembo village, Kasonga Parish, Kyangwali Sub County, Buhaguzi County Hoima District

The above notwithstanding, I am mindful that the facts of this case are unique and involve issues of national security and the settlement of refugees. The latter especially may bring to account international and national obligations of the GOU towards refugees and thus hearing of this suit must be expedited and the temporary injunction kept in check to avoid abuse by the applicants. Therefore, this order shall remain in force for three months or until the main suit is fixed for hearing (whichever is earlier) and thereafter shall be subject to renewal by this court or the Learned Registrar whenever this suit comes up for hearing.

Also since this order is meant to maintain and not alter the status quo, I direct that the refugees who have already been settled on part of the suit land shall remain within the confines of their settlements with no interference from the applicants and/or their agents until final determination of this suit.

Since this matter was decided on a balance of convenience, I order that each party bears their costs of this application.

I so order

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EVA K. LUSWATA
JUDGE
4/4/2014