THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCILLENOUS APPLICATION NO. 800 OF 2013

(Arising from Civil Suit No. 385 of 2013)

ANNE THERESA MUGIZI:: APPLICANT

(Administrator of the Estate of the Late Davis Joash Mugizi)

VERSUS

1. **LUSWATA N. CHWA *Alias* MULANGILA**
2. **BUWEMBO PETER *Alias* MUTONGOLE** **:::::::::::::::: RESPONDENTS**
3. **ZAWEDDE T. *Alias* NALINYA**

BEFORE: HON MR JUSTICE BASHAIJA K. ANDREW

RULING

This application is brought by Chamber Summons under ***Section 98*** of the ***Civil Procedure Act; Order 41 rr. 1, 2 and 9*** of the ***Civil Procedure Rules*** seeking for orders that:

1. ***A temporary injunction issues restraining the Respondents, their agents, servants, assigns and representatives from trespassing, entering, inspecting and in any way dealing with the Plaintiff's land (kibanja) situate at Wamala village, Nabweru Sub-county, Wakiso District pending the hearing and disposal of Civil Suit No. 385 of 2013.***
2. ***Costs of this application be provided for.***

The grounds of this application are briefly set out in the Summons but are amplified in the affidavit of Anne Theresa Mugizi the Applicant. In the main they are that the

she is the administrator of the estate of her late husband Davis Joash Mugizi who died intestate, and before his death had purchased several pieces of *bibanja* in Wamala village, Nabweru Sub-county in Wakiso District. After his death persons that were at the time unknown to the Applicant uprooted the fence around the suit *kibanja* and burnt down the *narpia* grass her cattle which forced her to graze on another piece of land but continued to be in possession and use of the suit land for other activities up to date.

That in 2009 one Kawangi an agent of the 3rd Respondent tried to fence off the suit land. The Applicant made an alarm and the said Kawangi ran off leaving the barbed wire and poles on the *kibanja.* The Applicant reported this incidence to the LC1 Chairman of the area who promised to take action but never did. Further that since 2013 began the Respondents have on several occasions committed acts of trespass on her land, which she reported to police vide *SD Ref 07/22/13* and 0524/13 but that same has not been effectively handled

The Applicant contends that the Respondents are trespassers and unlawful claimants who intend to defraud her of her *kibanja*, yet they have at all material times been aware that the suit land forms part of the estate of her late husband. Further, that she will suffer irreparable damage if the Respondents dispose of the land which is meant to benefit her children who are now orphans and beneficiaries to the estate of their late father, and that she has a strong case with a high likelihood of success.

In reply to the above, the Respondents through the 1st Respondent Luswata Nashif Chwa filed an affidavit opposing the application. That he is the lawful Attorney of Omumbejja Nnalinya Sarah Nattu the caretaker of the estate of Ssekabaka Suuna 11 where Wamala *Masiro* (tombs) is part and parcel of the estate and that he does not know the 3rd Respondent. That the Applicant's late husband's alleged occupation of the suit property was without consent of Nnalinya Nattu, and that the *bibanja* on the

Masiro land had been allocated to servants of *Masiro* to utilize but without selling or disposing of the same.

That in July 1969 the predecessor of the sitting Nnalinya Princess Hasifa Nakabiri Nnalinya of Wamala tombs communicated to all occupants on the *Masiro* land that they were not allowed to dispose of the *bibanja*, a position which was maintained by the *Masiro* Administration to date. That neither himself nor the sitting Nnalinya has ever masterminded or uprooted the fence around the said *kibanja* and that the Applicant and her late husband have always been trespassing on the *Masiro* land. That it is the Wamala *Masiro* Administration under the leadership of Nnalinya who are in occupation of the suit land/*kibanja*, which has been part of the estate of Ssekabaka Ssuna 11 since the acquisition of the land in 1824.

That Kawangi is unknown to the administration of the Wamala *Masiro* and besides, the entire ***Kyadondo Block 203*** belongs to the estate of Ssekabaka Ssuna 11 and the Applicant and her late husband had and has no interest in the suit land/*kibanja*.That the Applicant just intends to interfere with the *status quo* before the final determination of the main civil suit and that the Respondents are in possession of the suit land/ *kibanja*.

Counsel for the parties filed written submissions to argue their clients' respective claims. From the submissions, however, it was noted that both Counsel dwelt more on the merits of the case yet the essence of this application is limited to the grant of a temporary injunction.

It is the established law that the main purpose of a temporary injunction is to preserve the *status quo* of the subject matter of the dispute pending the final determination of the head suit. See: ***Commodity Trading Industries v. Uganda Maize Industries and another [2001-2005] HCB 118.*** The principles upon which the grant of a temporary injunction is based are well settled, but each case must be considered on its own

peculiar facts. The tested guidelines laid down by Lord Diplock in ***American Cyanamid Co. v. Ethicon Ltd [1975] A.C. 396*** are mainly that;

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 damages if the injunction is denied.***
3. ***If court is in doubt as to the above considerations it will decide the application on the balance of convenience.***

That court should not attempt to resolve issues related to the main suit while considering the above principles was noted in the case of ***Prof. Peter Anyang Nyong'O &Others v. The Attorney General of Kenya & Others; East African Court of Justice Case Ref. No. 1 of 2006 (unreported).***

The applicant is required to show that he or she has a *prima facie* case with a probability of success. A *prima facie* case with a probability of success is no more than that the court must be satisfied that there is a serious question to be tried. In the case of ***Robert Kavuma v. M/s Hotel International, .S.C.C.A. No.8 of 1990*** Wambuzi C.J. stated that the applicant is required at this stage of trial to show a *prima facie* case and a probability of success but not success. Further in the case of ***Godfrey Sekitoleko & Others v. Seezi Mutabazi [2001-2005] III HCB 80*** the Court of Appeal made the position clear by stating as follows;

> ***"The court has a duty to protect the interests of parties pending the disposal of the substantive suit. The subject matter of a temporary injunction is the protection of legal rights pending litigation. In exercising its jurisdiction to protect legal rights to the property from irreparable damage pending the trial, the 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."

Therefore, in the instant application aspects which relate to the proprietary rights of the parties to the suit land are premature, and will only be addressed when the case is heard on its merits.

It is also important to note that the Applicant depons in her affidavit that she has been in possession and use of the suit land for other activities since 1986. This was not contested by the Respondents who actually confirmed in their pleadings that the Applicant fenced off the suit land and barred the Defendants and their agents from accessing it. It shows that the Applicant is in possession of the suit land. Therefore, preserving the *status quo* would be preserving the situation as it is; which is that the Applicant continues to be in occupation, possession and utilization the suit land pending the final determination of the main suit.

On the principle of irreparable injury, Lameck Mukasa J held in ***Francis Kanyanya v. Diamond Trust Bank H.C.C.S. No. 300 of 2000*** relying on ***Kiyimba Kaggwa v. Hajji Nassar Katende [1988] HCB 43*** **t**hat irreparable injury means that the injury must be substantial or a material one, that is, one that cannot be adequately compensated for in damages.

In the instant application, the Applicant states in her affidavit that to date she is in occupation and use of the suit *kibanja* on which she has intentions of resuming the growing of *narpia* grass for the grazing for her cattle as before, and that she will suffer irreparable loss and damage if the Respondents dispose of her land which is meant to benefit her children who are now orphans and beneficiaries to the estate of their late father. It was also submitted for the Applicant that the cattle the Applicant grazes on the suit land which is her source of livelihood and for her children, and that

she also has plans to utilize part of the land for income generating purposes to look after her family.

Counsel for the Respondents on the other hand submitted that the Applicant has sought general damages as one of the remedies in the main suit, which implies that she is alive to the fact that it would atone for any loss she is likely to suffer since court would be able to evaluate the evidence presented and award adequate damages to whoever deserves the same.

I find that even though the Applicant prays for general damages in the head suit, they would not be an adequate relief to atone the injuries claimed since the Applicant is in possession of the suit land which is also used as a source of livelihood to benefit the her entire family. Just because damages can subsequently atone for an injury does not mean the injury should be let to occur in the first place in order to be atoned for. That would be an absurd contradiction of the main purpose of the principle as to the preservation of the *status quo.* I am satisfied that the Applicant will suffer irreparable injury once the temporary injunction is not granted.

On the principle of the balance of convenience, it is settled law that if court is in doubt on any of the above principles it will decide the application on a balance of convenience. This court is not in any doubt given the fact that the Applicant has established in her pleadings that she has a *prima facie* case with a probability of success, and that that she will suffer irreparable damage if the application is not granted, and that there's need to preserve the *status quo* This application is allowed. Costs will be in the cause.

BASHAIJA K. ANDREW
JUDGE
11/04/2014