

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

MISC APPLICATION NO. 1110 OF 2013
(ARISING OUT OF CIVIL SUIT NO. 533 OF 2013)

BIRUNGI

SIMPSON.....

APPLICANT

VERSUS

1. BAYEGA HALIMA

1. NKWANGA MANSUL

RESPONDENTS

2. THE MUYAMBI ANTHONY

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RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This is an application for a temporary Injunction. The brief facts are that the applicant purchased land comprised in FRV HQ T10 Folio 6, Block (Road) 415 Plot 42 at Kamaliba (hereinafter called the suit land) from the 1st and 2nd respondents on 23/7/13 and the transaction was sealed as an agreement of sale of the same date. The 2nd and 3rd respondents then proceeded to sell the suit property to the 3rd claiming that the applicant had failed to pay the balance of the purchase price and waived his right of purchase in the agreement. The applicant deemed the transaction between the respondents to be fraudulent and thereby filed Civil Suit No.533/2013 contesting it and seeking order for cancellation of the registration in favour of the 3rd respondent. The applicant further claims to be in possession of the suit land and thereby presents this application seeking orders (*inter-alia*) to restrain the respondents, their agents, employees or successors in title from transferring, dealing, in trespassing or interfering with the applicant's possession, use

and quiet possession of the suits land until disposal of the main suit. The parties filed several affidavits in support and rebuttal of the application and the matter proceeded by written submissions.

The law on temporary injunctions is contained in **Order 41 rules 1(a)** of the **Civil Procedure Rules**. The principles to be followed before granting a temporary injunction are well settled and quite well articulated in the submissions of counsel.

It is now settled law that when court is considering the application for a temporary injunction it must bear in mind that its purpose 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., Katende (1985) HCB 43** and **Commodity Trading Industries Vs Uganda Maize Industries and another [2001-2005] HCB 118**. The principles governing the grant of a temporary injunction are well settled and have been well argued by both counsel. 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 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 the balance of convenience.

In considering the above principles, the court should also bear in mind that 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 Nyongo & others Vs The Attorney General of Kenya & Others; East African Court of Justice Case Ref. No. 1 of 2006 (unreported)**

- 1) **The applicant has to show that he has a *prima facie* case with a probability of success in the main suit.**

In my view a *prima 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 trial to show a prima facie case and a probability of success but not success. (Emphasis mine)

The claim in the main suit is that the applicant bought the suit land and paid part of the purchase price but was unable to complete the transaction because the 1st and 2nd respondents, who were the vendors, sold it to another person. He deemed it fraud for the vendors to have ignored his unregistered interest and proceeded to deal in and sell the suit land to the 3rd respondent. He also deemed it fraudulent for the 3rd defendant to have had the suit land registered into his name when he was aware of the applicant's presence on the suit land. He stated that he had suffered loss as a result of the respondent's actions and sought orders (inter alia) for the transaction of the respondents to be reversed and the registration in favour of the 3rd respondent revoked.

In support of his claim, the applicant presented a sale agreement between him and the 1st and 2nd respondent's dated 23/7/13 by which he purchased the land. Indeed, the respondents did not contest the sale only stating that the agreement had been overtaken by events when the applicant failed to pay the balance of the purchase price and after he waived his rights and allowed them to sale the land to a third party. All three respondents contested the fact that the applicant is in active possession of the suit land. In my view, the applicant has shown on a balance of probabilities that he did at one point acquire an interest in the suit land and his and the 3rd respondent's conflicting interests should be further investigated. The court would be interested to know and decide in the main suit which party breached the agreement of sale of 23/7/13, if at all, and whether the 3rd respondent is an innocent party who purchased the suit land without notice. All these indeed raise triable issues and by all accounts the applicant has raised a prima facie case.

Having found so, my next inquiry would be whether the status quo should be preserved as the court hears the main suit?

2) The order is intended to preserve the status quo

I believe the above principle 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. It is not in dispute that both the applicant and the 3rd respondent did at different times purchase the suit property from the 2nd and 3rd respondents. However, both parties dispute the fact of the party in actual possession. This will of course have a direct bearing on the *status quo* to be maintained as the main suit proceeds.

The plaintiff submitted that he is in active possession. Although he did not mention the actual date he gained possession (and this is a strong bone of contention against him). He claims that he is already excavating sand from the suit land and he presents photographs and a survey report in support of his assertions. The applicant further claims that after filing the main suit, he obtained evidence (by way of search report issued by the Registrar of titles) to show that the 3rd respondent is no longer the registered proprietor of the suit land. That he will in the future even require to move this court for an amendment of his pleadings in the main suit to make the necessary changes.

The respondents strongly contest the above claims. They assert that the current status quo is that it is the 3rd respondent in active possession and carrying out the same activity of excavating sand from the suit land. The 3rd respondent likewise furnishes photographs depicting excavation activities. He also attaches to his affidavit in reply, a survey report that his counsel attempted to decipher in his submissions to the effect that it is the 3rd respondent in active possession and that the current position of the applicant is outside the suit land in a road reserve. One of the photographs produced by the 3rd respondent shows a fence which it is claimed separates the two parties from each other. The respondents further argue that the current status quo that should be maintained can be deduced from the interim order granted by the Learned Registrar (in Misc Appl, No. 1110/13) on 25/11/13. *Therein, the applicant undertook and was ordered* “not to move, or *enter* to excavate in the land in dispute and claimed by the 3rd respondent.” According to the 3rd respondent therefore, granting this application would result into allowing the applicant to take possession of the suit land (which it is claimed he did not have before) and disposes the 3rd respondent, thus altering the *status quo* on the land and not maintaining it.

The arguments of both parties on this principle is quiet extensive and even supported by documentary evidence. Unfortunately I am unable on the available evidence alone to confirm which of the two parties is in actual possession for the following reasons.

The acreage of the suit land is given on the certificate of title as 21.4450 acres making it a sizeable piece of land. It may well be that either party is working on a different location on the land or even not at all! All this would require more exhaustive evidence but I hasten to add that, expecting the court at this point of the proceedings to divulge into the details of possession, may result into the danger of investigating the merits of the suit. The court has not yet visited the locus or even called oral evidence to support either party and thereby it would be premature to believe one party against the other. By no means would mere photographs afford a conclusive picture of the *status quo* to favour one party against the other. Further, neither the applicant, 3rd respondent and nor their counsel can profess to be experts on matters of land survey and mapping in order to convince this court that the contents of the sketch maps presented depict the actual *status quo* favouring their conflicting claims. Even then, I believe this is evidence that would be the preserve of the authors of those documents during hearing of the main suit.

Further, the order of the Learned Registrar given on 25/11/14 is rather contradictory as orders the applicant among others not to move thereby, not giving the specific location in which he was to remain put. I do agree with counsel for the applicant that that particular order did not expressly set aside or superseded the earlier interim order. It even appears that the court envisaged yet another hearing interparty on 3/12/13 of those interim proceedings.

I do agree with counsel for the 1st and 2nd respondents when they state in their submissions that this case presents a challenge as there is no definite status quo to be established from reading the pleadings. In my opinion, there is nagging evidence yet to be fully proved that the applicant may not currently be in possession of the suit land. I would say, similar evidence is present that the 3rd respondent may not be the current registered proprietor of the suit land and therefore have no business to have a claim in it at all. Above it all, it is most important to this court, and in my view, it is equally important to the parties herein, that the physical status of the suit land is left intact and an interrupted until final determination of the matters in issue. In my view, (and the principles of granting a temporary injunction notwithstanding), this case presents a unique situation that would require the exercise of judicial discretion to achieve a result that is most

judicious and practical in the circumstances. The provisions of S. 98 CPA should in this case override the provisions of Order 43 Rule, I and 3 on which this application is premised. I accordingly rather, I resort to choose not to make a finding on the other two principles for granting an injunction as it would be superfluous to do so in the present circumstances the provisions of Section 33 of the Judicature Act which I believe should be appropriate and useful. Therein,

The High Court shall in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of the those matters avoided.

Thereby in order for this court to fully and effectually investigate the triable issues raised in the main suit, I move to invoke the inherent powers of this court under the above two provisions to order that both the applicant and the respondents in this application, and them being the parties in the main suit, are from the date hereafter, to desist from carrying out any activity on the suit land. They should not enter upon, occupy, deal in or transfer the property to themselves or any other person not party to this suit. All parties should forthwith cease any casual or economic activity on the suit land and shall within **seven days** of this order, remove there from any equipment, workers and/or agents at their cost. This order shall be presented to both the LCI Chairperson and the Officer in Charge of the police station/post of the area in which the suit land is situate so that they assist in its enforcement and to maintain the peace.

This order shall remain in force for three months or until the main suit is fixed (whichever is earlier) and shall be subject to renewal by this court or the Learned Registrar whenever this suit comes up for hearing.

Each party shall bear their costs in respect of this application.

I so order.

Dated at Kampala this 24th day of February, 2014.

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EVA K. LUSWATA

JUDGE