

**THE REPUBLIC OF UGANDA**

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

**MISCELLANEOUS APPLICATION NO.1512 OF 2014  
(ARISING OUT OF CIVIL SUIT NO.744 OF 2014)**

**SEMPEBWA NSUBUGA::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT/PLAINTIFF**

**VERSES**

**KAMPALA CAPITAL CITY AUTHORITY::::::::::::::::::::::::::::: RESPONDENT/DEFENDANT**

**RULING**

**BEFORE HON LADY JUSTICE EVA K. LUSWATA**

This is an application brought by way of chamber summons under Order 41r.1, 2 and 9 of the Civil Procedure Rules

- a. A temporary injunction doth issue restraining the respondent and or their agents from any interference with the applicant's possession of the suit land and any further dealings on the same until further orders of the court.
- b. Provision be made for cost of the application.

The grounds of this application as set out in the motion and supporting affidavit are briefly that the applicant as the registered proprietor of land comprised in Plot 4893 Block 244 (herein after referred to as the suit land) is faced with an imminent eviction and demolition of the property on the suit land by the respondent. He deems the actions of the respondent unconstitutional and, has accordingly filed a suit against the respondent seeking *interalia*, a permanent injunction, damages in trespass and costs.

On their part, the respondent through Atwine K. Moses their Ag. Director Physical Planning, argue that the notice issued against the applicant was made under their mandate as administrator and regulator of the Kampala City and in compliance with physical planning and public health laws in force. That the applicant's developments on the suit land having no approved building plans, are in a dilapidated state and having been erected on the Kikubamutwe Road, Tank Hill,

was liable for removal after notice. They deem the main suit to be oppressive and to have been filed in bad faith.

Both counsel filed written submissions as requested by Court.

According to Order 41 Rule 1 (a) CPR, the primary purpose of a temporary injunction in these circumstances would be is the preservation of the suit land and protecting it from being wasted, damaged, alienated, and/or wrongfully sold by any party to the suit, pending resolution of the main suit. The court in **American Cyanamid Co. Vs Ethicon Ltd [1975] AC 396** Lord Dip lock laid down guidelines for the grant of temporary injunctions that have been continuously followed in our jurisdiction particularly in the cases of **E.L.T Kiyimba Kaggwa Vs Hajji Katende [1985] HCB 43**

The granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the *status quo* until the question to be investigated in the main suit is finally disposed of.

The conditions for the grant of the interlocutory injunction are;

- i. Firstly that, the applicant must show a prima facie case with a probability of success.
- ii. Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
- iii. Thirdly if the Court is in doubt, it would decide an application on the balance of convenience.

Further in considering the above principles, the court should bear in mind the following guidelines:-

- a) That temporary injunctions are discretionary orders and therefore all the facts of the case must be considered and balanced judiciously.
- b) That the same being an exercise of judicial discretion, there are no fixed rules and the vetting may be kept flexible.
- c) The court should not attempt to resolve issues related to the main suit:

See: **Prof. Peter Anyang Nyo & Ors Vs The Attorney General of Kenya & Ors; East African Court of Justice Case Ref. No. 1 of 2006** (unreported).

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 Vs M/S Hotel International SCCA No.8 of 1990** Wambuzi C J (as he then was) 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. The rationale given in the per-curium of **Kiyimba Kaggwa (supra)**, is that the evidence at this point (being affidavit evidence) is incomplete and not contested by arguments and cross examination. Case law is to the effect that though the applicant has to satisfy court that there is merit in the case, it does not mean that one should succeed. See for example, **Kiyimba Kaggwa (supra)**.

In the main suit, the applicant is contesting the decision of the respondent to raze down his building on the suit land. His counsel argues that at the time the suit was filed, his client was in possession and occupation of the suit land which is the *status quo* that should be maintained until the matters in controversy are determined. That argument is not controverted and in reply to the suit, as is the case with the application, the respondent argues that a notice for demolition was issued against the applicant (along with others) on 8/12/14 because the developments on the suit land have no approved plans and were made in contravention of public health laws.

In my view, the arguments made for the applicant raise serious issues that would require investigation by the court especially where the applicant stands to lose valuable property by demolition as indicated in the respondent's notice. That said, I must not be blind to the fact that although the issues to be determined in the main suit cannot not exhausted in these proceedings, at a minimum, the applicant must show that he has a legal right to protect and that his suit is not frivolous and vexatious. I thereby find relevant the decision in **Godfrey Sekitoleko & Ors VS Seezi Mutabazi [2001-2005] HCB Vol.380** that;

*“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. (Emphasis in this court).*

It has been argued by the respondent and borne out of the evidence so far adduced, that the applicant is in fact not the registered proprietor of the land as he claims. Annexure A to his affidavit attests to that fact because the land is registered in the names of another, one Peter Mukasa Kakembo. The attached instrument of transfer is not conclusive for although it mentions those transacting, there is no indication of ownership of the land or for what consideration it is being sold for. That said, the applicant's occupation of the suit land is not in dispute and he would, as one in occupation, be able to maintain a claim to protect the land from alienation and for compensation in trespass.

I notice however, that the applicant's principle argument is that he bought the suit land after the developments were already erected and that there is no encroachment on any road as his developments are built along a pathway. His counsel takes this argument further when he submits that that no deed plan has yet been adduced to show that the developments were made on a pre-existing road or that, there would be compensation payable to his client in case one is planned in the area. In reply, it is argued for the respondent that the current ownership of the suit land or its developments are not in issue and would in fact be irrelevant for purposes of the relevant physical planning and public health laws. It is explained that, once the developments on any land have been found to be without building plans and in contravention of the aforementioned laws, they must be removed by the owner, or them failing, demolished by the respondent. The agent of the respondent argues further that, the notice was not issued because the developments were built in a road or road reserve and the word "road" appearing in the notice was only meant to be descriptive to give an address to their location.

Much was said of the powers of the respondent under both the Kampala City Authority Act 2010, the Physical Planning Act 2010, the Public Health Act Cap 281 and the rules thereunder. I am not prepared to interpret those laws or determine whether they have been contravened by the applicant at this point, as there will be a danger of devolving into the merits of the suit. However, I do find merit in the respondent's arguments that the genesis of the notice to the applicant was *inter alia* because he did not have proper approval from the respondent in respect of the existence of the developments on the suit land. At a bare minimum, he is expected to have had building plans or at least to produce them after he was served with the notice. This in my view,

would even put to question whether the status quo ought to be maintained as the substantive disputes between the parties are investigated in the main suit.

The applicant argued further that he will suffer irreparable injury in the event that his developments are razed down and he turns out to be the successful party in the main suit. According to decided cases, irreparable injury is one that is substantial or material, and cannot be adequately compensated in damages. See **Kiyimba Kaggwa (supra)**. The court in **Commodity Trading Industries Vs Uganda Maize Trading Industries [2001-2005]HCB 119**, was held that this depends on the remedy sought. If damages would not be sufficient to adequately atone the injury, an injunction ought not to be refused.

Unfortunately not much was given by evidence to explain the state of the developments on the suit land and of what value they are to the applicant or what he stands to lose if they are razed down. What is on record is that those developments are currently the subject of a notice of removal under the Public Health Act, Cap 281 as buildings deemed to be in contravention of that law. The court is thus unable to determine the extent and severity of the applicant's loss if this application is denied.

Even if the above were not to hold, I have the stronger view that a temporary injunction is an equitable remedy and anyone who approaches the court in equity must likewise do equity. See **Herbert Kabunga Traders Vs Stanbic Bank (U) Ltd HCMA 159/2012**. At the time he filed this application, the applicant did not show that he had the proper authority to maintain the developments on his land. It is not in dispute that the respondent has the legal mandate to administer and regulate the presence of those developments on the suit land. I am of the strong view that temporary injunctions were not designed to fetter the powers and functions of bodies similar to the respondent and therefore, issuing a blanket temporary stay to their statutory powers would stifle their operations and give a wrong signal to the public.

In conclusion, I am convinced that the applicant has before this court, in the main suit, issues that merit trial. However, I am left in doubt that denying him the injunction will result into irreparable damage. It is therefore necessary to determine whether the balance of convenience lies in his favour to merit the grant of a temporary injunction. It was held in **Gapco (U) Ltd Vs Kaweesa Badru & Anor Misc. Application 259/13** that if the risk of doing an injustice is going

to make the applicants suffer, then probably the balance of convenience is favorable to him/her and the court would most likely be inclined to grant to him or her the application for a temporary injunction. The applicant is in undisputed possession of the suit land on which he has developments. Likewise, the respondent has the legal mandate to administer, regulate and even sanction noncompliance of certain laws relevant to those developments. In the face of conflicting such interests, I am more inclined to maintain the status quo, by granting the temporary injunction. However, because of what I have earlier stated, it is imperative for the applicant to show even at this point, that his developments do not contravene any physical planning and public health laws.

Therefore, the temporary injunction is granted on the condition that the applicant shall within 21 (twenty-one days) hereof, produce for the benefit of this court and the respondent, proof that he holds approved building plans or any such permit in respect of the developments on the suit land from the respondent. Should he fail to do so, within the time stipulated, the temporary injunction shall automatically expire. He is of course at liberty to pursue the merits of his claim in the main suit.

Since at this point of the proceedings the parties have been found to be evenly placed, I order that each party bears their costs of the application.

I so order.

**EVA K. LUSWATA**  
**JUDGE**  
**14/07/2016**