THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISC. APPLICATION NO. 1086 OF 2017

(ARISING FROM CIVIL SUIT NO. 535 OF 2017)

PRINCE KALEMERA H. KIMERA :::::::::::::::::::::::::: APPLICANT

VERSUS

1. **THE KABAKA OF BUGANDA**
2. **BUGANDA LAND BOARD :::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

Prince Kalemera H. Kimera *(hereinafter referred to as the "Applicant")* brought this application by Chamber Summons against the Kabaka of Buganda and the Buganda Land Board *(hereinafter referred to as the "1st" and "2nd" Respondent respectively)* under Section 98 of the Civil Procedure Act Cap 71 (CPA) and Order 41 rr.1, 2 and 9 of the Civil Procedure Rules SI 71 - 1(CPR) seeking orders that;

1. ***A temporary injunction doth issue restraining the Respondents and/or their agents from further pressing any interest, rights, responsibilities in and /or ownership of land listed before court vide High Court Family Division MA No. 278 of 2015 arising out of O/S No.09 of 2014 as falling under the estate of the late H.H. Sir Daudi Chwa II until the final disposal of the head suit.***
2. ***A temporary injunction doth issue restraining the Respondents and or their agents from initiating commencing surveys, mutations, mortgaging, charging, collecting, assessing, and or otherwise acquiring any payment in relation to land listed before***

court vide High Court Family Division MA No. 278 of 2015 arising out of O/S No. 9 of 2014 as falling under the estate of the Late H.H. Sir Daudi Chwa II until the final disposal of the head suit.

3. ***Provisions be made for the costs of this application.***

The application is supported by affidavits in support and rejoinder sworn by the Applicant. He primarily contends that he is a lineal descendant to the late H.H Sir Daudi Chwa II, and a 2nd degree beneficiary to his estate. That he is a holder of Letters of Administration for the estate of the late Prince Henry Harold Kagolo Kimera, his biological father and a biological son to the late H.H Sir Daudi Chwa II, and that as such his father was a 1st degree beneficiary in the estate of the late H.H Sir Daudi Chwa II whose estate has not yet been wholly administered.

That on 23/10/2015, the Commissioner for Surveys & Mapping, Entebbe, entered consent judgment with *M/s Wameli & Co. Advocates* in *HCMA No. 278 of 2015* whereby the former agreed to process deed prints for several pieces of land including land at Masajja originally registered under FC18454 Block 273 Kyadondo *(hereinafter the "suit land")* which is on court record as forming part of the estate of the late H.H Sir. Daudi Chwa II. That following the consent judgment deed prints including those for the suit land, were processed by the relevant Government Department and also put on court record. That the consent judgment has to this very date not been varied, reviewed, or set aside at all.

The Applicant also states that mailo certificates of title over the suit land or part thereof have been made by the Government in the names of the 1st Respondent, but without the prior express knowledge and/or consent of a dully recognised agent of the estate of the late H.H Sir Daudi Chwa II. Further, that he later learnt of the imminent compensation to the 2nd Respondent by the Uganda National Roads Authority (UNRA) upon the insistent urging of the 2nd Respondent, for

the Kampala – Jinja Expressway Project where it passes through the suit land. The Applicant believes that the suit land is in real imminent danger of being permanently wasted, altered and/or otherwise affected to his detriment and the entire estate of the late H.H Sir Daudi Chwa II, where he is a beneficiary as a lineal descendant. It is mainly for these reasons that the Applicant seeks the order of a temporary injunction.

The Respondents opposed the application and filed an affidavit in reply and another as a supplementary affidavit sworn by Bashir Juma Kizito. I will specifically address latter affidavit and the objections to it raised by joint counsel for the Applicants later in this ruling.

Mr. Bashir Juma Kizito states that he is Head Physical Planning, Survey and Research of the 2nd Respondent with due and lawful authority to swear the affidavit on behalf of the Respondents in reply to that of the Applicant. That he is advised by the Respondent's Advocates, and verily believes it to be true, that the consent judgment between *M/s. Wameli & Co. Advocates* and the Asst. Commissioner for Surveys & Mapping in *HCMA No. 278 of 2015* was irregularly obtained and is bad in law. That it was signed off by a one Dr. Yafesi Okia, the then Asst. Commissioner for Surveys & Mapping; an officer who has no independent legal personality and thus who, in law, is not capable of suing or being sued, and as such lacked the necessary locus to enter the purported consent judgment, and nor did he have the capacity to bind the Government of Uganda or the other Respondent in *HCMA No. 278 of 2015*.

Mr. Kizito further states that he is advised by the Respondents' Advocates, and verily believes it to be true, that the Applicant does not establish, on the face of the plaint or by any annextures thereto, his *locus standi* to bring an action for or on behalf of the estate of Ssekabaka Sir Daudi Chwa II. That he is further advised by the Respondents' Advocates, and I verily believes it to be

true, that the orders sought by Applicant are untenable in law, because they have the effect of determining or disposing of the main suit, rendering it nugatory.

Also, that he is advised by the Respondents' Advocates, and verily believes it to be true, that the *status quo* is that the 1st Respondent is the registered proprietor of the land comprised in Kyadondo Block 273 Plots 87, 99, 110 and 38, and as such is the Project Affected Person (PAP) by the Kampala – Jinja Expressway and Kampala Southern Bypass project. That UNRA is obliged to compensate PAPs based on Kibanja/customary holdings or registered proprietorship under the Registration of Titles Act, before taking possession of the land in question, and that UNRA is ready to pay the 1st Respondent the registered proprietor of the suit land, who is also ready, willing and able to receive such compensation. That if the injunction is granted, not only will it alter the *status quo,* by depriving the 1st Respondent of the rights of a registered proprietor prior to the determination of the main suit, but it will also cause inordinate delay to the said Government projects because the 1st Respondent will not hand over possession of the suit land unless and until fair and adequate compensation is paid for it and duly received. That the inconvenience to be caused by the grant of the orders sought is partly reflected in letter dated 05/04/2017 from UNRA to the Deputy Attorney General which the Applicant has attached to the affidavit in support of his application.

Mr. Kizito also states that he is advised by the Respondents' Advocates, and verily believes it to be true, that all of the land over which the Applicant purportedly seeks a restraining order is registered in the name of the 1st Respondent having been so vested in him by virtue of the *Traditional Rulers (Restitutions of Assets and Properties) Act Cap. 247,* and is managed by the 2nd Respondent. That the orders sought by the Applicant seek to change the *status quo* and essentially to determine the main suit. That he is further advised by the Respondents' Advocate,

and verily believes it to be true, that the granting of a temporary injunction in this matter would not maintain or preserve the *status quo* until the issues in the main suit are disposed of. On that account the Respondents seek the dismissal of the application with costs.

The Applicant is represented jointly by Mr. Senkeezi – Saali and Mr. Swabur Marzuq, while the Respondents are represented jointly by Mr. David F.K Mpanga and Mr. Medard Lubega Segoona. Counsel for the parties filed written submissions to argue the application. The submissions are on court record. I will not reproduce them in this ruling but I have taken them into account in arriving at a decision in this application.

Before rendering opinion on the substantive issues posed by this application, it is called for to first clarify the position of the law as it relates to the supplementary affidavit sworn by Bashir Juma Kizito on 09/08/2017 and filed in this court on the same date, and its implication on the application. Bashir Juma Kizito states that he is;

> ***"Head Physical Planning, Survey and Research of the 2nd Respondent with due and lawful authority to affirm this supplementary affidavit on behalf of the 1st and 2nd Respondents."***

The said affidavit's *Annexture A1* is copy of the Special Powers of Attorney appointing Bashir Juma Kizito, among other persons, as a lawful Attorney of the 1st Respondent with power, *inter alia*, to swear affidavits in any application brought in the course of any civil suit against the 1st Respondent. *Annexture A2* to the said affidavit is copy of the Revocation of Powers of Attorney, which the 1st Respondent had earlier on 02/06/2016 granted to the Katikiro and Attorney General of Buganda respectively. Both *Annextures* were duly lodged with the office of the Registrar of Documents and were registered on 07/08/2017. It is noted in particular that *Annexture A1* has no retrospective effect.

In paragraph 4 of the supplementary affidavit, the deponent basically states that he derives his authority from the Special Power of Attorney, *Annexture A1*, to affirm the supplementary affidavit and the affidavit in reply which he affirmed on 07/08/2017.

Counsel for the Applicant was served with the said supplementary affidavit on 09/08/2017 which they received "under protest" and immediately wrote to court stating their objections to the affidavit being relied upon. The first objection is that the affidavit was sworn and filed two days after the time set by court without leave of court. The second is that it was sworn and filed a day after the Applicant had filed and served his affidavit in rejoinder to the affidavit in reply of the Respondents, upon them. The third is that the jurat is not part of the rest of the contents thereof as it is separated by a full blank page from the rest of the contents and cannot be said to have been deponed before the alleged Commissioner for Oaths.

Starting with the last objection, the affidavit clearly states on the very page in issue that;

"(The rest of this page has been left deliberately blank)"

It means that the blank space between the jurat and the rest of the contents of the affidavit was deliberate and any reader would not be left in any doubt that the next page is a continuation of the same affidavit. Counsel for the Applicant did not cite any law that bars such an explanation for blank space in an affidavit or to back his assertions that the affidavit cannot be said to have been deponed before the Commissioner for Oaths. There is no merit in this particular objection.

I however find legally justifiable the objection that the supplementary affidavit was sworn and filed two days after the time set by the court without leave of court. Order 51 r. 6 CPR requires that where time has been fixed for doing any act or taking any proceedings by the order of court, the court may enlarge the time upon such terms, if any, upon application of the party seeking the

extension. In this application, time within which to file and serve the application, the affidavit in reply, and rejoinder was set by order of this court. The impugned supplementary affidavit was filed out of the time set by court in the order without leave of court. That renders the supplementary affidavit incompetent for the purpose of this application.

The second objection is that the supplementary affidavit was sworn and filed a day after the Applicant had filed and served his affidavit in rejoinder to the affidavit in reply of the Respondents, upon them. Once again I entirely agree with the objection. In ***Mutembuli Yusuf vs. Nagwomu Moses Musamba & Another EP Appeal No.43 of 2016,*** the Court of Appeal upheld this court's decision that supplementary affidavits filed after affidavits in rejoinder have been filed and served on the opposite party are incompetent for flouting the law and procedure under Section 136 of the Evidence Act Cap 6. While agreeing with this court striking out 86 affidavits sworn as supplementary affidavits after the Respondent had filed and served affidavits in rejoinder on the opposite party, the Court of Appeal, at page 12, held that;

> ***"Affidavits are considered as purely evidence and as such they can only contain what has already been pleaded. Under Section 136 off the Evidence Act (Cap 6) for each witness, evidence in chief is presented first followed by cross examination by the opposite party if any and lastly re – examination."***

In the instant application, the moment the Applicant filed and served the affidavit in rejoinder on the Respondents and all counsels' submissions were filed on court record and served respectively following after the same pattern, any purported supplementary affidavit would be incompetent and serve no evidential value.

The legal implication is that facts Mr. Kizito Bashir sought to introduce by the supplementary affidavit would not be countenanced with in this application. It also means that Mr. Bashir Kizito Ali was not seized with the necessary legal authority to swear the affidavit in reply for want of evidence of such authority at the time of filing on 07/08/2017. This court in ***Lena Nakalema Binaisa vs. Muchunguzi Mayers HCMA 0460 of 2013*** citing its earlier decisions in ***Taremwa Kamishana Tomas vs. Attorney General HCMA No.48 of 2012; and Makerere University vs. St Mark Education Institute & O'rs HCMA No. 373 of 1993,*** held that an affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of the other. As was also held in ***Farkudin Vallibhai Kapasi & Anor vs. Kampala District Land Board & Anor HCCS No.570 of 2015,*** the omission to accompany documents with the legal authority upon which a party derives the locus in a suit at the time of filing such documents is a fatal omission. The net effect is that there is legally no affidavit in reply in the instant application.

The Law on temporary injunctions:

Order 41 r. (1) CPR provides 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."

In ***Daniel Mukwaya vs. Administrator General HCCS No. 630 of 1993*** the stated primary purpose of an order of a temporary injunction was held to be the preservation the *status quo* of the subject matter of litigation pending the final determination of the rights of parties in the head suit.

"Status quo" simply means the "existing state of thing" existing prior to a particular point in time. In ***GAPCO vs. Muwanga Muhammed T/a Musa & Moses Services HCCS No. 84 of 1998,*** it was held that where the *status quo* has changed, then it is doubtful that an order of temporary injunction may serve any purpose as it may mean preserving the illegality or the breach or wrongful act.

Counsel on both sides in this application rightly restated the legal principles and criteria for the grant of an order of temporary injunction by citing some decided cases on the matter. In ***Daniel Mukwaya vs. Administrator General*** (supra) it was held that the main considerations are;

(a) Is there a serious issue to be tried?

(b) Are damages an adequate remedy?

(c) Where does the "balance of convenience" lie?

(d) Are there any other special factors?

In ***Hubbard vs. Vosper [1972]2 QB 84;*** and ***Kiyemba – Kaggwa vs. Haji A.N. Katende [1985] HCB 43,*** it was emphasized that the criteria above stated has to be read in the context of the principle that court's discretion cannot be fettered by laying down any hard and fast rules which would have the effect of limiting the flexibility of granting the remedy of a temporary injunction.

Opinion:

Applying the principles to facts of the instant application as regards the first criteria, it is noted that there exists a dispute as to ownership of land at Masajja originally registered under FC 18454 Block 273 Kyadondo *("suit land").* The Applicant claims ownership by virtue of his alleged beneficial interest in the estate of HH. Sir. Daudi Chwa II. He claims that he is a lineal descendant and holder of a Power of Attorney for the late Prince Henry Harold Kagolo Kimera, who was son to; and therefore a 1st degree beneficiary to the estate of HH. Sir Daudi Chwa II; which estate the Applicant alleges has not yet been wholly administered.

On the other hand, the 1st Respondent also claims a legal interest in the suit land by virtue of registration in its name; the same having been so vested by virtue of the *Traditional Rulers (Restitutions of Assets and Properties) Act Cap 247,* and managed by the 2ndRespondent. The Respondents strongly contend that any land so vested by law cannot be divested by a suit such as one filed by the Applicant in the head suit.

Given these competing claims of interest in the suit land, it inevitably calls for court to investigate the basis and/ or merits of the respective claims. That invariably leads the determination of the parties' proprietary rights in suit land by this court. The parties' opposed claims of interest in the suit land no doubt raise serious issues to be tried by court.

The second criterion is whether damages would be an adequate remedy in the circumstances. It is observed that the prayers sought by the Applicant under order (i) and partly 2 of the *Amended Chamber Summons* were abandoned. He only sustained the prayer for an order restraining the Respondents from acquiring compensation payment for Uganda National Roads Authority (UNRA) in respect of the Kampala – Jinja Expressway Project in relation to land forming the subject matter the litigation.

Joint counsel for the Respondents opposed the Applicant's abandonment of the prayers. The opposition is not in the substance of the prayers, but on the ground that by sustaining such a prayer the Applicant would be amending his pleadings, yet he is legally bound by his pleadings. On that account joint counsel for the Respondents argue that the prayers sought in the application are untenable and inconceivable in law.

In rejoinder, while agreeing that parties are bound by their pleadings, joint counsel for the Applicant argued that the prayers sought are not pleaded as resultant prayers depending on each other. Rather, that they are presented as separate prayers, and that the grant of one does not affect the other.

Beginning with the last point, there is no law that precludes a party abandoning any part or the whole of its claim or reliefs it had sought from court in its pleadings. Similarly, a court cannot hold a party upon reliefs/prayers which the party abandons or has sought to abandon in its pleadings. The court may only not grant reliefs/prayers not sought by a party in the pleadings, but the court may, in its discretion, grant reliefs/prayers even though not specifically sought by the party in the pleadings, if in the view of the court the reliefs/prayers will meet the ends of justice.

The above position is rooted in Section 33 of the Judicature Act Cap 13, regarding the general provisions as to remedies. The High Court, in the exercise of the jurisdiction vested in it by the Constitution, or any written law, may 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, so that as far as possible all matters in controversy between the parties may be completely and finally determined.

In the instant application, court's discretion to grant remedies cannot be fettered by form of the pleadings in the *Amended Chamber Summons.* The substance of litigation is the guiding factor whether or not court can grant any remedy.

On the criteria regarding whether damages would be adequate remedy, the Applicant seeks to have the Respondents restrained from acquiring any compensation payment from UNRA in respect of the Kampala – Jinja Expressway Project which affects the suit land. *Annexture "E"* to the affidavit in support of the application - a letter dated 08/06/2017 from UNRA, is clear that quite imminent compensation is to be effected to the Respondents in respect of land that includes the suit land. If such compensation is paid without first determining the substantive issues as to the proprietary rights of the parties in suit land, it would have the effect of rendering the main suit nugatory; besides triggering a multiplicity of other litigation concerning the same subject matter. In the event that the Applicant succeeds in his claim, no amount of damage would be adequate recompense as the subject matter of the litigation will no longer exist for him to lay any claim of interest over. That would amount to irreparable damage. In ***Gella vs. Cassman Brown & Co. [1973] EA 358***, it was held that if the applicant is to suffer irreparable injury, then an injunction ought to be granted.

On criteria of balance of convenience, this court is only required to weigh doubts against certainties as to who stands to lose or to suffer more by not granting the order of temporary injunction. The Applicant and the Respondents are asserting wholly opposed claims over the suit land. Premised on the particular facts in the respective affidavit evidence of the parties, clearly, the Applicant stands to lose more if the order is not granted. If, on the other hand, the Respondents are not restrained from acquiring the compensation payment in respect of the suit land, and the Applicant eventually succeeds in his claim, he would suffer injustice more. The suit

land will no longer be available as UNRA will have acquired irrevocable rights over it. Similarly, he will no longer be entitled to the compensation money from UNRA.

On the other hand, restraining the Respondents now would not occasion an injustice if in the end they successfully defend the suit. The impending compensation payment would still be due to them having been adjudged the rightful owners of the suit land. In this case, that is where the balance of justice would fall.

For the foregone reasons, the application is allowed. An order of temporary injunction is granted restraining the Respondents or their agents/servants or persons claiming under them, from acquiring compensation payment from UNRA in respect of the Kampala – Jinja Expressway Project in respect of land originally registered under FC 18454 Block 273 Kyadondo, pending the determination of the head suit in *HCCS No. 535 of 2017* or until court otherwise orders. Costs of this application will be in the cause.

BASHAIJA K. ANDREW
JUDGE
10/08/2017

Mr. David FK Mpanga together with Mr. Medard Lubega Segoona counsel for the Respondents present.

Mr. Senkeezi – Ali, Mr. Swabur Marzuq, and Mr.Illukor counsel for the Applicant present.

The Applicant is present.

Legal Representatives of the Respondents present.

Mr. Godfrey Tumwikirize Court Clerk present.

Ruling read in Open Court.

BASHAIJA K. ANDREW
JUDGE
10/08/2017