

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**

**HCT – 04 - CV- MA-0010-2017  
(ARISING FROM CIVIL SUIT NO. 0002/2017)**

**CHERUKUT DAVID**

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**VERSUS**

**APPLICANT**

- 1. CHEKWOTI ABAS**
- 2. CHEBET MUSTAFA**
- 3. MUSTAFA ISSA**
- 4. YEKO MANSUR**
- 5. AKETI JOSEPH GABRIEL**
- 6. MAKHAHA SHAIBU**
- 7. MUTORO NICHOLAS**
- 8. MWEMBA AMUSA KINANJOI**
- 9. SUTUMA PATRICK**
- 10. MALEWA JOSEPH & OTHERS**

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**RESPONDENTS**

**BEFORE: THE HON. MR. JUSTICE HERY I. KAWESA**

**RULING**

The applicant made this application under O.41 r. 1, 2 and 3 of the Civil Procedure Rules and section 64 (e) and 98 of the Civil Procedure Act.

The Applicant sought orders for restraining the Respondents, their agents, worker men, servants, assignees or successors in title from surveying the suit lands located at Munda and Sirinda villages in Kapchorwa Municipality and District respectively or trespassing upon or in any way alienating, selling or dealing with the suit land until the main suit is heard and determined.

The grounds for the application, were supported by the affidavit in support of **Cherukut David** and are briefly that:-

- i) The applicant is the owner of the suit land.
- ii) The applicant is in possession.

- iii) The Respondents have illegally and fraudulently made incursions on the suit land and attempted to forcefully survey it.
- iv) Respondents claim is fictitious and illegal.
- v) The balance of convenience is in favour of the Applicant.
- vi) It is in the in the interest of justice that the application is granted.

The Respondents jointly oppose the application. The affidavit in reply of **Mirembe Amuza** (8<sup>th</sup> Respondent) contains their grounds of rebuttal.

During the hearing, **Counsel Olubwe** for the Applicant contended that the grounds were not denied by the Respondents, who affirmed in paragraph 10 of their affidavit in reply that they are surveying land in Bukwanga village, Bulambuli District, not in Kapchorwa District. Counsel in rejoinder to Respondent's counsel referred to the annexures to the pleadings and argued that the sum total the evidence on record is that there is conflict on the land, raising triable issues, and court should use its discretion to preserve the status quo.

However Respondent's Counsel argued that there was no prima facie case as enunciated by the case of **Kiyimba Kagwa v. Katende 1988 HCB 43**.

His argument is that Respondents have proved that the survey is in respect of land at Lukonge, Bulambuli not where the applicant is alleging. He argued that there... survey was authorised by the District Surveyor following the historic map of Bugisu. He referred to the annex of the affidavit in support 9letter from Kapchorwa District) an affidavit of **Cherukut**, where upon he argued that 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents were from Bukwanga and Bwela villages not in Sikwenda Kapchorwa.

He argued that the chain had no merit and ought to be dismissed.

Having listened to the arguments as above, this is an application for a temporary injunction. In this type of application court is guided by provisions of O. 41 r.1 of the Civil Procedure Rules.

The provision above states that:

*“Where in any suit it is proved by affidavit or otherwise;*

- a) That any property in dispute 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/her creditors.”*

Court may grant a temporary injunction to restrain such act or make such order to prevent the damaging, alienation, sale, removal, or disposition of the property until the determination of the suit.

This provision was elaborately expounded upon in the case of ***Kiyimba Kagwa v. Katende (1985) HCB 43*** where court held that:

*“the granting of a temporary injunction is an exercise of judicial discretion, and the purpose is to preserve the matters in the status quo until the investigation of the main suit is completed.”*

Court laid out three conditions for the grant of a temporary injunction. These are:

- (i) Prima facie case.
- (ii) Irreparable injury, not adequately compensatable by an award of damages.
- (iii) Balance of convenience.

The above tests when applied to this application, it is noted that:

**1. Prima facie case:**

Though Respondents argue that there is no prima facie case, the test is whether the claim is frivolous. At this stage court does not divulge into the merits and demerits of the main cause. Court only examines if there is a serious issue to be tried at the trial.

In this case, from the pleadings already the suit land which the Respondents are allegedly surveying is being claimed as being one and same with the one being claimed by applicants. The annexures to the affidavit in support of the application show that the land dispute involves claims from parties in Kapchorwa dealing fraudulently with same parties named as being from Bulambuli and the annex, names some of the Respondents as being part of the people complained about.

With due respect to Respondent's counsel's arguments the court at this stage cannot determine whether the land is in Kapchorwa or Bulambuli. It can only find that there is an issue regarding the survey being undertaken by Respondents.

I therefore find that there is a prima facie case. The rest of the Respondents' arguments on this point are for determination by the court at the main trial, and are irrelevant at this stage.

**2. Irreparable Injury**

In the *American Cynamid v. Ethicon Ltd [1975] AC 396*, case:

*“If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial*

*position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage."*

From the evidence, it is shown by the affidavit of **Cherukut David** in paragraph 2, and 7 of his affidavit, this land is over 100 acres and the Respondents in their affidavit of **Mwebe Amuza** in reply show in paragraph 8 and 10, that they are not surveying Applicant's land but then land in Bulambuli.

They do not mention the rest of Respondents save 5<sup>th</sup>, 7<sup>th</sup> and 10<sup>th</sup>. It is clear that there is a likelihood that the claim by the Applicant is for real property which is not compensatable by an award of damages in these circumstances. Irreparable injury is therefore proved.

### **3. Balance of convenience:**

The Court has the duty to protect the interest of the parties pending the disposal of the substantive suit.

The aim of a temporary injunction is to preserve the status quo in order to prevent the ends of justice from being defeated. If granting the order results into hardship to the party against whom the order is sought then the order is not granted. (See *Elisa Musoke v. Ahmada Kezaala (1987) HCB 81*. Balance of convenience therefore tilts in favour of that party whom if the status quo is preserved does not suffer further injury.

In this case the evidence shows that Respondents (paragraph 4 of **Cherukut's** affidavit) attempted to survey and were repulsed.

This is not denied by affidavit in reply of **Mwembe Amuza**. The evidence further shows that some of the Respondents claim they are surveying elsewhere, but it is silent on the others. Clearly the balance of convenience tilts in favour of applicant. Equity helps the vigilant. If Respondents are surveying they should not survey the land which applicant points to as his, till the dispute is resolved. This court finds that the balance of convenience favours applicant.

Having found as above, I find that applicant has proved that;

1. He has prima facie case with possibility of success.
2. That if not granted the injunction he will suffer irreparable damage.
3. That the balance of convenience favours him requiring that the status quo be maintained.

For reasons above, this application is granted with costs to the applicants.

I so order.

**Henry I. Kawesa**

**JUDGE**

**12.06.2017**