

**THE REPUBLIC OF UGANDA**  
**AT THE HIGH COURT OF UGANDA AT KAMPALA**  
**[LAND DIVISION]**  
**MISC. APPLICATION NO. 0017 OF 2016**  
**ARISING FROM CIVIL SUIT NO. 009 OF 2016**

**1. ROBERT BYAMUKAMA**  
**2. CHARLES ATUHE:.....APPLICANTS**

**VERSUS**

**1. AKOTH LEONARD**  
**2. ANNE OKOTH**  
**3. OPIA NIGHT**  
**4. AMAA ROSE KALETURE**

} .....**RESPONDENTS**

**BEFORE HON. MR. JUSTICE HENRY I. KAWESA**

**RULING**

The Applicants moved this Court by chamber summons for grant of a temporary injunction against the Respondents. The application is supported by the affidavit of Robert Byamukama.

The general grounds are that the Applicants are registered proprietors of land in Block 395 Plots 732 and 733 at Sekiunga. The Respondents are owners of adjacent plots named as No.2257 and 2258 which are subdivisions of original plot 37. The Respondents, in the process of constructing on their plots have encroached on the Applicant's plots.

The Applicants aver that if the construction is not halted, they will be completely deprived of the use of their land. They pray for a temporary injunction to restrain the Defendants from any further developments on the suit land until the final disposal of the main suit.

The Respondents opposed the application and filed an affidavit in reply, sworn by Amaa Rose Kaleture. The Respondents refute all the allegations above claiming that all constructions are within their own plots. They argue that the deed plans attached to the Applicant's and Respondent's titles show that there is a road access between their plots. They therefore share no common boundary with the Applicants.

The deponent further states that the constructions are in advanced stages and the balance of convenience favours them. (*See Paragraphs 11, 12, 17 and 24*). During the hearing, the parties addressed Court orally through their respective Counsel.

Counsel for the Applicants, relying on the affidavit in support argued that it is properly shown that there is a *prima facie case* given the history of the demarcation of these plots. He argued that the encroachment by the Respondents on the Applicant's plot will occasion damage to the Applicants and that the constructions undertaken are of a permanent nature and will cause undue expense. He further argued that the balance of convenience favours them, in that the construction be stayed so that the proper boundaries are established. He prayed for costs of the application.

In response, the Respondent's case is that the plots are surveyed, have titles and prepared deed plans. It is their position that they do not boarder the Applicants, but the Applicants boarder the road. They argue that their constructions are completed and are within their own boundaries. They referred to annexures A, D, D1 and D2 to argue that their developments are in advanced stages and the balance of convenience favours them. They further argue that the Applicants have no *prima facie case* against them. They also argue that in case there is encroachment, the Applicants can be adequately compensated by an award of damages; yet it is the Respondents who have incurred loss by way of money utilised to construct before the interim order. They prayed that the application be rejected with costs.

In rejoinder, Counsel for the Applicants disputed the facts as alluded by the Respondent, insisting that the construction is not completed. He argues that there is no amount of compensation to be envisaged as the matter hinges on land. He re-echoed his earlier prayers.

From the above discourse, I do hold as follows:

For every party who comes to Court seeking injunctive relief, the burden is on him to prove that;

- i) He/she has a *prima facie case* with a possibility of success,
- ii) That he/she will suffer irreparable injury which would not be adequately compensated by an award of damages
- iii) That the balance of convenience tilts in his favour.

**a) Prima facie case**

The above principles were settled as paramount in the case of **Kiyimba Kagwa versus Katende [1985] HCB 43**

Applying the above tests to this case, I do find that while the Applicant alludes to the facts of trespass as alleged in his affidavit in support of the application, the Respondents have opposed all the facts and set up in the affidavit of Amaa Rose in reply, another set of facts to the contrary. The affidavit of Amaa Rose states that the Respondents are constructing on their own side of their plots.

They deny all the alleged boundary disputes and have provided evidence in support of their claim contained in annexures A, B, 'C' and 'D'. The documents attached show that the Applicant's claim is grossly rebutted. The standard of proof is on he who alleges a fact to prove it per section 101, 102 & 103 of the Evidence Act. This means that the Applicant has not successfully rebutted the Respondents averments above to prove the existence of a *prima facie case*.

**B. Irreparable damage**

The evidence before Court, is as shown by the Respondents on their attachments. There is no evidence attached to the Applicant's application to show the extent of the alleged trespass by way of construction. Arising from the evidence, it is shown that the Respondents are in advanced stages of building.

The law is that;

*‘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’ per **American Cyanamid versus Ethicon Limited [1975] AC 396**’.*

The parties in this case have all agreed that it is the Respondent’s buildings which are on the part of the land being claimed by the Applicants. If by the end of the case they are found to be in trespass, then it is them (Respondents) who would suffer in case a demolition is ordered.

On the other hand, the Applicants would be compensated by an award of damages for the loss and trespass occasioned by the Respondents thereon. This test therefore disentitles the Applicants to the grant of an injunction as damages would suffice to remedy the mischief envisaged.

**C. Balance of convenience**

As already discussed above, the balance of convenience favours the Respondents who have shown that they are in possession and have reached advanced levels of constructions. This is a case where any injunction would hurt the Respondents more from any side of the outcome.

If granted, their investment (construction) would be damaged, hence they would suffer loss. If not granted, they still bear the risk of paying damages to the Applicants in case they lose the case among other reliefs including demolition. The balance therefore favours them.

For all reasons stated above, I find that the application has no merit.

It is dismissed with costs in the main cause.

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Henry I Kawesa

JUDGE

17/1/2018

17/1/2018

John Mike Musisi for the Applicants/Plaintiffs

Robert Ojambo for the Respondent/Defendant

4<sup>th</sup> Defendant/Respondent present.

1<sup>st</sup> Applicant present.

Court: Ruling delivered to the parties as above.

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Henry I Kawesa

JUDGE

17/1/2018 \_