

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.1304 OF 2020

(ARISING OUT OF HIGH COURT CIVIL SUIT NO.709 OF 2020)

MUGUMYA BRIAN (*suing as the Administrator of the Estate of the Late Regina Katahirima*):::APPLICANTS

VERSUS

- 1. DEOX TIBEINGANA**
- 2. FRANCIS MUTABAZI**
- 3. GIDEON KIRUMIRA KABUYE**
- 4. THOMAS TAYEBWA**
- 5. KAMPALA CAPITAL CITY AUTHORITY**
- 6. ATTORNEY GENERAL**
- 7. COMMISSIONER LAND REGISTRATION:::RESPONDENTS**

Before: Lady Justice Alexandra Nkonge Rugadya.

RULING.

Introduction:

This application is made under the provisions of **O. 41 rules 1 & 9 of The Civil Procedure Rules S.I 71-1, Section 98 of The Civil Procedure Act Cap 71 and section 33 of the Judicature Act Cap.13**, seeking a temporary injunction to restrain the 1st, 2nd, 3rd and 4th respondents from further transferring condominium titles, disposing off or in any other manner dealing or construction and causing any developments on land formerly comprised in

plot 8 LRV 4036 Folio 17 now **plot 8 Chwa II Close**, until final disposal of the main suit.

The application also seeks an order restraining the 1st, 2nd, 3rd and 4th respondents from evicting the applicant, his caretakers, agents and employees from the building situate on the suit land, until final determination of the main suit.

Grounds of the application:

The grounds of this application are set out in the accompanying affidavit sworn by the applicant, Mr. Mugumya Brian on 18th September, 2020. Briefly, that the applicant is the administrator of the estate of the late Regina Katahirima, who is the registered proprietor of land formerly comprised in **Plot 8 LRV 4036 Folio 17** now **Plot 8 Chwa II Close** (*hereinafter referred to as 'the suit land'*).

That the late Regina Katahirima and the 1st respondent agreed that the 1st respondent was to develop the suit land with 12 condominium units and that the 1st respondent however breached the said contract/memorandum of understanding as he failed to fully perform his contractual obligations.

That the 1st respondent, well aware of the alleged breach, created condominium certificates of title under **Condominium Plan No. KCCA000183** on the suit land, on which there are no finished condominium structures, and transferred the same to the 2nd, 3rd and 4th respondents.

He further contends that the 1st respondent has refused to pay rental fees as agreed in the memorandum of understanding and that the applicant's interest and that of the beneficiaries of the estate of the late Regina Katahirima in the suit land is threatened by further dealings, transfers and sale by the 1st respondent who is already in breach of the memorandum of understanding between him and the deceased.

That if a temporary injunction is not granted, the applicant and his siblings will suffer irreparable damage as they are under eminent risk of being evicted by the 1st, 2nd, 3rd and 4th respondents which would render the main suit nugatory.

Further that the balance of convenience tilts in his favour since he is in physical possession and use of the suit property as the administrator of the late Regina Katahirima and as one of the beneficiaries of the same.

The 1st and 4th respondents filed their respective replies. The 6th and the 7th respondents, respectively the Attorney General and the Commissioner, Land Registration who were sued as nominal defendants did not file any affidavit in reply.

They however raised a number of objections, the main gist of which was that the applicant had no cause of action against them and that the application was an abuse of court process aimed at protecting illegalities and it would therefore be unjust to condemn them in costs when orders sought did not directly affect them.

The 4th respondent filed his reply and submissions in rejoinder jointly with the 2nd respondent who had not however filed any response to the application. The two raised two preliminary points of law, contending that the applicant had no locus *standii* to file this application, which application to them was aimed at protecting an illegality.

This court also duly noted that on 23rd October, 2020, the 1st and the 4th respondent had also filed an application: **MA No. 1531 of 2020**, now pending before another judge.

In that application they sought to strike out **MA No. 1304 of 2020** (the present application) challenging the alleged illegal occupation of the suit property by the applicant.

From the record I could not establish whether or not **MA No. 1531 of 2020** was served to the intended respondents therein. But what is clear is that the issues of illegal occupation that had been raised in that application were already brought to the attention of this court through the preliminary objections raised by the 2nd and 4th respondents' submissions in this very application which they had sought to strike out.

The 3rd respondent on his part did not show interest in this application. Court also noted that the matters raised in this application did not affect the 6th and the 7th respondents. They did not file any response but instead filed submissions, and as correctly pointed out by them the applicant had no cause of action against the two.

Objections by the applicant:

The applicant on his part also requested this court to reject all points of law brought out in submissions by the 2nd, 6th and 7th respondents who had not filed affidavits in reply.

To the applicant, this was a total departure from the pleadings, an afterthought and a ploy by the respondents to engage themselves in a fishing expedition.

That the system of pleadings operates to define and deliver with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which court will be called upon to adjudicate between them.

Chhoy

It thus serves a double purpose of informing each party what will govern the interlocutory proceedings before the trial and what issues court will determine at the trial. (***Interfreight Forwarders (U) Ltd vs EADB, SCCA No.33 of 1992.***).

The 2nd and 4th respondent however disagreed with that position, relying on the decision made in the case of ***Ndaula Ronald vs Haji Nadduli Abdul, Election Petition No. 20 of 2006***, which decision this court finds instructive.

Order 6 rule 28 of the CPR is clear that a party is entitled to raise a point of law by his/her pleading. These can be raised at any time or at any stage of the proceedings, with or without prior knowledge of the parties. (***Ndaula Ronald vs Haji Nadduli Abdul, (supra)***).

In ***Nelson Sande Ndugo vs Electoral Commission, HCCS No. 4 of 2016***, it was held that a preliminary objection ought to be raised at the earliest opportunity, as the determination of the same might have the effect of disposing of the same when brought at a later stage. Thus where it appears that the intention to raise a preliminary objection has been pleaded, the party raising it is at liberty to raise it at any time.

Therefore the argument that it is a departure from the pleadings or that there was no pleading to that effect is unsustainable. This court is enjoined to try the points of laws raised, regardless of whether pleaded or not, made orally or as in this case, by way of submissions. That therefore puts to rest the objection by the applicant.

Objections raised by the 2nd and 4th respondents:

- a) **Whether or not the applicant had locus standii to file the application:**

Chabanga

The 4th respondent, Mr. Thomas Tayebwa in his affidavit in reply contended that this application was an abuse of court process since the applicant lacked interest in the suit property.

That he is the current registered proprietor of the condominium property comprised in **LRV KCCA 359 FOLIO 3 Unit 1 plot 8 and LRV KCCA 359 FOLIO 6 Unit 4 plot 8 Block Chwa II Road, Nakawa Division**, having purchased the same from the 1st respondent on 8th April, 2019, at a consideration of **Ugx. Shs. 400,000,000/= (four hundred million shillings only)** each.

He thereafter took possession of the suit land without any third party claims. However that around September, 2020 the applicant invaded the site and chased away all the workers and took possession of his units.

Citing **section 59 of the RTA**, the 2nd and 4th respondents' submissions were that a certificate of title is conclusive evidence of proof of ownership.

That the suit land comprised in **LRV 4036 folio 17 plot 8, Chwa II Close, Kampala** which had been jointly owned by the late Katahirima Regina and Muramuzi Bartholomew was transferred to 1st respondent and later to the 4th respondent. That upon her death her interest in the land ceased to exist and accordingly, the applicant had no *locus standii* to file this application.

The respondents cited **section 56 of the RTA** which provides that *two or more persons who are registered as joint proprietors of the land shall be entitled to the land as joint tenants; and in all cases where two or more persons are entitled to undivided shares in any land those persons shall in the absence of any evidence to the contrary be presumed to hold that land in equal shares.*

That one of the cardinal principles of joint tenancy is the principle of joint tenancy is the principle of survivorship, which is to the effect that upon the death of one of the joint owners the property remains vested in the survivors

by right of survivorship and all interests of the deceased joint owner are extinguished.

The 4th respondent went on further to raise other matters which though pertinent, were not in my view relevant to this application as they delved directly into the merits of the main suit.

The applicant on his part, in responding to the objections raised by respondents rejected their claim that his mother was a joint owner of the suit land and raised other issues which in my view were the main gist of the contention in the head suit which he himself had filed.

Court noted some contradiction between the respondents' respective responses on the views expressed on the matter. On the one hand, the 1st respondent averred that there were some condominium titles which were still registered in the names of the deceased.

This would only imply that the applicant who is a son of the deceased, not only had beneficial interest in the property but also had a role to play as the administrator of her estate in effecting transfers.

On their part however, and in contradiction to that averment, the point raised by the 2nd and the 4th respondents was that following the demise of the applicant's mother, the applicant who had not been party to the agreement could claim no interest in the property.

In light of all the above considerations, the issue as to whether or not the applicant has the *locus* to file the application had a direct bearing on whether or not in the first place the applicant had the *locus standii* to file the main suit.

All in all, the arguments for or against that assertion which is the basis of the dispute could as well be brought out with substantial proof under the

main suit, where also serious allegations of fraud had been raised, and where any other issues of illegalities alleged to have been committed by the applicant would appropriately be addressed.

I have also carefully perused the provisions of **section 56 of the RTA** which the respondents have duly brought to my attention and which I find pertinent under the main suit.

Essentially, that section would require court to carefully analyse the evidence as presented for it to appreciate the nature of the transaction and any rights created between on the one hand, the deceased from whom the applicant claims to have derived his interest, and Mr. Bartholomew Muramuzi on the other hand who had sold the land to the 1st respondent/defendant.

An application of this nature would not fairly, fully and finally resolve the above, as such matters would go beyond the scope of what this court is mandated to do under **order 41 rule (1) of the CPR**.

Now for the merits of this application.

Order 41(1) of the CPR provides as follows:

Where in any suit it is proved by affidavit or otherwise:

a) that the property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit,;

or

b) that the defendant threatens or intends to remove or dispose of his/her property with a view to defraud his/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 dealing with the merits of this application for a temporary injunction, a 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.*

These principles can be found in such cases as ***American Cyanamide Co vs. Ethicon Limited [1975] AC 396; Geilla v Cassman Brown Co. Ltd [1973] E.A. 358*** and ***GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013.***

The main purpose for issuance of a temporary injunction order is therefore restricted to the preservation of the suit property and the maintenance of the *status quo* between parties, pending the disposal of the main suit.

From the record this court on 24th September, 2020 issued an interim order which however lapsed on 15th October, 2020. The order was extended by the then presiding judge to 19th October, 2020 when this application was to be heard.

Court made the order restraining the 1st, 2nd, 3rd and 4th respondents from evicting the applicant and their agents/caretakers and employees from occupying and possessing the suit land or in any other way interfering with the applicant's possession; and also restraining them from making any

Ambar

further transfers of the title dealings, construction or causing any development on the suit land.

The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have been well laid out as follows:

1. *The applicant has shown a prima facie case with a probability of success.*
2. *The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.*
3. *Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (see **Fellowes and Son v. Fisher [1976] 1 QB 122**).*

1. Prima facie case.

The concept of a *prima facie* case, was explained in **Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others, C.A. Civil Appeal No. 65 of 2011 [2001 – 2005] HCB 80.**

Court must be satisfied that the claim is not frivolous or vexations, and that there are serious questions to be tried.

There ought to be a triable case with serious issues to be decided by court. In the present application as stated, the controversy rotates around the estate of the late Regina Katahirima from which the applicant claims benefit.

At this preliminary stage of the trial, court may not be required to inquire into or deal with the merits of the case. It is enough to show that there is a pending suit with a possibility of success (*prima facie*), and a cause for which injunctive reliefs are invoked. (**Sec. 98 of the Civil Procedure Act and O.41 r1 of the Civil Procedure Rules**).

The applicant must also show that the said property in the suit is in danger of being wasted, damaged, alienated, wrongful sale, threat of removal or threat to dispose of the same.

The applicant in the present matter, appended to his application a copy of the letters of administration in respect of the estate of the late Regina Katihirima issued on 24th January, 2020 as **Annexure 'A'**; a copy of the memorandum of understanding between the late Regina Katahirima and Deox Tibeingana, the 1st respondent as **Annexure 'B'**; photographs of the incomplete condominium structures on the suit land as **Annexure "L"**; copies of demand notices from the late Regina Katahirima's lawyers to the 1st respondent as **annexures 'I' and 'J'** and print outs of search statements/reports from the lands department as **annexure 'S'**.

From the pleadings and submissions herein the applicant claimed that the suit land belonged to his late mother who is the registered owner of a reversionary interest and that the 1st to 4th respondents fraudulently procured or created condominium titles with forged signatures of the late Regina Katahirima in order to grab the family land.

The 1st respondent contended in his response that the construction of the premises was for sale which necessitated the creation of other titles for third parties who had already advanced their monies, which made them genuine and *bonafide* proprietors of the suit premises.

The 4th respondent also admitted that he is the current registered owner of two condominium units on the suit land, having acquired the same from the 1st respondent.

The above indicate that a *prima facie* case has been made out by the applicant. The questions to be addressed by this court concern actual ownership of the property and whether or not the applicant had any *locus* to file the head suit. Furthermore, matters concerning fraud and other illegalities alleged to have

been committed were all serious allegations, to be considered and reserved for a fully-fledged trial.

2. Irreparable damage

'Irreparable damage' has been defined by **Black's Law Dictionary, 9th Edition Page 447** to mean "damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement."

Irreparable damage is the loss that cannot be compensated for with money (see **City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000**).

In this present application, the applicant's claim is that he will suffer irreparable damage if the injunction does not issue.

The 4th respondent on his part contended that he will suffer more irreparable damage if this application is granted since his construction plans will be halted.

That he was not privy to the memorandum of understanding relied upon by the applicant. Furthermore, that the alleged trespassers to his units had no interest in the said units as he had offered them two different units of the apartments.

That he legally purchased the condominium units and that the transaction was not tainted with any fraud but also that the caveats lodged by the applicant, if any, would serve the same purpose as the prayers in this application.

That the applicant will not suffer any irreparable damage since the 4th respondent was willing and able to compensate the applicant for any damage suffered.

Alhassan

He further stated that the balance of convenience yields in his favour if this application is granted since he plans to complete the units by December, 2020 and rent them out to get revenue.

I have carefully perused and analysed all the pleadings and arguments raised by each side. This court must determine in the first place what the state of the property to be preserved was, and the nature of the damage likely to occur and the party to be affected most by the order.

The purpose of granting a temporary injunction is for preservation of the *status quo*, defining the parties' legal rights pending litigation. The court does not at this stage determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared.

Status quo' therefore means an existing state of affairs, things or circumstances during the period *immediately preceding the interlocutory application* (***Humphrey Nzei vs Bank of Uganda, CACA 001 of 2013***).

If failure to grant the injunction might compromise the applicant's ability to assert their claimed rights over the land, for example when intervening adverse claims by third parties are created, there is always a very high likelihood of occasioning a loss that cannot be compensated for with money.

In the present case, the application was filed on 21st September, 2020, three days after the suit had been filed. From the plaint, the *status quo* as established at that material time was that the applicant had lodged caveats on each of the twelve existing condominium titles created by the 1st respondent. Out of the twelve, seven of them were still registered in the names of the deceased Regina Katahirima, mother to applicant.

The 1st respondent who did not deny those assertions however maintained that the ongoing construction of the premises was intended for sale, which necessitated the creation of other titles for third parties as well as those of the applicant's late mother.

The 4th respondent in his reply claimed that around September, 2020 while he was campaigning in the NRM primaries a group of people by the applicant forcefully invaded the site and chased away the workers and took possession of his unit, a matter which the 4th respondent had reported to the police on 18th September, 2020, the full implications of which assertions will be dealt with during the main trial..

The 4th respondent attached the condominium certificate of titles as **annexures 'A1' & 'A2'**, search statement/reports from the land registry as **annexures 'B1' & 'B2'**, 1st sale agreement marked as **annexure 'C1'** and the 2nd sale agreement as **annexure 'C2'**, construction floor plans as **annexure 'D'** and a copy of summons for a meeting from the Uganda police force to the 4th respondent as **annexture 'E'**.

In rejoinder, Mr. Mugumya Brian, the applicant denied having used any force to repossess the property and maintained that the 1st to 4th respondents knowingly bought non-existent structures whose plan was never signed by the registered proprietor as required by the law and that the 1st to 4th respondents were at all times aware the suit land belonged to the applicant's late mother; was aware of the applicants' purchase of the suit land.

That the 4th respondent was not a *bonafide* purchaser of the suit land as he was fraudulent and that the *status quo* is that no construction has been commenced and that it is the *status quo* which ought to be maintained by the issue of a temporary injunction.

Taking into account the above, the reliefs being sought in this application stem from the alleged fundamental breach of contract under which cancellation of titles is sought by the applicant.

The possibility of irreparable loss has been established as a probability in the event that the property is sold, transferred, disposed of, encumbered or in any other manner alienated before the determination of the suit, which eventuality

may compromise the applicant's ability to assert his acclaimed rights over the suit premises.

Also given that there is eminent threat posed by the respondents' continued activities on the disputed land despite the caveat, this may affect the reliefs sought by the applicant and/or occasion loss which may not be atoned for by way of compensation.

Court must also strike a balance between the applicant's interests and any third parties *bonafide* interests likely to be affected by the order. Accordingly, the *status quo* to be preserved would call for maintaining the restriction as already imposed by the caveats which had been lodged onto each condominium certificate on behalf of the beneficiaries of the estate administered by the applicant.

In the premises, for purposes of preserving the *status quo*, a temporary injunction is hereby issued along the following terms:

1. *The 1st, 2nd, 3rd and 4th respondents, their agents and employees are hereby restrained from selling, or making any further transfers of the condominium titles or through any other way alienate or create encumbrances over the suit property until the final disposal of the suit.;*
2. *An order issues restraining the 1st, 2nd, 3rd and 4th respondents from constructing or making any development in respect of the seven condominium units which are still registered in the names of the late Regina Katahirima, until further orders are issued by this court;*
3. *The applicant's shall remain in occupation of the two condominium units, until further orders have been issued by this court.*
4. **MA No. 1305 of 2020 and MA No. 1531 of 2020 are overtaken by events. Costs in the cause.**

Alexandra Nkonge Rugadya
Judge


11th November, 2020.