THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0076-2020

(Arising from ISG-036-CV-MA-059-2020)

(All arising from ISG-036-CV-CS-089-2020)

1. ATWIINE ALLAN

2. NANOZI JOSEPHINE :::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

ASIIMWE GODWIL TRACY :::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Introduction.

[1] This is an appeal from the ruling of the Magistrate Grade One sitting at the Chief Magistrate's Court of Isingiro at Isingiro against an order for a temporary injunction to restrain the Appellants from causing waste, damage, selling, cultivating, harvesting beans, maize and bananas and chasing away the Respondent's workers and continuing to cause injury to the Respondent and from alienating the suit property which was subject of ISG-036-CV-CS-089-2020 pending before that court.

Background.

[2] The background of this appeal is as follows;

Around August 2013 the Respondent and the 1st Appellant while in courtship lived together and they bore one issue. The relationship did not work out so they separated. During the pendency of the courtship, the Respondent alleges that the 1st Respondent orally gave

her land to use and develop at Ruhimbo Cell, Kamuri Ward, Isingiro Town Council, Isingiro District so that the Respondent uses it to grow crops for the family and cater for the necessities of their issue. The Respondent further alleged to have developed the said land by planting a banana plantation, a maize plantation thereon and a servant's quarters house plus a toilet. It was alleged further that in July 2018, the 1st Appellant asked the Respondent to leave the land by 31st December 2019 on grounds that he wanted to sell the land.

On **15th July 2020**, the Respondent filed in the Chief Magistrate's Court of Isingiro at Isingiro **ISG-036-CV-CS-089-2020** against the Appellants. The suit requested court for;

1. An order that the Defendants compensate the Plaintiff in the sum of UGX 18,500,000/= being the current market value for the developments on the said land with interest thereon at 24% annual interest rate from the date of judgment till payment in full.
2. An order that the Defendants pay the Plaintiff UGX 1,150,00/= in special damages as pleaded in the plaint with interest thereon of 24% from time of judgment till payment in full.
3. An order for payment of general damages with interest thereon of 24% from time of judgment till payment in full.
4. An order for costs.

On **29th July 2020**, the Respondent filed **ISG-036-CV-MA-37-2020** against the Defendants in the civil suit seeking an order of temporary injunction to restrain them from causing waste, damage, selling, cultivating, harvesting beans, maize and bananas and chasing away the Respondent's workers and continuing to cause injury to the Respondent and from alienating the suit property pending the hearing and determination **of ISG-036-CV-CS-089-2020**.

On **7th September 2020**, the application came up for hearing before the learned trial Magistrate. All parties were in court, the Applicant was unrepresented while the Respondents were represented. The record of court shows that counsel for the Respondent raised a preliminary objection in relation to the competence of the application as it sought for maintenance of the status quo of land which was not in dispute as per the pleadings since the Applicant was only claiming compensation, general damages, special damages and costs of the suit. The learned trial Magistrate dismissed the objection on grounds that it was misconceived because the Applicant sought to restrain the Respondents from causing waste and denial to the developments of the said land. The trial Magistrate proceeded and determined the application in the following terms;

> *"Ruling for temporary injunction.*
>
> *I have analysed the evidence for the Applicant and respondents in reply and both their submissions although the applicant is not seeking or claiming ownership of the land and developments but is seeking for compensation of*

the developments. I agree with counsel for the respondents that the applicant can be compensated in monetary terms as she seeks, however counsel must also consider the balance of convenience between the Applicant and Respondents.

If this application is allowed or dismissed the applicant has a child between her and the 1st respondent to take care of even the respondent was ordered to take care of the baby, the 1st respondent is not and the applicant is harvesting food for the baby.

The 1st Respondent does not have a baby to take care of and he is not, and the applicant and respondent are failing to use the developments in harmony but causing threats, I find that on the balance of convenience all the parties don't stay on the land, it was the applicant prior to filing this case in occupation of the suit land and this is not contested until the separation took place.

In the circumstances, this application is hereby allowed with costs in the main cause."

The Appellants who were the Respondents in the above application, being dissatisfied with the above order filed this appeal. The four grounds of appeal as follows: -

1. The trial Magistrate failed to appreciate that the application was incompetent and not sustainable in law

and therefore misdirected himself when he granted the application.

2. The trial Magistrate erred in law and fact when he allowed the application.
3. The trial Magistrate misdirected himself when in reaching his decision engaged in extraneous matters, fanciful reasoning and imaginations.
4. The trial Magistrate misdirected himself when in reaching his decision claimed that the suit property was land.

Representation.

[3] The Appellants were represented by M/s Bwatota Bashonga & Co. Advocates while the Respondent was represented by M/s Ngaruye Ruhindi, Spencer & Co. Advocates. both counsel filed written submissions in the matter which I have considered.

The duty of this court.

[4] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see Father Nanensio Begumisa and three others vs Eric Tiberaga SCCA 17of 2000, [2004] KALR 236). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see Lovinsa Nankya vs Nsibambi [1980] HCB 81).

In its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally. (**See** Nyero vs Olweny and Ors (Civil Appeal 50 of 2018) and Kaggwa vs Ampire (Civil Appeal 126 of 2019) **per Mubiru J.**)

I shall be guided by the above legal principles in determining the instant appeal by first and foremost re-evaluating the evidence on the court record in **ISG-036-CV-MA-37-2020** vis-à-vis the law on temporary injunctions.

Analysis and decision.

[5] Counsel for the Appellants argued grounds 1 and 2 together and grounds 3 and 4 together. I shall resolve this appeal in the same format.

Ground 1: The trial Magistrate failed to appreciate that the application was incompetent and not sustainable at law and therefore misdirected himself when he granted the application.

Counsel for the Appellants relied on **Order 41 rules 1(a) and (b)** of the Civil Procedure Rules and submitted that the Respondent did not in any way dispute ownership of property by the Appellants of which she

made developments thereon and neither is she a creditor against the Appellants. That she acknowledges in her plaint and affidavit in support of her application for a temporary injunction that the Appellants are the owners of the land on which she claims or alleges to have some developments for which she was claiming compensation. That in granting the application, learned trial Magistrate failed to appreciate the principles for grant of an injunction laid out under **Order 41 rules 1(a) and (b)** of the Civil Procedure Rules.

In reply, counsel for the Respondent submitted that counsel for the Appellant's reasoning was faulty. That it was an elementary principle of law that whatever is affixed to the land is part of the land. That what was in dispute were the developments on the land and once they were destroyed the court would be impaired in assessing what compensation to be awarded if what was to be compensated for would be no more. That the court acted with justice when it ordered that the developments should not be tampered with until the court had looked at those developments to enable it effectively and fairly determine whether indeed those developments existed and if so, how much would reasonably be the value therefore to enable the court reach a fair decision as regards the compensation to be awarded. Counsel agreed that it was true that the court did not appreciate the principles for granting a temporary injunction but in granting it acted fairly with judicial discretion which this court ought not to interfere with since the purpose was to preserve the status quo until the court had seen what was in dispute before it finally resolved the dispute which any other reasonable court placed in a similar situation would do.

[6] The aim of a temporary injunction has been held by this court as primarily to maintain the status quo of the subject matter of the dispute pending the final determination of the rights of the parties in order to prevent the ends of justice from being defeated. (**See** Daniel Mukwaya vs Administrator General HCCS no. 630 of 1993; Erisa Rainbow Musoke vs Ahamada Kezala [1987] HCB 81 and Farida Nantale vs Attorney General & 5 ors Misc. Application no. 230 of 2013).

I am in agreement with counsel for the Respondent's submission that the grant of a temporary injunction is an exercise of judicial discretion. I am buttressed in this finding by the decision of the then Court of Appeal in Geilla vs Cassaman Brown & Co. Ltd [1973] 1 EA 358 where it was held inter alia that;

> *"First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it is shown that the discretion has not been exercised judicially."*

Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular. (**See** R vs Wilkes (1770) 4 Burr 2527 per Lord Mansfield).
Discretion must be exercised according to common sense and according to justice. (**See** Gardner vs Jay (1885) 29 Ch 50 per Bowen L.J and the

Supreme Court of India decision in Parimal vs Veena alias Bhart (2011) 3 SCC 345).

Discretion in relation to a temporary injunction may only be said to have been judiciously exercised if the court appreciated the facts and applied those facts to the principles governing issuance of temporary injunctions. (See ER Investment Ltd vs Tanzania Development Finance Co. Ltd and another (1) [1999] EA 75).

The conditions for grant of a temporary injunction are now settled. Before the court grants such a remedy, three conditions must be satisfied; firstly, that there must be a serious question to be tried on the facts alleged and a probability that the Plaintiff will be entitled to the relief prayed; second, that the court's interference is necessary to protect the Plaintiff from the kind of injury which may be irreparable before his legal right is established; third, that on a balance of convenience, there will be greater hardship and mischief suffered by the Plaintiff from the withholding of the injunction than will be suffered by the Defendant from the granting of it. (See Tanzania Breweries Ltd vs Kibo Breweries Ltd and another [1999] 1 EA 341 and East African Industries vs Trufoods, [1972] EA 420).

On evaluating **ISG-036-CV-MA-37-2020** to ascertain whether it satisfied the above conditions;

Whether the Applicant in ISG-036-CV-MA-37-2020 had a prima facie case with likelihood of success.

[7] The burden lies on the Applicant to show court that there exists a prima facie case before it with a likelihood that it will succeed. The Applicant only needs to show that there exists a serious question to be tried and that the suit is not vexatious or frivolous. (**See** Alley Route Ltd vs UDB Ltd Misc. Appn. No, 634 of 2006). The extent of proof in establishing a prima facie case has been held to be a tricky one. (**See** Tanzania Breweries Ltd vs Kibo Breweries Ltd and another [1999] 1 EA 341). This is so because at this point of the suit, no evidence has yet been led by the parties. The court is cautioned to tread lightly while considering whether a prima facie case has been established lest it be condemned for prejudging the main suit before hearing.

[8] A temporary injunction relating to land can only be granted where the Applicant has an interest in the land or on the basis that the Respondent has threatened to dispose of the property in circumstances that could delay execution of any decree that would be passed against them. (**See** Agip (K) Ltd vs Vora [2000] 2 EA 285).

have carefully examined the **ISG-036-CV-MA-37-2020** specifically the affidavit in support. The Applicant therein, in her unchallenged averments deposed that she had made developments on the suit land worth UGX 18,500,000/= for which she required compensation from the Respondents therein. This in my view is an interest in the suit land which if proved in the head suit, would entitle the Applicant to the remedies she seeks therein.

I find that the applicant satisfied the first condition.

Whether the Applicant would suffer irreparable damage if the application was not granted.

[9] Irreparable damage has been defined as loss that cannot be compensated by an award of damages should the Applicant or Plaintiff be successful in the main suit. (**See** American Cyanamid Co. vs Ethicon Ltd [1975] UKHL 1)).

The Applicant's now Respondent's case was for compensation of the developments she made on the land which she quantified at UGX 18,500,000/=. It therefore follows that if any loss was occasioned to those developments, a sum of UGX 18,500,000/= as she sought would be adequate to her in the head suit.

The application would therefore not have succeeded on this condition.

On whom does the balance of convenience lay?

[10] According to the record of proceedings, the learned trial Magistrate based his ruling solely on the above last condition to grant the injunction.

It is now settled that *"…it is only where there is doubt as to the adequacy of the respective remedies in damages available to either party or both, that the question of balance of convenience arises. See American Cynamid Co vs Ethicon Ltd. It is only where the court is in doubt as to whether there is a prima facie case or irreparable damage that it resorts to determining the case on a balance of convenience. This*

is the holding in Alley Route Ltd vs Uganda Development Bank Ltd (supra)." This is per Justice Jeanne Rwakakooko in **Mandatally Allibhai Popat vs Master Managers & Traders Limited Civil Appeal No. 13 of 2021 (commercial Division)**.

[11] As earlier discussed, there is no doubt that the Applicant/Respondent's suit exhibited a prima facie case, **ISG-036-CV-MA-37-2020.** However, the Applicant failed to establish that the Applicant would suffer irreparable damage if it was not granted.
The learned trial Magistrate's consideration of where the balance of convenience lay was in my view not misconceived given the facts before him.
Other requirements that a court may look into before grant of an injunction of the instant nature are; (i) whether the case is so clear and free from objection on equitable grounds that the court ought to interfere to preserve property without waiting for the right to be finally established; and (ii) whether there has been a delay and the Applicant has come with clean hands. (**See ER Investment Ltd vs Tanzania Development Finance Co. Ltd and another (1) (supra)**.

[12] Given the peculiar nature of the main suit and facts surrounding it which concerned developments on the suit land which the Applicant required to preserve as; first of all as potential evidence in the main suit and secondly as a source of livelihood owing to the fact that the Applicant had a child to take care of and was using the same to fend for her child yet the Respondents were destroying, cultivating and

harvesting it without letting her access it, I am in agreement with the learned trial Magistrate's finding, as on whom the balance of convenience lay; this was the Applicant. There was a need to protect the Applicant by way of a temporary injunction. (**See also generally** American Cyanamid Co. vs Ethicon Ltd [1975] UKHL 1 per Diplock LJ). The trial Magistrate was in my view duty bound, in the interest of justice as he did to step in and preserve the property without waiting for the Applicant's rights to be finally established in the head suit.

[13] From the above evaluation I conclude that the Applicant in **ISG-036-CV-MA-37-2020** has established that she was entitled to a remedy of a temporary injunction. This finding resolves the remaining grounds of this appeal.

This appeal therefore fails and the order of the learned trial Magistrate ISG-036-CV-MA-37-2020 is upheld.

The costs of this appeal shall abide the outcome of the main cause.

The file **CS-089-2020** is to immediately be forwarded back to the trial court at Chief Magistrate's Court of Isingiro for expeditious hearing.

Dated, delivered and signed at Mbarara this 31st day of August 2023.

Joyce Kavuma
Judge