

VERSUS

Before:

Panelists:

1. Hon. Adrine Namara,
2. Hon. Susan Nabirye &
3. Hon. Michael Matovu.

1. Mr. Geoffrey Balondemu of Branmark Advocates for the Applicant.
2. Mr. Ferdinand Musimenta of S & L Advocates for the Respondent.

Introduction

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Respondents from dealing with the subject property until his application for a temporary injunction is heard and disposed of.

- [2] Mr. Allan Waniale, Advocate, filed an affidavit in reply on behalf of the Respondent Bank. He deposed to the Applicant's abuse of the administrative injunction issued by the Commercial Division of the High Court from 2019 until he withdrew the application in December 2022. It was also deposed that the Applicant had vacated the property and handed over vacant possession to the Respondent. Mr. Waniale avers that the application is intended to frustrate the Bank's efforts to recover the borrowed funds.
- [3] Counsel made oral arguments and were also invited to file skeletal arguments with necessary authorities. The Court thanks Counsel for the succinct arguments and clear presentation.

Preliminaries

- [4] For starters, the Applicant raised three preliminary points of law;
- [4.1] Firstly, citing the case of **Mugoya Construction Ltd v. Central Electricals Ltd H.C.M.A No. 699 of 2011** for the proposition that Mr. Waniale swore an affidavit that did not disclose the means of his knowledge as required by Order 19 rule 3(1) of the Civil Procedure Rules S.I 71-1 (*from now CPR*). This offended Section 59 of the Evidence Act Cap. 6. Mr. Balondemu also cited the case of **Banco Arabe Espanol v Bank of Uganda SCCA No. 8 of 1998** and **Micro Credit for Development and Transformation Cooperative Savings and Credit Society v Semanda Edward H.C.M.A No. 101 of 2021** in support of this contention.
- [4.2] Secondly, Mr. Waniale's affidavit offended Rule 9 of the Advocates (Professional Conduct) Regulations S.I 267-2, which forbids an Advocate from giving evidence in contentious matters. In addition to the Banco Arabe case (*supra*), Counsel cited the case of **Simon Tendo Kabenge Advocates v Mineral Access Systems (U) Ltd**.
- [4.3] Finally, the affidavit did not disclose a reasonable answer to the application. For this, Counsel relied on Order 6 Rule 30CPR and the case of **Prof. Oloka Onyango & Ors v Attorney General (Constitutional Petition No. 6 of 2014)** and **MHK Engineers Ltd v Macdowell Ltd HCMA 825 of 2018** for the proposition that failure to rebut a fact specifically traversed in an affidavit amounts to an admission.

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- [5] In reply, Mr. Musimenta argued that Order 3 Rule 1 CPR permitted Advocates to swear affidavits and that Mr. Waniale was not in Court. He cited the case of **C.A.C.A No. 168 of 2012 Kanyarugu v Hon Namara Grace** for the proposition that Counsel for the applicant had come to the knowledge as Counsel.
- [6] In rejoinder on the preliminary point, Mr. Balondemu reiterated his earlier arguments.

Resolution of preliminary points

Defective affidavit.

- [7] Mr. Waniale swore the affidavit in reply on instructions to depone the same on behalf of the Respondent. He was deposed to have represented the Respondent in the reference before this Court and in the suit before the Commercial Court. As a starting point, we do not agree with Mr. Balondemu's argument that Mr. Waniale does not disclose the means of his knowledge. Our reading of the affidavit is that he does so and in a very clear averment in paragraph 1, where he deposes to represent the Respondent as Counsel. He also deposes that he has instructions from the Respondent to make the affidavit. The Applicant cited the case of *Banco Arabe Espanol*. In that case, Counsel for Respondent swore an affidavit dispelling technical matters regarding difficulties transferring money between Uganda and Spain. The Court found these not to be in the knowledge of Counsel unless he was well armed with the relevant source.
- [8] However, in **Mbarara Municipal Council v Jetha Brothers**,¹ a similar objection was raised where both the *Banco Arabe Case* and Regulation 9 of the Professional Conduct Regulation were said to have been breached. The Honourable Justice Ezekiel Muhanguzi JSC held that anyone could swear affidavits to prove a set of facts, and an advocate is not an exception. An Advocate is, therefore, not prohibited to swear an affidavit where necessary, especially on matters that are well within their knowledge. It would seem to us, therefore, that modern precedent suggests a more liberal approach to affidavit evidence by Advocate. In **Niko Insurance Ltd v Southern Union Insurance Brokers Ltd & 4 Others**² Madrama J. (*as he then was*) considered the provisions of Order 19 R 3 CPR and held that the rule required affidavits to be confined to matters within the deponent's knowledge. In the case before us, we hold that Mr. Waniale states that he has instructions to make the affidavit and makes the same of his knowledge. Further,

¹ S.C.M.A No. 10 of 2021

² H.C.M.A 817 of 2016

he did not appear as Counsel in the application. We would therefore overrule the objection.

- [9] The second limb of the objection is that it offended Rule 9 of the Advocates Professional Conduct Regulations. The rule bars an Advocate from appearing in a matter that he would be required to give evidence or cease to appear should it become apparent that they will be required to provide evidence. Mr. Balondemu argues that the matters before this Court are contentious and relate to unlawful dismissal and ensuing liabilities. Counsel submitted that this matter was on all fours with the Banco Arabe and Simon Tendo Kabenge cases. In the Banco Arabe case, we have, in paragraph 7 above, stated the facts relating to the transfer of monies from Spain to Uganda. In the Simon Tendo Kabenge case, the objection about averments was on payment of court fees. Kiryabwire J.(as he then was) observed that the deposing counsel did not state that her client authorized her to depose the affidavit on behalf of her client. The significant variance is that in the present case, Mr. Waniale indicates that he is instructed to depone the affidavit at paragraph 2 of the affidavit in reply, which would fall within the meaning of Order 3 Rule 1 CPR. Wamala J. canvassed this point in **MHK Engineering v Macdowell Ltd**,³ where his Lordship found that swearing of an affidavit can be categorized as an act in any court required or authorized by the law to be made by a party in such court and may be made or done by the party in person, or by their recognized agent, or by advocate duly appointed to act on their behalf. It is our view, duly appointed and instructed, that Mr. Waniale could swear the affidavit, and as such, the objection would be overruled.
- [10] The final ambit of the objection is that it did not disclose a reasonable answer to the application. The application, as we understand it, is an application for an interim injunction restraining the Respondent from selling, alienating, or dealing with the subject property until the main application is heard and disposed of. The grounds of the application were summarized in the motion. For clarity, the grounds were a pending main claim, a pending substantive application, a serious threat of sale before hearing of the main application, a risk of substantial irreparable loss, and that it was just, fair, and equitable that an interim order be granted. In the reply, the Respondent averred to the filing of an action at the Commercial Court, out of which an interim administrative injunction was issued. It was deposed of abuse of the said order, refusal to prosecute the primary cause at the Commercial Court, handing over the vacant possession of the subject property, and forum shopping, among other things. Put against each other; the respective contentions invite various questions for determination in the application before us. The

³ H.C.M.A No 825 of 2018

material question of the status quo arises from the averment of vacant possession. In this purview, we do not think there is any implied admission, as Mr. Balondemu would have us believe, and we would overrule the objection.

Submissions on the merits of the application

- [11] Mr. Balondemu stated the conditions for a grant of an interim injunction to be whether there is a substantive pending application and a serious threat of execution before the hearing of a substantive pending application. He cited the cases of **Hon. T. Ssekikubo & 3 Ors v A.G and Others Constitutional Application No 04 of 2014** and **Alcon International v New Vision Newspaper S.C.C.A no 04 of 2010**. On the first test, Learned Counsel referred the Court to Labour Reference No. 196 of 2021. On the second test, Counsel pointed to paragraph 15 of the affidavit in support and the notice of sale and advert of sale. He argued that a sale was not the same as foreclosure. The Respondent had not gained title nor sold the suit property, and there was no evidence of a sale. Counsel cited the case of **Progressive Group of Schools Ltd & 2 Others v Absa Bank (U) Ltd & Another C.A.C.A No 349 of 2020**, where the Court rejected the existence of a mortgage where a mortgage deed was not adduced in Court. Counsel closed his submissions by suggesting that the status quo was that the Applicant was still the Registered Proprietor of the suit property.
- [12] Mr. Musimenta stated that the suit property had been sold. The Applicant had handed over vacant possession, so there was nothing to injunct. Learned Counsel submitted that the Applicant had previously filed H.C.C.S No. 719 of 2019 and H.C.M.A No. 1097 of 2019 at the Commercial Court, where he sought similar orders. He withdrew the application after being informed of Regulation 13 of the Mortgage Regulations. As such, he was guilty of forum shopping. He relied on **M.A 21 of 2022 Male Mabirizi v A.G, H.C Crim Rev 002/2018, Uganda v Hon Kassiano Wadri & 31 Ors** and **Co. Cause No. 142 of 2017 Chemical Distributors (U) Ltd v Byaruhanga Silver**.
- [13] From the pleadings and submissions of the parties, the short question for determination is whether the Applicant has satisfied the conditions for a grant of an interim order. These conditions or the threshold is relatively well settled.
- (i) In the case of **ABSA Bank Uganda Ltd & 2 Others v Electro-Maxx L (U) Ltd and Another**,⁴ the Honourable Mr. Justice Boniface Wamala pointed out that the law on injunctive reliefs is clear. An order of an injunction is

⁴ H.C.M.A No. 241 of 2020 [2020] UG CommC 6

intended to preserve the status quo until the Court resolves all matters.⁵ This would be the first test.

- (ii) The second test, under Order 50 Rule 3A(3) of the Civil Procedure(Amendment) Rules, 2019, is that an interim order may only be granted where there is a pending substantive application.

[14] On status quo, it was submitted that the Applicant is the registered proprietor of the suit property but not in possession of the premises. Mr. Musimenta suggested that the property had been sold. In Mr. Balondemu's view, this was evidence from the bar and the Applicant attached a photocopy of the certificate of title to the supporting affidavit. It was marked Annexure "E" and bore the Applicant's name as proprietor. Of the two accounts regarding property ownership, we would find the Applicant's account believable on the balance of probabilities. There was no evidence to rebut the presumption that the Applicant is the registered proprietor of the subject property. No sale agreement or deed of transfer was produced before us. In keeping with Section 52 of the Registration of Titles Act Cap. 230, we would be inclined to the view that the property is vacant albeit registered in the Applicant's name.

[15] It was contended for the Respondent that the intended order sought did not include a restraint from transfer. The order reads as follows:

'An interim order of injunction do issue restraining the Respondents, servants, Workmen/women assignees or anyone acting under their direction or authority or anyone claiming under or through them from selling, alienating and/or dealing with the Applicant's suit property comprised in _____ until the determination of miscellaneous application number _____ of 2023 for a temporary injunction which is pending before this court'

According to **Black's Law Dictionary**⁶ the expression '*alienate*' means to transfer or convey (property or a property right) to another. Because the drafting berth of this intended order is extensive, the Applicant's assertion of omission of transfer would be very mislaid. It is, therefore, practicable to injunct the transfer of the suit property until the disposal of the substantive application. We would thus find that the status quo is that the Applicant is the registered holder of the title and that he sought an order of restraint, including transfer of the property at the registry.

⁵ Kiyimba Kaggwa v Katende(Supra)

⁶ Black's Law Dictionary, 11th Edition Bryan A. Garner, Thomson Reuters at page 91

- [16] Regarding the existence of a substantive application, this application arises out of Labour Dispute Miscellaneous Application No. 48 of 2023, which is an application for a temporary injunction over the suit property pending the hearing and determination of Labour Reference No. 196 of 2021. On the 8th day of June 2023, this Court issued filing directives for submissions in that application, which is set for ruling on the 14th of July 2023. In the circumstances, we are satisfied that there is a pending application. This position would be consistent with the Supreme Court's dicta in the case of **Alcon International Ltd v The New Vision Printing and Publishing Co Ltd and Another**.⁷ In this decision, the Supreme Court held that a court hearing an application for interim relief must be satisfied that there is a pending substantive application. See also **Hwang Sung Industries Ltd v Tajdin Hussein**.⁸ We determine that a grant of temporary relief in the present case is in the interests of the true purpose of injunctive orders, which is to preserve the status quo pending the resolution of central issues.
- [17] Before taking leave of this matter, Mr. Musimenta raised concerns about foreclosure and forum shopping. Our resolution on the status quo issue will address foreclosure for now. However, on forum shopping, we agree with Mr. Musimenta's assertion that it is a practice that the Courts abhor. Judicial time is not well utilized where a party or parties skip from Court to Court in a bid to find what might be an advantageous venue. A suit was filed in the commercial division in 2019. It was not prosecuted. The labour reference was filed in 2021, and this application was only filed in April 2023. Annexure F to the Applicant's affidavit in support was a letter to the labour officer on a complaint of unlawful dismissal. Annexure H relates to a memorandum of claim by the Applicant against the Respondent in Labour Reference No. 196 of 2020 filed in this Court. At the same time, annexure "A" to Mr. Waniala's affidavit in reply is an amended plaint seeking a declaration on indebtedness, a restraint order, general damages, interest, and costs. To the extent that the suit in the commercial court did not attach or relate to the labour dispute, we would not find a case of forum shopping. In the case of **Engineer John Eric Mugenyi v. Uganda Electricity Generation Company Ltd**,⁹ the Court of Appeal found it disturbing that litigants should be uncertain about which forum to file an action in. The Industrial Court is a special court to handle labour disputes and claims under any other law. This would entail matters relating to salary loans and, as has been held in other matters, defamation arising from the employment relationship.¹⁰ In our view and in keeping with the Court of Appeal

⁷ Supreme Court Civil Application No. 4 of 2010) [2010] UGSC 34 (30 June 2010)

⁸ S.C.C.A No. 19 of 2008

⁹ C.A.C.A 167 of 2018

¹⁰ LDR 335 of 2017 Mutono Lauben v Kampala International University



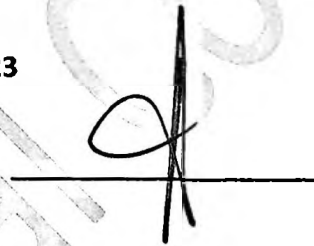
dicta in the Mugenyi case, matters ancillary to, arising from, or relating to the employment relationship should be consolidated into the employment dispute. The Court and litigants' time ought to be efficiently utilized.

Final Decision and Orders of the Court

- [18] Considering that we have overruled the preliminary points of law and found that the Applicant has met the threshold, this application succeeds. An interim order of injunction hereby issues the Respondents, servants, Workmen/women assignees, or anyone acting under their direction or authority or anyone claiming under or through them from selling, alienating, and/or dealing with the Applicant's suit property comprised in Block 392 Plot 984, Sekiwunga Busiro, Wakiso District until the determination of miscellaneous application number 048 of 2023 for a temporary injunction which is pending before this court. There shall be no order as to costs.

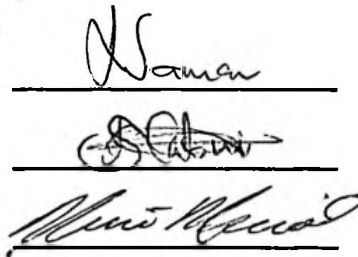
It is so ordered this 27th day of June 2023

Anthony Wabwire Musana,
Judge, Industrial Court



The Panelists Agree:

1. Hon. Adrine Namara,
2. Hon. Susan Nabirye &
3. Hon. Michael Matovu.



Ruling delivered in chambers on 27th June 2023 at 2:00 p.m in the presence of:

1. The Applicant is absent: None
2. For the Respondent: Mr. Ferdinand Musimenta

Court Clerk: Mr. Samuel Mukiza.

Sylvia Nabbagala Mbuga,
Registrar, Industrial Court