

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO.745 OF 2007
(Arising from C.S. No.489 of 2007)

1. **TIM KABAZA**)
2. **DOMINIC ENJIKU**) :.....: **APPLICANT**
3. **TOM O. ORECH**)

VERSUS

CHATHA INVESTMENTS LTD :.....: **RESPONDENT**

BEFORE: HON. JUSTICE RUBBY AWERI OPIO

RULING

The application was brought by Chamber Summons under order 41 rules 1 and 9 of the Civil Procedure rules and Section 98 of the Civil Procedure Act. The Application was for orders that:

- (i) A temporary injunction be issued against the Respondent restraining it from erecting a perimeter fencing of LRV 3437 Folio 1 and LRV 3437 Folio 2 until the determination of the main suit;

- (ii) The costs of the application be provided for.

The grounds for the application were contained in the affidavits of Mr. Katongole and that of Tim Kabanza. The grounds were briefly that:-

- (a) The Respondent was about to commit an act of public nuisance by fencing off the property comprised in LRV 3437 Folio 1 and LRV 3437 Folio 2 which was in a road reserve and which house septic tanks connected to the sewerage system for the use of the residents of Kyambogo Lower Estate.

- (b) The Applicants have filed a suit in the High Court to stop any development which would cause a perimeter fencing of the suit property which suit was still pending in court.
- (c) It would be just and equitable that the Respondent is stopped from erecting a perimeter fencing on the suit property pending the determination of the substantive suit.

The application was opposed by the Respondent by way of three affidavits, the 1st and 2nd sworn by the Respondent's Managing Director and the 3rd one sworn by a local resident of the area.

During the hearing the Applicants were represented by Mr. Kibuka-Musoke while the Respondent was represented by Mr. Mubiru. Mr. Kibuka-Musoke submitted inter alia that the Applicants were residents of Kyambogo Lower Estate where they use common facility for sanitation in the form of septic tanks and the channels leading to those tanks were found on the suit property. That the Respondent was given an offer by Kampala City Council on 2/2/2007 to carry out excavation works on the suit property and among other things, they were given terms and conditions for the developments. According to the affidavit of Mr. Katongole, the Respondent had flouted their terms and conditions by planning to erect a perimeter fencing which would block the Applicants from accessing the way-leave which carries the septic tanks connected to the sewerage system which serves their estate and that the Applicants were injured by the erection of the fence because it would prevent them from having access to the way-leave and therefore access to the sewerage system and its channels for the purpose of repair or replacement in cases of damages, an act which would contravene section 160 of the Penal Code Act.

Mr. Kibuka-Musoke contended that the above acts of the Respondent would amount to both private and public nuisance and both civil and criminal in nature. Mr. Kibuka continued and submitted that the Applicants had established a sustainable case against the Respondent in so far as the acts of the Respondent were unlawful and was being resisted in that while the Applicants were pleading nuisance, NEMA had ordered the Respondent to put back the suit premises as far as possible to their original form. Counsel accordingly concluded that the

Applicants had fulfilled all the conditions necessary for the grant of a temporary injunction as stated in **Giella Vs Casman Brown [1973] EA 358:-**

- 1) That the Applicant has to demonstrate a prima facie case with a probability of success in the main suit.
- 2) That the Applicant would suffer irreparable damages.
- 3) That where the court is in doubt it has to decide on the balance of convenience.

Mr. Mubiru in his submission opposed the application. The learned Counsel contend that the granting of the temporary injunction would not be proper in that it would itself dispose of the main suit. Counsel relied on the case of **UMSC Vs Sheikh Kassim Mulumba [1988] HCB 110.**

Secondly the learned Counsel submitted that the Applicants in this suit had no locus standi in bringing the suit as members of the Kyambogo Lower Estate community without seeking authority by way of a representative order from this court to sue for and on behalf of the other members of the community. For that position, Counsel relied on the case of **Z.K. Sentongo Vs Shell (U) Ltd [1995] 3 KALR 1.** For that reason the learned Counsel prayed that the application should be struck out.

Thirdly, the learned Counsel contended that the denial of access to septic tank was out of question because the Respondent had arranged to build separate septic tank, which would cater for the need of the four houses that would be affected by the building of the wall. Counsel submitted that the Applicants were not using the services of the septic tank and would not in any way be affected since their homes were far away and therefore not affected by the relocation. That the Applicants have their own septic tanks 500 metres away. The learned Counsel accordingly concluded that the Applicants had not established conditions for the grant of a temporary injunction.

It is now settled law that when court is considering the application for a temporary injunction it must bear in mind that its purpose is to preserve the status quo in respect of a matter in

dispute: **NITCO Ltd Vs Hope Nyakairu [1992-93] HCB**. The following principles should be born in mind while considering an application for a temporary injunction:-

- 1) The Applicant has to show that he has a prima facie case with a probability of success in the main suit.
- 2) The Applicant has to show that he is likely to suffer irreparable damages if the injunction is denied.
- 3) If court is in doubt as to the above two considerations it will decide the application on the balance of convenience:

See: **Robert Kavuma Vs Hotel International, Supreme Court Civil Application No. 8 of 1990** (unreported).

In considering the above principles, the 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 judicially.
- (b) That the same being an exercise of judicial discretion, there are no fixed rules and the veting may be kept flexible.
- (c) The court should not attempt to resolve issues related to the main suit: See: **Prof. Peter Anyang 'Nyong'O & others Vs The Attorney General of Kenya & others; East African Court of Justice Case Ref. No 1 of 2006** (unreported).

I must first deal with a very important point raised by Mr. Mubiru on the locus standi of the Applicants, where he contended inter alia, that the Applicants had no locus standi to bring the suit claiming to be members of Kyambogo Lower Estate without getting a representative order from court. Mr. Kibuka-Musoke in reply submitted that the Applicants had brought the matter in their individual capacities because they had been denied access to the septic tank by the Respondent. I have perused the plaint in question. Paragraph 4 thereof states that the Plaintiffs' claim against the Defendant is for acts of public nuisance, stopping them and other

residents of the Lower Kyambogo Estate from accessing the way-leave in that area, blocking an access to the sewerage system and channels leading thereto. It is clear from the above that the Plaintiffs sued the Defendant in their respective capacities for the acts of the Defendant which had affected them as members of Lower Kyambogo community individually. Therefore, the Plaintiffs did not have to sound a bell for a representative action since their rights were allegedly infringed individually although the same affected many members within their community. Therefore this was not a class action as known in our Civil Procedure Rules. The Plaintiffs only joined in the action simply because their claims arose out of the same transactions and they did not want duplicity of suits. I think that was being kind to the Defendant.

There was also contention that the Plaintiffs did not have locus standi in that their homes were far from the septic tank and were not using the same. First of all the above contention was not borne of any evidence. It was therefore submission from the bar. However, there was evidence by way of affidavit that the Applicants would be denied access to public septic tanks by the acts of the Respondent. That would clearly constitute a cause of action in nuisance. Above all, the cause of action seems to be on enforcement of environmental rights. It is trite law that environmental health rights can be enforced by anybody under Article 50 of the Constitution whether such a person is interested or not in the subject matter. It is not in dispute that NEMA had drawn issues against the activities of the Respondent in this matter.

Therefore anyone with such a background could take up the matter before court for its enforcement in the manner the Applicants did. See: **Advocates Coalition for Development (ACODE) Vs Attorney General; Green Watch Vs Attorney General & Another.**

As far as the merits of this application is concerned, I have noted that the acts the Applicants are complaining against are both criminal and civil in nature. A public nuisance is both a criminal and civil matter. The activities of the Respondent have also drawn concern from NEMA and Uganda Electricity Transmission and Distribution Company. NEMA in particular got concerned and put a halt to any further development by the Respondent. The Uganda Electricity Distribution Company also raised issue about the activities of the Respondent to comply with the restoration order. In those circumstances I find that the Applicants have clearly established a prima facie case with probability of success in the main suit.

As far as irreparable injuries are concerned, I do agree that it is very difficult to assess damages caused by nuisance in monetary terms because it concerns mainly inconvenience. Moreover the inconvenience here is related to the rights to a healthy environment. There is also the issue of degradation involved in the matter. This may result into serious consequences on the environment, which may not only affect the Applicants but future generations. Such injuries may not be atoned in damages. For the above reasons I find that the Applicants have also established that they are likely to suffer irreparable damages.

Lastly, on the balance of convenience, court has to decide on the right to a clean and healthy environment and the right of ownership and use of property. The cardinal principle is that there must be sustainable use of property. In this case there is concern from the Applicants that the Respondent's activities are likely to deny them access to septic tanks, which would inflict on their right to a clean and healthy environment. The activities of the Respondent have also drawn concern from NEMA and the Uganda Electricity Distribution Company Limited in terms of environmental degradation. NEMA has issued restoration order against the Respondent. It would thus appear from the above circumstances that the balance of convenience to maintain the status quo is in favour of the Applicants as opposed to the Respondent.

For the above reasons I find that the Applicant has fulfilled the requirements for the grant of a temporary injunction. Considering the nature of the dispute, the injunction to be issued should have a fixed period of six months. Parties should therefore ensure that the main suit is determined within the above period. Costs of this application shall be in the cause.

HON. JUSTICE RUBBY AWERI OPIO

JUDGE

31/3/2008

Kibuka-Musoke for the Applicant.

Joy Ntambirweki for the Respondent.

Court: Ruling read in Chambers as in open court.

HON. JUSTICE RUBBY AWERI OPIO

JUDGE

31/3/2008.