

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPL. NO. 1117 OF 2000 **(Arising**
out of Civil Suit No. 431 of 2000)
TUAHA LUYIMBAZI KATONGOLU:..... APPLICANT/PLAINTIFF
VERSUS
THE LIQUIDATOR OF GREENLAND BANK ::RESPONDENT/DEFENDANT

BEFORE THE HON. LADY JUSTICE M. S. ARACH-AMOKO

RULING

This is an application by the Applicant/Plaintiff for an order restraining the Respondent/Defendant from auctioning or selling property comprised in Block 18 plots 526, at Natete, pending the finalisation of Civil Suit No.431 of 2000.

The application was brought under the provisions of Order 37 Rule 1(a) and 2(1) of the Civil Procedure Rules. The grounds are briefly that:-

- (1) Respondent/Defendant has threatened to sell the applicant's property comprised in Block 18 Plots 526 at Natete.
- 2) The Applicant/Plaintiff stands to suffer irreparable loss and damage if the property is sold before the finalisation of the main suit.
- 3) It is in the interest of justice that the intended sale is stopped until the suit is finalised.

The Applicant/Plaintiff, Twaha Luyimbazi Katugulu filed an affidavit in support of the application on the 14.8.2000. In the affidavit he attests that he obtained an overdraft facility from the respondent/defendant and deposited the certificate of title of the land in question on 23.11.96. On 22.10.96 the Respondent/Defendant took possession of his vehicle Reg. No.236-UBB with the intention of purchasing it at Shs.7 million. His indebtedness on the

principal sum was as a result reduced to Shs.2.7 million and he wrote to the Respondent/Defendant on the 1.3.99 indicating so. The Respondent/Defendant took possession of his vehicle and failed to deduct its value from his indebtedness or release the vehicle. On the 10.1.2000 the Respondent/Defendant wrote to him indicating that his indebtedness was Shs.21,773,333. On the 8.5.2000, he received a statutory notice indicating that the mortgage sum was Shs.23,920,000. On the 31.5.2000 he received yet another notice indicating that his indebtedness was Shs.25,859,183, and a threat to auction his property. He disputes the amount claimed and the interest charged by the Respondent/Defendant. He has instituted Civil Suit No.431 of 2000 in which he claims the value of his vehicle plus lost income. The said suit has high chance of success and he will suffer irreparable loss if the security is auctioned and sold before the finalisation of the suit.

No affidavit in reply was filed on behalf of the Respondent/Defendant.

When the application was called for hearing before me on the 8.9.2000 Mr. Masembe Kanyerezi, learned counsel for the Respondent/Defendant raised a preliminary objection that:

- 1) The property, the subject of this application is not the property in dispute in Civil Suit No.431 of 2000. O.37 r 1(a) cannot therefore apply.
- 2) The suit, (Civil Suit No.431 of 2000) is not for a permanent injunction or for restraining the Respondent/Defendant from committing a breach of contract, therefore a temporary injunction cannot be sought under Order 37 rule 2(1) of the Civil Procedure Rules.

The application is therefore misconceived and should be dismissed with costs.

Ms Charity Nakabuye learned counsel for the Applicant/Plaintiff contended that the Application was brought under the proper law, that is Order 37 rule (1) (a) and rule 2(1). That the land in question is the property in dispute in the counterclaim of the

Respondent/Defendant and in the Applicant/Plaintiffs reply to the counterclaim. That the purpose of a temporary injunction is to maintain the status quo, and there is no requirement under Order 37 rule 2(1) that there must be a prayer for a permanent injunction in the main suit before a temporary injunction can be granted. The application is therefore competent and should be allowed to proceed on merit.

The relevant part of Order 37 rule 1(a) provides as follows:

- “1. Where in any suit it is proved by affidavit or otherwise-
- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree or
 - (b)
- 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.”

It is clear from the above provision that before the court can grant a temporary injunction, it must be proved by affidavit or otherwise, that the property the subject of the application is the property in dispute in the suit. The purpose of this rule is to preserve the status quo, by ensuring that the subject matter of litigation is not destroyed or irreversibly altered before trial, and to protect the right of the Plaintiff as set up in the action from being defeated by some act of the defendant before trial. See: Kaggwa vs Katende [1985] HCB 43., Odido vs Label (EA) Ltd. [1987] HCB 77.

I have examined the affidavit in support of the instant application. The land the subject of this application is referred to in paragraph 2 thereof as follows:

- “2. On the 23rd November 1996, I obtained an overdraft facility and deposited my certificate of title of land comprised in Plot 526 Block 18, Natete Kibuga.”

The in paragraphs 11 and 12, the Applicant/Plaintiff depones:-

“11. I have sued the Respondent in Civil suit 431 of 2000 in which I claim for the value of my vehicle plus lost incomes civil suit 432 has high chances of success and I will suffer substantial and irreparable loss if the security is auctioned and sold before the finalisation of the suit.”

I have also perused the plaint in Civil Suit No. 431 of 200 together with the Written Statement of Defence and counterclaim as well as the reply thereto.

According to paragraph 3 of the plaint filed on 20.4.200, the “Plaintiff’s claim against the Defendant is for recovery of motor vehicle 236 UBB Toyota Carina, loss of income, special and general damages, interest and costs of the suit”

The Respondent/Defendant denied the claim and instead contended that the applicant/Plaintiff owed it the sum of Shs.23,319,444.66 and that the Plaintiff deposited the said vehicle as further security for an outstanding loan and it was being held as such.

The Applicant/Plaintiff denied the amount in the counterclaim and in its reply, and contended on its part that he did not deposit the vehicle as further security as alleged.

It is clear from the above that the land the subject of the instant application is not mentioned anywhere in the pleadings. Neither has it been proved by affidavit that it is the subject of the suit. I therefore respectfully agree with Mr. Masembe Kanyerezi that Order 37 rule 1(a) is inapplicable to the instant application.

The first ground of objection is accordingly upheld.

As for the application or Order 37 rule 2(1), the wording of that rule is clear. The opening statement is:-

“2(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind right.”

Under sub-rule 2(1) of Order 37, therefore the suit must be for restraining the Defendant from committing a breach of contract or injury in order for the sub rule to apply. Civil suit No.431/2000 is not for restraining the defendant from committing a breach of contract or any other injury. The suit is for the recovery of motor vehicle Re. No.236 2 UBB, special damages and general damages, interest plus costs.

For the above reasons, I once more agree with Mr. Kanyerezi that the-provisions of Order 37 rule 2(1) are also in application. I therefore uphold the second ground of objection as well. I am cushioned in my decision by the authorities of:

- Nyakuranga vs Esso (U) Ltd [1992] 1 KLR 182
- UMSC VS SHEIK Mulumba [1980] HCB 110

All in all, I find that the application is misconceived and bad in law and dismiss it with costs to the Respondent/Defendant.

M. S Arach-Amoko

JUDGE.

14.9.2000.