

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS APPLICATION NO. 523 OF 2010
ARISING FROM CIVIL SUIT NO. 449 OF 2008

- 1. SILVER BYARUHANGA**
- 2. LAWRENCE KIRYOWA & 26 OTHERS.....APPLICANTS**

VERSUS

THE UGANDA LAND COMMISSION.....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under Order 41 rules 1(a), 7 and 9 of the Civil Procedure Rules (CPR). It seeks orders that a temporary injunction be granted restraining the respondent and or their agents, servants, employees or people working under their authority or direction from selling, transferring, cancelling plots or taking over land comprised in M21 Mbuya and or its derivative sub plots 63 – 65 and plots 67 – 71 Port Bell Road, Mbuya, pending the hearing and determination of the suit; and that costs be in the cause.

The application is based on grounds that the applicants are the rightful owners/allocatees of the suit land who are in possession of lease offers from Kampala District Land Board in their names; that the respondent as part of an out of court settlement re allocated the suit land to the applicants but to date has not issued them with lease offers; that many of the applicants have paid the requisite premium and ground rent to Kampala District Land Board and were in the process of acquiring land titles for their respective plots; that the suit land is in immediate danger of being taken over by the respondents and or allocated to other entities; that if the respondent is not

restrained the applicants will suffer irreparable loss and damage as their plots will be taken over by the respondent; and that it is necessary to maintain the *status quo* until the main suit is heard and disposed off otherwise the main suit will be rendered nugatory.

The application is supported by the affidavit of **Silver Byaruhanga** the 1st applicant. The respondent did not file any affidavit in reply though it was served and there is an affidavit of service to that effect. The hearing therefore proceeded *ex parte*. Counsel for the applicant filed written submissions on the matter.

The gist of a temporary injunction is the preservation of the suit property pending disposal of the main suit. In addressing this, courts have set out conditions to be fulfilled before the discretion of granting the temporary injunction is exercised. These are that the applicant must show that there is a *prima facie* case with probability of success; and that the applicant might otherwise suffer irreparable damage which would not easily be compensated in damages. If court is in doubt, it will decide the question on the balance of convenience. In addition, Order 41 of the CPR requires the existence of a pending suit. It provides that where it is proved to court that in a suit the property in dispute is in danger of being wasted, damaged or alienated by any party to a suit, the court may grant a temporary injunction to restrain, stay, and prevent the wasting, damaging and alienation of the property. See **Kiyimba Kaggwa V Haji Katende [1985] HCB 43**.

The pendency of a suit, in this case civil suit no. 449 of 2008 filed by the plaintiffs/applicants against the defendant/respondent, is not in issue.

On whether there is a *status quo* to be preserved, the 1st applicant avers in paragraph 7 of his supporting affidavit that by the time the main suit is heard or disposed of, the respondent is likely to have cancelled the allocation of the suit land to the applicants and handed it to other persons or entities, and that it is urgent and necessary to grant an injunction to restrain the respondents from disposing of the suit property and rendering the main suit nugatory.

The *status quo* the applicants/plaintiffs seek to maintain is that the respondent/defendant should be restrained from disposing of the suit property which is the gist of the main suit. The *status quo* is not about who owns the suit property but the actual state of affairs on the suit premises prior to the filing of the main suit. The subject matter of a temporary injunction is the protection of legal rights pending litigation. Court's duty is only to protect the interests of parties pending the

disposal of the substantive suit. In exercising this duty, court does not determine the legal rights to property but merely preserves it in its actual condition until legal title or ownership can be established or declared. See **Commodity Trading Industries V Uganda Maize Industries & Anor [2001 – 2005] HCB 118; Sekitoleko V Mutabaazi & Ors [2001 – 2005] HCB 79.**

In the instant case, the actual state of affairs is that the applicants were allocated their respective plots of land by Kampala District Land Board and the lease offers are in their names, but the respondent is in the process of allocating the same land to other entities. Thus, there is a *status quo* to preserve in that the actual state of affairs should remain as they are on the suit land until the main suit is disposed of.

As to whether the suit establishes a *prima facie* case with probability of success, case law is that though the applicant has to satisfy court that there is merit in the case, it does not mean that one should succeed. It means the existence of a triable issue or a serious question to be tried, that is, an issue which raises a *prima facie* case for adjudication. See **Kiyimba Kaggwa, supra.**

The applicant avers in paragraph 2 of his supporting affidavit that the applicants are the rightful owners/allocatees of the suit land and are in possession of the lease offers from Kampala District Land Board in their names. A copy of the lease application is attached to his affidavit as annexure **A**. The respondent did not file an affidavit in reply, but in the main suit, it denies the applicants' allegations, contending that Kampala District Land Board had no jurisdiction to allocate the land to the applicants.

In my opinion, this gives raise to serious triable issues pointing to a *prima facie* case for adjudication. It is not for court at this stage to go into the merits of the main suit. This will be done when the main suit is heard on the merits. Thus this court has refrained from addressing all that affidavit evidence and submissions on who is the rightful owner of the suit property.

The 1st applicant avers in paragraph 6 of his supporting affidavit that the applicants were in the process of obtaining title deeds in respect of their plots when the defendant/respondent embarked on cancelling their allocations in favour of Uganda Peoples Defence Forces which occupies the adjacent plots. The 1st applicant also avers in paragraph 8 of his supporting affidavit that unless the injunction is granted the applicants will suffer irreparable damage, loss and injury. It was submitted for the applicants that the respondent's actions of cancelling the land already allocated

to the applicants who are in the process of fulfilling the conditions of their lease offers will occasion a loss which cannot be adequately atoned by award of damages.

It has been held that irreparable injury does not mean that there must be physical possibility of repairing injury. It means that the injury must be substantial or material, that is, one that cannot be adequately compensated in damages. This depends on the remedy sought. If damages would not be sufficient to adequately atone the injury an injunction ought not be refused. See **Kiyimba Kaggwa, supra**.

The 1st applicant's affidavit evidence has not been rebutted or challenged by the respondent who never filed an affidavit in reply. On the authority of **Samwiri Massa V Rose Achieng [1978] HCB 297** the facts as adduced in the affidavit evidence of the applicant which are neither denied nor rebutted are presumed to be admitted.

In the premises, I am satisfied that if the injunction was not granted, in the event that the applicants/plaintiffs are successful in establishing their rights on the suit land in the main suit, they would incur irreparable loss to regain ownership of the same.

In the premises, I allow this application.

Costs of this application will be in the cause.

Dated at Kampala this 20th day of December 2012.

Percy Night Tuhaise

JUDGE.