

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**  
**MISCELLANEOUS APPLICATION NO. 926 OF 2012**  
*ARISING FROM CIVIL SUIT NO. 494 OF 2012*

**RUTH LUNKUSE.....APPLICANT**

**VERSUS**

**1. HENRY SSALI TAMALE**

**2. STANBIC BANK (U) LTD.....RESPONDENTS**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This was an application by chamber summons brought under Order 41 rules 1, 3 and 5 of the Civil Procedure Rules (CPR), and section 38(1) & (3) of the Judicature Act. It seeks orders that a temporary injunction doth issue restraining the respondents, their agents, assignees, servants and or employees from evicting the applicant, selling, transferring and or any dealing on the suit land comprised in Kyaggwe Block 110 plot 1640 at Seeta (suit land) until the hearing and determination of the main suit; and that costs of the application be provided for.

The grounds of the application are that the applicant is the wife of the 1<sup>st</sup> defendant who is the registered proprietor of the suit land; that the 1<sup>st</sup> defendant illegally mortgaged the same to the 2<sup>nd</sup> defendant as collateral to a loan and all dealings were without the applicant's consent; that the applicant has filed a civil suit against the defendants/respondents pending determination before this court; that the 2<sup>nd</sup> defendant has foreclosed and advertised the suit land for sale and demanded vacant possession such that the applicant lives in fear of eviction from her ordinary

residence she cherishes and uses as a source of livelihood; that the applicant will suffer irreparable damage if the respondents are not restrained from evicting, selling, transferring or dealing with the land, which will also render the main suit nugatory; and that the injunction should be issued against the respondents in the interests of justice.

The application is supported by the affidavit of **Ruth Lunkuse** the applicant. The 2<sup>nd</sup> respondent opposed the application through an affidavit in reply sworn by **Kiremire Mugenyi** the head of Recovery and Rehabilitation of the 2<sup>nd</sup> respondent bank. The 1<sup>st</sup> respondent did not file an affidavit in reply. His Counsel informed court that they intend not to oppose the application, but will argue the merits of the main suit.

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. 494 of 2012 filed by the plaintiff/applicant against the defendants/respondents, is not in issue.

On whether there is a *status quo* to be preserved, the applicant avers in paragraph 1(e) of her supporting affidavit that the 2<sup>nd</sup> defendant has foreclosed and advertised the suit land for sale and demanded vacant possession, and that she lives in fear of eviction and losing her cherished ordinary residence and exclusive source of livelihood to which she has very deep sentimental attachment. She annexed a copy of the advertisement as **B** to her supporting affidavit. She also averred in paragraph 1(f) of her supporting affidavit that if the respondents are not restrained from evicting, selling, transferring or dealing with the land, the applicant will suffer irreparable damage, and that it will also render the main suit nugatory.

The *status quo* the applicant/plaintiff seeks to maintain is that the respondents/defendants should be restrained from evicting, selling, transferring or dealing with the land. The applicant's Counsel, relying on the 1<sup>st</sup> applicant's supporting affidavit submitted that the applicant is in possession of the suit property.

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 applicant is in possession of the suit premises in that she resides there. 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.

This takes me to the issue of whether there is a *prima facie* case established by the applicant against the defendants. The applicant avers in paragraph 1(a) & (b) of her supporting affidavit that she is the wife of the 1<sup>st</sup> defendant who is the registered proprietor of the suit land, and that the 1<sup>st</sup> defendant illegally mortgaged the same to the 2<sup>nd</sup> defendant as collateral to a loan, and that all dealings were without the applicant's consent. The 2<sup>nd</sup> respondent in paragraph 4 of the affidavit in reply sworn by its head of Recovery and Rehabilitation avers that the loan was granted to the 1<sup>st</sup> respondent after he presented a letter of consent to mortgage the property by a one Nalunjogi Salima wife to the 1<sup>st</sup> respondent. Copies of the mortgage deed, the consent and the marriage certificate were attached to the affidavit in reply as annexures **SBU1, SBU2 and SBU3** respectively. The applicant in her affidavit in rejoinder avers that **SBU3** is a forgery and she does not know the said Nalunjogi Salima as a co wife. The same issues are evident in the parties' pleadings in the main suit. The 2<sup>nd</sup> respondent's Counsel submitted that the main suit has no chances of success because the suit is bad in law on account that the 2<sup>nd</sup> respondent relied on a marriage certificate presented by the 1<sup>st</sup> respondent to grant him a loan. It was her submission that the applicant has no lawful cause against the 2<sup>nd</sup> respondent.

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**.

In my opinion, the issues at stake in the instant situation give 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. I therefore refrained from addressing all that affidavit evidence and submissions regarding the rights claimed by the parties on the suit land.

The 1<sup>st</sup> applicant avers in paragraph 1(f) of her supporting affidavit that she will suffer irreparable loss and damage if the injunction is not granted. Her Counsel submitted that the suit land is a matrimonial home and if evicted the applicant's sentiments and other attachments cannot be compensated. He cited **Imelda Bakedde V Busulwa Nsereko [1996] 6 KALR 46** to support his submissions. The 2<sup>nd</sup> respondent's Counsel however submitted that it is the 2<sup>nd</sup> respondent who will suffer loss if the 1<sup>st</sup> respondent does not settle the loan advanced to him. In rejoinder the applicant's Counsel submitted that the submission of the 2<sup>nd</sup> respondent's Counsel was irrelevant.

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 applicant's affidavit evidence is that she is residing on the suit property to which she has emotional attachments. If the injunction is not granted, in addition to being rendered homeless, in the event that the applicant/plaintiff is successful in establishing her rights on the suit land, she would incur irreparable loss to regain possession of the same. Financial compensation would not be adequate solace or atone her being evicted from the property since they are in occupation of the same. She has also averred that she has sentimental attachment to the suit land which has not been rebutted by the respondents. The sentiments are not compensatable by way of damages

which would in effect amount to irreparable damage as was held in **Imelda Bakedde V Busulwa Nsereko [1996] 6 KALR 46**. I am satisfied that the applicant will suffer irreparable injury if the injunction is not granted.

Even the balance of convenience is in favour of the applicant who is residing on the suit land as her home. Her interests would need to be protected pending the hearing and determination of the main suit.

In the premises, I allow this application.

Costs of this application will be in the cause.

**Dated at Kampala** this 20<sup>th</sup> day of December 2012.

Percy Night Tuhaise

**JUDGE.**