

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS APPLICATION NO. 302 OF 2012
ARISING FROM CIVIL SUIT NO. 38 OF 2012

1. **NALULE MARIAM**
2. **NALUMU SHADIA (THROUGH NALULE MARIAM HER NEXT FRIEND)**
3. **ZAWEDDE AMINA**
4. **SEMPALA MUSA.....APPLICANTS**

VERSUS

SENGENDO SWAIBU.....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under Order 41 rules 1(a), 3 and 9 of the Civil Procedure Rules (CPR) and section 98 of the Civil Procedure Act cap 71. It seeks orders that a temporary injunction be granted restraining the respondent, his servants or agents from trespassing upon, interfering and or dealing with the suit kibanja or enforcing any of the terms of the instrument of revocation executed in 2011 until the determination of the main suit or until further orders from this court; and for costs of the application.

The application is supported by the affidavit of **Nalule Mariam** the 1st applicant. The respondent opposed the application through an affidavit in reply sworn by him.

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. 38 of 2012 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 her supporting affidavit that the plaintiff/applicant has lived on the suit land with the defendant/respondent as a wife together with the 2nd, 3rd and 4th applicants who are their children. The 1st applicant constructed a residential house on the suit land with the consent of the defendant who was not in position to develop it. The 2nd, 3rd and 4th applicants have a proprietary interest in the suit land as children of the 1st applicant and the respondent, having received the same as a gift from the respondent. The respondent, who until recently also lived on the suit land has however, on diverse occasions, attempted to dispose of the property as a result of which the applicants/plaintiffs filed a suit against him for a declaratory judgment that the 1st applicant has a beneficial interest and the 2nd, 3rd and 4th applicants have a proprietary interest in the suit land.

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 applicant's Counsel, relying on the 1st applicant's supporting affidavit submitted that if the injunction is not granted and the respondent goes ahead to dispose of the property, the main suit will be rendered a nullity.

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 are in possession of the suit premises in that they reside 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.

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 respondent/defendant avers that his defence has a possibility of success. The respondent's written statement of defence in the main suit alleges that he owns the land through inheritance from his late father. In paragraph 6 of his affidavit in reply to this application, he avers that he has never granted the house or part of it to the applicants. The applicants/plaintiffs' claim to the suit land on the other hand is allegedly by way of gift to the 2nd, 3rd and 4th applicants and the 1st applicant claims to have a beneficiary interest in the same .

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 14 of her affidavit supporting the application that the applicants will suffer irreparable loss and damage if the injunction is not granted. His Counsel submitted that if the respondent evicts them they will become homeless. The respondent in paragraph 13 of his affidavit reply averred that there is no immediate danger or irreparable loss likely to be suffered by the applicants and that he is only constructing his house on the land. His Counsel submitted that there is no evidence that the applicants will suffer irreparable loss and invited this court to make a finding to that effect. He stated that on the contrary, the respondent's constructing on the land will improve its value.

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.

The 1st applicant's affidavit evidence is that the applicants are residing on the suit property. If the injunction was not granted, in addition to being rendered homeless, in the event that the applicants/plaintiffs are successful in establishing their rights on the suit land, they would incur irreparable loss to regain possession of the same. Financial compensation would not be adequate solace or atone their being evicted from the property since they are in occupation of the same. 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 applicants who are residing on the suit land as their home. Their 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 29th day of November 2012.

Percy Night Tuhaise

JUDGE.