THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISCELLANEOUS APPLICATION No. 0041 OF 2007

(Arising from Civil Suit No. 0031 of 2007)

KABACO (U) LTD. ……

APPLICANT/PLAINTIFF

VERSUS

1. RWIMI SUB-COUNTY LOCAL GOVERNMENT }

2. NDORA R. KAGABA } ::::::: RESPONDENTS/DEFENDANTS

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

RULING

This application was brought by way of Chamber Summons under O.41 r.1 (a), 2, & 9 of the Civil Procedure Rules; and seeks from this Court, that an order of temporary injunction do issue restraining the Respondents/Defendants, their servants, or agents from entering and/or disposing of, alienating, wasting, constructing on or effecting any dealing with or carrying out any activities on the suit land till the disposal of the head suit herein; and further that costs of the application be provided for.

The grounds for the application are set out in the affidavit deposed to by one Johnson Niwagaba, the Manager of the Applicant/Plaintiff; and the gists of which, paraphrased, are that:

1. The Applicant/Plaintiff and the 1st Respondent/Defendant concluded a contract in 2003; by which the Applicant/Plaintiff was to construct a fuel service station on the 1st Respondent/ Defendant's plot of land situated at Rwimi Trading Centre, Kabarole District.
2. The Applicant/Plaintiff proceeded to perform its obligation under the contract; but in or about November 2006, the 2nd Respondent/Defendant, in an act of trespass onto the said plot of land, caused it to be fenced of thereby preventing the Applicant/Plaintiff from completing its part of the contractual bargain.

3. The Applicant/Plaintiff is apprehensive that the suit land will be irretrievably disposed of, or put to different user, and the Applicant/Plaintiff will suffer irreparable or substantial loss; and consequently, the head suit will be rendered nugatory; and for which reason the Applicant/Plaintiff seeks the order of temporary injunction to preserve the status quo until the head suit is disposed of.

In a deposition made in reply to the foregoing, Ndora R. Kagaba, the 2nd Respondent/Defendant, denied that the Applicant/Plaintiff had any interest in the suit land; hence its occupancy thereof had been unlawful. Further, he contended that the transaction between the parties had merely created licence whose purpose was to enable the Applicant/Plaintiff be allocated the suit land by the competent authority and thereafter have its interest registered. He conceded that indeed they had fenced off the suit land; but that they had only done so upon breach of the contractual terms by the Applicant/Plaintiff.

The principles that govern the grant of the discretionary remedy of temporary injunction are now settled. The purpose of the remedy is to, in deserving cases, preserve the status quo as between the parties in dispute; until the matter in controversy is finally determined and disposed of. Therefore a party seeking this grant has to satisfy certain well laid down rules; which were well laid down by Odoki J., as he then was, in the case of ***E.L.T. Kiyimba – Kaggwa vs. Haji Abdu Nasser Katende, HCCS No. 2109 of 1984; [1985] H.C.B. 43***.

These are, first, that the Applicant must show that there is a prima facie case, with the probability of success, discernible from the head suit. Second, the Applicant has to show that unless the injunction is granted, irreparable injury, which an award of damages would not adequately atone for, hence grave injustice, might result. In the event that the Court still finds itself in doubt, after considering these two factors, then it has to decide the matter on the basis of where the balance of convenience would lie.

The rule regarding the existence of a prima facie case is problematic; as the Court, at this stage has not been availed such evidence as would entitle it to properly determine the substantive suit. It has to largely restrict itself to the pleadings; and where evidence is adduced, its import is limited for resolving the dispute between the parties. In this regard, I fully concur with the views made 'per curiam' by Odoki J. (as he then was), in the case cited above, where, he agreed with the unease expressed by Lord Diplock in the celebrated case of ***American Cyanamid Co. vs.***

Ethicon Ltd. [1975] 1 All E.R. 504, over the requirement that a prima facie case be established before grant of temporary injunction can be made.

I have considered the pleadings in the head suit, the facts agreed upon by the parties in the scheduling conference, and as well, the affidavit evidence presented by either side in this application; and they disclose that indeed the 1st Respondent/Defendant and the Applicant/Plaintiff, through a number of correspondences read together, agreed that the latter was to use the suit plot of land for the purpose of construction of a fuel service station. The terms of the occupancy agreed upon are contained in the documents that together constitute the contract.

The application made by the Applicant/Plaintiff for the land (*a copy of which was annexure 'A' to the affidavit in support of the application*), and which the Respondents/Defendants also relied on in their reply, was standard form 'Land Form 2'. Two important entries therein are crucial for the determination of the matter now before me; namely, the undertaking by the Applicant/Plaintiff that it would develop the suit land 'immediately' upon the same being offered to it; and the express warning that any plot which is not developed within 2 years is to be offered to another person. The Applicant/Plaintiff's signature in the application Form comes after these two entries.

The Form shows that on the 28th April 2003, the Applicant/Plaintiff accepted the offer made by the 1st Respondent/Defendant on the 15th of April, 2003; thereby concluding the contract. Although the Applicant/Plaintiff commenced development work on the site, it it was only by early 2007 that it was in position to commence the final stage of putting up the service facilities for which it had been availed the plot; but this was pre–empted by the re–entry onto the suit plot by the Respondents/Defendants around November 2006; and thereby preventing the Applicant/Plaintiff from gaining access to it.

Between the date of concluding the agreement, and the re–entry by the Respondents/Defendants, was a period of four and a half years. This exceeded the two year period permitted under the agreement for the development of the plot, by two and a half years. There is no indication anywhere that the Applicant/Plaintiff sought from the 1st Respondent/Defendant, extension of the contractual period at all. In the circumstance, the Applicant/Plaintiff was in clear breach of the contract; and it is a little difficult to see how it can be said that it has established any prima facie case to entitle it to the grant of temporary injunction.

In fact, from documents attached to the Applicant/Plaintiff's plaint, it had, by end of the year 2004, carried out all the necessary pre–requisite process for developing the land. It is apparent that its inability to do so was its dependency on a third party, namely Total (U) Ltd., to which it intended to lease the suit land for the supply of the fuel. It is this that explains the belated exercise carried out in 2006 to establish the volume of traffic passing by the site of the proposed fuel station at Rwimi Trading Centre; an exercise which, common sense would dictate, it should have conducted prior to, and leading to its picking interest in the suit land.

On the ground of irreparable injury if the grant of injunction were not made, the situation before me is that the Applicant/Plaintiff had not commenced any business on the land at all; there being no fuel station constructed as yet. There is no knowing what proportion of the vehicles in the vehicle census would actually have stopped over at Rwimi Trading Centre for fuel, had the fuel service station been there. The special damages pleaded in the plaint are, as stated therein, mere speculative projections; and are manifestly quite remote and far–fetched. They are not in any way a representation of real or potential earnings whatever.

Therefore, if eventually the Applicant/Plaintiff were to succeed in the main suit, any loss it might have suffered prior to the determination of the suit would not be irreparable at all; hence, the balance of convenience clearly favours leaving the status quo undisturbed in its entirety. This means the Respondents/Defendants, who have regained possession of the suit premises are to remain in quiet possession thereof.

I see no reason to inconvenience them with an order of injunction whose merit the Applicant/Plaintiff has, in all aspects, utterly failed to establish. In the result, I dismiss this application for temporary injunction; and for which reason, it accordingly follows that the interim order of injunction granted by the Deputy Registrar of this Court against the Respondents/Defendants in this matter hereby stands vacated. Costs of the application shall be in the cause.

Chigamoy Owiny – Dollo

JUDGE

10 – 02 – 2010