THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO.494 OF 2018

(ARISING FROM MISCELLANEOUS CAUSE NO.229 OF 2018)

PROLINE SOCCER ACADEMY---------- APPLICANT

VERSUS

COMMISSIONER LAND REGISTRATION---------- RESPONDENT

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application by way of Chambers summons against the respondent under Section 33 of the Judicature Act cap 13 and Section 98 of the Civil Procedure Act, and Order 41 r 1, & 9 of the Civil Procedure Rules, for orders that;

a) A temporary injunction doth issue restraining the respondent, its servants' assignees, employees, nominees and any such persons claiming through them from issuance of title or carry out any activity of land conveyance on the suit land until the disposal of the main application.

b) Costs of the application be provided for.

The grounds in support of this application are set out in the affidavit of Mujib Kasule dated 29th August 2018 which briefly states;

1. That the applicant has a pending application for judicial review against the respondent before this honourable court seeking prerogative orders of this court against an administrative decision by the respondent in respect of land comprised in LRV 4182 Folio 3 Plot M. 135 land at Entebbe.

2. That applicant on orders of the Head of State was allocated 30 acres of land in Entebbe on Plots M121A and M121B on which it was to construct an ultra-modern football academy facility in line with International Standards.

3. A lease was granted to the applicant by the Uganda Land Commission on the basis of the Head of State's directive, and extended to a full term of 49 years.

4. The Ministry of Lands, Housing and Urban Development on the same basis issued a leasehold Certificate of title vide Leasehold Register Volume 4182 Folio 3 Plot M.135 land at Entebbe.

5. The respondent erroneously cancelled the applicant's certificate of title of land comprised in Leasehold Register Volume 4182 Folio 3 Plot M135 land at Entebbe.

6. The applicant has learnt that the respondent is likely and about to issue a certificate of title for the above land to another person contrary to its legal interests therein.

7. The applicant is suffering and likely to suffer further irreparable loss or injury which is not compensable by way of damages if the respondent issues title to another person.

8. That the balance of convenience lies in favour of the applicant who hold an existing lease on the suit land.

In opposition to this Application the Respondent through Kibande Joseph a Senior Registrar of Titles ministry of Lands Housing and Urban Development filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. This application is misconceived and an abuse of court process as against the respondent as the orders sought have already been overtaken by events.

2. That the applicant does not disclose any plausible ground for the grant of temporary injunction.

3. That the applicant's title which had been erroneously issued vide Leasehold register volume 4182 Folio 3 Plot M.135 Land at Entebbe was already cancelled as it had been created over another title.

4. That further the status quo to be maintained is that the title comprised in LRV 4148 Folio 3 stands cancelled and no transaction can be entertained by the respondent.

5. That upon further perusal of the register at the office of titles, there is already a title which had been earlier issued over the suit land even before the applicant's title was issued in favour of Civil Aviation Authority.

6. That according to the office of the respondent, the land in issue is owned by Civil Aviation Authority with a title comprised in 3159 Folio 8.

7. That currently LRV 4182 Folio 3 is non-existent as the same was already cancelled hence the respondent's office cannot carry out a transaction on a title which is not existing.

8. That the applicant will not suffer any irreparable damage as the title has since been cancelled since 2014and the applicant has not suffered any loss.

9. That the applicant has not shown any danger that is orchestrated by the respondent to warrant a grant of a temporary injunction.

In the interest of time the respective counsel were directed to file written submissions and i have considered the respective submissions. The applicant was represented by *Mr Kalikumutima Deo, Mr Kimara Arnold Norgan and Mr Ahaabwe Joshua* whereas the respondent was represented *Mr Ssekitto Moses*- Senior Registrar of Titles.

The applicant's counsel submitted that, the granting of a temporary injunction is an exercise of judicial discretion as was discussed in the case of **Equator International Distributors Ltd Versus Beiersdorf East Africa Ltd & Others Misc.Application No.1127 Of 2014**.

Discretionary powers are to be exercised judiciously as was noted in the case of **Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29.**

It should be noted that where there is a legal right either at law or in equity, the court has power to grant an injunction in protection of that right. Further to note, a party is entitled to apply for an injunction as soon as his legal right is invaded as was discussed in the case of **Titus Tayebwa Versus Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009**.

He contended that it is not is dispute that the Applicant has a running lease on the suit land to which the respondent is invading through the process of issuing a certificate of title on Plot No.19-21 to another person an act that is intended to deprive the applicant of its legal interest. It is hence not in dispute that the respondent is invading the applicants legal right.

It is trite law that for an application to be maintained three conditions must be satisfied by the Applicant as was discussed in the case **Behangana Domaro and Anor Versus Attorney General Constitutional Application No.73 of 2010** that is; - The applicant must show a prima facie case with a probability of success, that the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and if the court is in doubt, it would decide an application on the balance of convenience.

<u>The Tests/Conditions to be fulfilled for a grant of a temporary injunction</u>

The legal principle upon which Court exercises its discretion to grant a temporary injunction in all actions pending determination of the main suit is now well settled as seen in the wealth of authorities.

The general considerations for the granting of a Temporary Injunction under **Order 41 Rule (2) CPR** are that;

> (1) **In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a Temporary Injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.**
>
> **(2) The Court may by order grant such Injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court thinks fit.**

For a temporary injunction to be granted, court is guided by the following as was noted in the case of **Shiv Construction versus Endesha Enterprises Ltd Civil Appeal No.34 of 1992**

1. The Applicant must show that there is a substantial question to be investigated with chances of winning the main suit on his part;
2. The Applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and the *status quo* not maintained; and
3. The balance of convenience is in the favour of the Application.

WHETHER THERE IS A PRIMA FACIE CASE WITH A PROBABILITY OF SUCCESS

This application is grounded on facts which have been included in the Chamber Summons and supported by affidavit of the Applicant. This submission will only highlight the contents of the grounds and accompanying affidavit, constituting facts having a bearing on the main suit and this application as here under:-

1. That the applicant company on the orders of the Head of State was allocated 30 acres of land in Entebbe Plot M135 on which it was to construct an ultra-modern football academy facility in line with international standards.
2. That the said land through a lease offer and subsequently a lease agreement was granted to the applicant by the Uganda Land commission on the 4th June 2008 vide minute ULC Min 40/2008(a)(3) on the directives of the Head of State.

3. That the Ministry of Lands, Housing and Urban development on the same basis issued a lease hold certificate of title vide Lease Hold Register Volume 4182 Folio 3 Plot M.135 to the Applicant.
4. That the applicant applied for extension of the lease period from the initial term of 5 years to a full term of 49 years which was granted by the Uganda Land commission vide minute ULC Min.40/2014(a)(54) of 6th November,2014.
5. That the applicant was informed that the land title; Volume 4182 Folio 3 was canceled under instrument number 481042 of 11.3.2013.
6. That the commissioner land registration canceled the above stated title erroneously and without following the requisite procedures of a right to a fair hearing.
7. That the applicant's lease granted by the Uganda Land Commission has never been canceled or recalled by the lessor.

My Lord, we contend that the Respondent unlawfully canceled the applicant's title without following the requisite procedures of law an act that was unlawful, erroneous and unjust.

In applications for a temporary injunction, the Applicant is required to show that there must be a prima facie case with a probability of success of the pending suit.

The Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried. **(See American Cynamide versus Ethicon [1975] ALL ER 504).**

A *prima facie* case with a probability of success is no more than that the Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried as was noted in **Victor Construction Works Ltd Versus Uganda National Roads Authority HMA NO. 601 OF 2010**.

As to whether the suit establishes a *prima facie* case with probability of success, case law is to the effect 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 there should be a triable issue, that is, an issue which raises a *prima facie* case for adjudication.

On the issue of a prima facie case; We contend that the Respondent violated **Section 91** of the **Land Act Cap.227** when did it not follow the requisite procedure while canceling the Applicant's title. **Section 91(8)** of the **Land Act** requires the registrar of lands before cancelation of a certificate of title to:-

i. Give not less than 21 day's notice in the prescribed form to any party likely to be affected by any decision
ii. Provide an opportunity to be heard to any such party to whom a notice has been given

iii. To conduct any such hearing in accordance with the rules of natural justice
iv. Give any reasons for any decision that he or she may make

The applicant under **paragraph 9** of his affidavit in support of the application states that he was informed that the land title; **Volume 4182 Folio 3** was canceled under instrument number **481042** of **11.3.2013**.This was upon the applicants submission of the requisite lease extension documents to the land registry. It's evident that the reason of cancellation was given to the applicant after cancellation in contravention of **Section 91(8)d** of the **Land Act** which requires the registrar to give reasons for any decision that he or she may make. Further to note, the applicant was not given notice, an opportunity to be heard nor was the procedure of cancellation in accordance with the rules of natural justice

On the above premise, this is enough to give rise to serious triable issues raising a *prima facie* case for adjudication since the Applicant's certificate of title was unlawfully canceled.

THAT THE APPLICANTS WILL SUFFER IRREPARABLE INJURY WHICH CANNOT BE ATONED FOR BY AWARD OF DAMAGES.

The other cardinal consideration is whether in fact the Applicant would suffer irreparable injury or damage by the refusal to grant the Application. If the answer is in the affirmative, then Court ought to grant the order. See: **Giella Versus Cassman Brown & Co. [1973] E.A 358**. By irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or material one that is; one that cannot be adequately atoned for in damages.

It was submission of the applicant that if the actions of the Respondent are not refrained by this Honourable Court, the Applicants will suffer irreparable loss that cannot be atoned by damages as the suit land on which the applicant holds a running lease will be granted to another person. On the above principle, we incline our submissions in the instructive words of **Lord Diplock** in the case of **American Cynamide Versus Ethicon [1975] 1ALL E.R. 504**. He states;

> *"The governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a Permanent Injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant's continuing to do what was sought to be enjoined between the time of the Application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no Interlocutory Injunction should normally be granted…"*

It is applicant's considered opinion that if a certificate of title in reference to the suit land is issued to any other person, the applicant will lose its legal interest in the suit land, the suit land being favourably located for the activities that the applicant carries on. The said injury will not be able to be compensated for in damages and thus the prayer that the Respondent is restrained whether by its self, or through its authorized agents and or, servants or any other person from issuance of title or carry out any activity of land conveyance on the suit land until the disposal of the main application

GRANTING AN INJUNCTION ON THE BALANCE OF CONVENIENCE.

It is trite law that if the Court is in doubt on any of the above principles, it will decide the application on the balance of convenience. The term balance of convenience literally means that if the risk of doing an injustice is going to make the Applicant suffer then probably the balance of convenience is favorable to him/her and the Court would most likely be inclined to grant to him/her the application for a Temporary Injunction.

In the case of **Victor Construction Works Ltd Versus Uganda National Roads Authority HMA NO. 601 OF 2010.** The High Court while citing the decision in **J. K. SENTONGO versus SHELL (U) LTD [1995] 111 KLR 1;** by Justice Lugayizi observed that if the Applicant fails to establish a *prima facie* case with likelihood of success, irreparable injury and need to preserve the status-quo, then he/she must show that the balance of convenience was in his favour.

The applicant contended that on the balance of convenience, if the injunction is not granted, the respondent will issue title of the suit land to another person as deed plans for **Plot 19-21** Fishways Road have been created. Further to add, the main suit will be rendered nugatory as court will have sanctioned an illegality of the Respondent's unlawful cancellation of the applicant's title.

The whole purpose of granting an injunction is to preserve the status quo as was noted in the case of **Humphrey Nzeyi versus Bank of Uganda and Attorney General Constitutional Application No.01 of 2013**. Honourable Justice Remmy Kasule noted that an order to maintain the status quo is intended to prevent any of the parties involved in a dispute from taking any action until the matter is resolved by court. It seeks to prevent harm or preserve the existing conditions so that a party's position is not prejudiced in the meantime until a resolution by court of the issues in dispute is reached. It is the last, actual, peaceable, uncontested status which preceded the pending controversy. The status quo to be maintained is in favour of the Applicant who holds an existing lease on the suit land. Under **paragraph 15** of the affidavit in support, it is clearly stated that the applicant holds an existing/running lease on the suit land which has neither been canceled nor recalled by the lessor. Further to note, the last, actual, peaceable and

uncontested status was the applicants proprietorship of the suit land to which it lawfully had a title

The respondent in his submissions submitted on the discretionary power of court to grant a temporary injunction as being derived from section 38 of the judicature Act and order 41(1) (2) of the CPA and Order 41 (1) (2) which in essence confer discretion upon court to grant a temporary injunction to prevent the ends of justice from being defeated. ***See Farida Nantale vs Ag & 5 others HCMA No. 630/2013.***

The Relevant consideration.

It was the respondent's case that the Applicant ought to demonstrate primarily that the temporary injunction if granted will maintain the status quo. In ***Farida Nantale vs Ag & 5 others ,*** the court noted that the purpose of granting the order is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of. The court further laid down the conditions for the grant of a temporary injunction:

a. The applicant must show a ***prima facie*** case with a probability of success
b. That the applicant will suffer irreparable injury which would not adequately be compensated with damages
c. Thirdly if the court is in doubt, it would decide an application on the balance of convenience.

The Legal arguments and Evidence for the Respondent.

In this Application, the Respondent's Evidence in opposition to the prayers sought for is derived from the affidavit of Kibande Joseph. In summary, the following are pertinent pieces of evidence discernible from the said affidavit in opposition.

In the instant case the status quo to be maintained is that the Applicant's title was already cancelled and the same is non-existent **as per paragraph 5** of the respondent's affidavit. The implication of which is that the respondent cannot carry out a conveyance on a title which is non-existent. The existing title is that which is registered under LRV 3159 Folio 8 in the names of Civil Aviation Authority as **per paragraph 8 of the Affidavit in Reply.**

On the issue of whether the Applicant has a prima facie case, he submitted that at this stage, court does not delve deep into the merits of the case but rather determines whether the claim is not frivolous or vexatious, to determine whether a prima facie case exists, courts have to inquire whether there is a serious issue to be tried at trial**. Page 55-56 of the Civil Procedure Justice Bench Book.** In the instant case the Applicant doesn't in any way whatsoever in his affidavit in support, refer to a pending suit/main application raising triable issues as the Respondent maintains that even before the cancellation of the Applicants Title issued under LRV 4182 Folio 3, the same was created in error as there was already an existing title in favour of Civil Aviation Authority comprised in LRV 3159 Folio 8 as the Respondent maintains in **paragraph 8** of the

Affidavit in reply. We thus pray that this court be pleased to hold that the applicant has failed to prove that there is a pending suit/main application which raises triable issues.

The respondent contended that, the Applicant's Allegation in paragraph (g) of the affidavit in support that the respondent is likely to issue a certificate of title for the above land to another person is merely speculative as the is already an existing certificate of title on the suit land in the names of Civil Aviation Authority without which was issued before the Applicant's title. More so the Applicant is not likely to suffer any irreparable loss or injury as the cancellation was done four years back in 2014. Its against such a background that the respondent maintains in **Paragraph 10** of the affidavit in reply that the applicant has not suffered any loss nor will he suffer any loss that cannot be atoned to by damages. ***See the case of American Cynamid Co. V Ethicon (1975)1 ALLER, 505 also cited with authority in the case of Gapco Uganda Ltd V Kaweesa Badru & Anor. 259 of 2013.***

In terms of balance of convenience, the respondent who is charged with the statutory mandate of keeping the sanctity of the register will suffer more if the order is granted, as there is no register to register the same as it will relate to LRV 4182 Folio 3 which was cancelled long before and it cannot be registered on FRV 3159 Folio 8 which was issued before it. **See Paragraph 11 of the affidavit in reply.**

The applicant's counsel has cited several provisions and legislations in support of this application for a temporary injunction like section 33, 38 of the Judicature Act and Section 98 of the Civil Procedure Act.

The law on granting an Order of temporary injunction is set out in ***section 64(c) of the Civil Procedure Act*** which provides as follows;

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed-

(a) …..
(b) ……
(c) grant a temporary injunction and in case of disobedience commit the person guilty of it to prison and order that his or her property is attached and sold.

Order 41 rule 2 of Civil Procedure Rules provides that in any suit for restraining the defendant from committing a breach of any contract or other injury of any kind…..apply to court for a temporary injunction to restrain the defendant from committing the breach of contract or any injury complained of……

The applicant's counsel has cited several authorities for the grant of temporary injunction and indeed this court agrees with the said authorities.

There should be a prima facie case disclosed*;*

Before deciding to grant or to deny a temporary injunction, it's important to consider if there is a prima facie case , according to *Lord Diplock* in ***American Cyanamid Co. v Ethicon Ltd [1975]***

AC 396 [407—408], the applicant must first satisfy court that his claim discloses a serious issue to be tried. The applicant in has stated that The respondent erroneously cancelled the applicant's certificate of title of land comprised in Leasehold Register Volume 4182 Folio 3 Plot M135 land at Entebbe without following the procedures. The respondent confirms in her affidavit in support that indeed the said land title was cancelled. This therefore raises a serious issue of contention of whether it was done in accordance with the set procedures.

The applicant must set out a prima facie case in support of the right claimed by him. The court must equally be satisfied that there is a *bonafide* dispute raised by the applicant, that there is an arguable case for trial which needs investigation and a decision on merits and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him.

The burden is on the applicant to satisfy the court by leading evidence or otherwise that he has a *prima facie* case in his favour. But a *prima facie case* should not be confused with a case proved to the hilt. It is no part of the Court's function at this stage to try and resolve the conflict neither of evidence nor to decide complicated questions of fact and law which call for detailed arguments and mature considerations.

It is after a *prima facie case* is made out that the court will proceed to consider other factors.

This application raises serious issue to be tried in the main cause and or a prima facie case.

Maintaining the status quo;

The applicant's counsel submitted on preservation of status quo; "*Status quo"* simply denotes the existing state of affairs before a given particular point in time. The purpose of the order for temporary injunction is primarily to preserve the status quo of the subject matter of the dispute pending the final determination of the case, and the order is granted in order to prevent the ends of justice from being defeated. *See*: ***Daniel Mukwaya v. Administrator General, H.C.C.S No. 630 of 1993; Erisa Rainbow Musoke v. Ahamada Kezala [1987] HCB 81***.

In the instant case, the status quo to be preserved is that the land in issue should not be dealt with in anyway before the court determines whether the cancellation or any subsequent transfer of land to other parties is determined.

The respondent contends that the said land title was already cancelled i.e That currently LRV 4182 Folio 3 is non-existent as the same was already cancelled hence the respondent's office cannot carry out a transaction on a title which is not in existent.

The applicant wishes to maintain the said land status by whatever description the land is called at the moment to avoid creating third party claims or bonafide purchases before the determination of the suit.

The current state of the land in respect of its registration should not be altered by whatever description until the determination of the suit. The applicant contends that the respondent is about to transfer the same and a deed plan has been issued for plot 19-21 Fishways Road Entebbe which constitutes the suit land. The respondent should preserve the status quo of the land.

The status quo to be maintained is in favour of the Applicant who holds an existing lease on the suit land for the entire piece of land as described in his land title.

Irreparable damage;

The other cardinal consideration is whether in fact the applicant would suffer irreparable injury or damage by the refusal to grant the application. If the answer is in the affirmative, then court ought to grant the order. By irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or material one, that is one that cannot be adequately atoned for by way of damages. In ***Commodity Trading Industries v Uganda Maize Trading Industries [2001 -2005] HCB 119***, it was held that this depends on the remedy sought. If damages would not be sufficient to adequately atone the injury, an injunction ought not to be refused.

The applicant contends that the said land was for a specific project of a modern stadium in Entebbe and the said project would require all the land as a whole to be a success. Once the applicant losses this part of the land the whole project would fail and this affects the person of the President who donated this land and it would be a national embarrassment or scandal to the fountain of Honour. I donot know of any amount of damages that would given to recompense the person of the President or whether there is similar acreage of land within the area that would be donated again to the applicant by the President.

The damage to the applicant's project will be material and substantial and no amount of compensation can atone it.

The balance of convenience

The balance of convenience simply means that the applicant has to show that failure to grant the temporary injunction is to his greater detriment. In ***Kiyimba Kaggwa v Haji A.N Katende [1985] HCB 43*** court held that the balance of convenience lies more on the one who will suffer more if the respondent is not restrained in the activities complained of in the suit.

The applicant has already submitted that the applicant will suffer irreparable harm.The applicant's counsel submitted

that balance of convenience is in favour of the applicant.

The applicant contended that on the balance of convenience, if the injunction is not granted, the respondent will issue title of the suit land to another person as deed plans for **Plot 19-21** Fishways Road have been created. Further to add, the main suit will be rendered nugatory as court will have sanctioned an illegality of the Respondent's unlawful cancellation of the applicant's title.

The court should always be willing to extend its hand to protect a citizen who is being wronged or is being deprived of property without any authority of law or without following procedures which are fundamental and vital in nature. But at the same time, judicial proceedings cannot be used to protect or perpetuate a wrong committed by a person who approaches the court.

The court's power to grant a temporary injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of temporary injunction being equitable remedy, it is in discretion of the court and such discretion must be exercised in favour of the plaintiff or applicant only if the court is satisfied that, unless the respondent is restrained by an order of injunction, irreparable loss or damage will be caused to the plaintiff/applicant. The court grants such relief *ex debitio justitiae*, i.e to meet the ends of justice. See ***Section 64 of the Civil Procedure Act***.

In the result for the reasons stated herein above this application succeeds and is allowed with costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
12th/10/2018