

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS APPLICATION NO. 278 OF 2012
ARISING FROM CIVIL SUIT NO. 146 OF 2012

BUSIKWA MARIAM

[Administrator of the estate of the late Nyamayarwo Yusuf]

.....**APPLICANT**

VERSUS

APOLLO KATINTI.....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under sections 33 of the Judicature Act, section 98 of the Civil Procedure Act, and Order 41 rules 1 and 9 of the Civil Procedure Rules (CPR). It seeks orders that a temporary injunction be granted restraining the respondent, his agents, servants and/or employees from further trespassing, interfering and or in any way dealing with the suit land (5 acres) until the determination of the main suit; and that costs of the suit be provided for.

The application is supported by the affidavit of **Busikwa Mariam** the applicant. The respondent did not file an affidavit in reply but his Counsel appeared in court and opposed the application.

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. 146 of 2012 filed by the plaintiff/applicant against the defendant/respondent, is not in issue.

On whether there is a *status quo* to be preserved, the applicant avers in her supporting affidavit that she is the administrator of the estate of the late Nyamayarwo Yusuf who was the lawful owner of the suit land having obtained the same in 1970. The applicant also avers that the respondent is unlawfully trespassing on the applicant's said piece of land with potential buyers and he intends to sell it without the consent of the applicant.

The *status quo* the applicant/plaintiff seeks to maintain is that the respondent/defendant or his agents, servants and/or employees should be restrained from further trespassing, interfering and or in any way dealing with the suit land the applicant and his family has been occupying, until the determination of the main suit. The respondent's Counsel however submitted that the *status quo* is that the respondent is in possession of the land by the admission of the applicant in paragraphs 6 and 7 of her supporting affidavit.

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 and her family have been occupying the five acres of land which she claims was initially a kibanja obtained from M. C. Mayanja by her father the late Nyamayarwo Yusuf. Contrary to the submissions of the respondent's Counsel that the respondent is in possession of the suit land, the applicant's averments in paragraphs 6 and 7 of her supporting affidavit are that the respondent is unlawfully trespassing on the suit land and is in the process of clearing and selling it. This indicates that there is a *status quo* to preserve in that the actual state of affairs should remain as they are, that is, the applicant to remain in occupation 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 her supporting affidavit that she has filed a case against the respondent pending before this court that she is the administrator of the estate of the late Yusuf Nyamayarwo who left behind the suit land the respondent is unlawfully trespassing on. The respondent did not file an affidavit in reply to this application but his pleadings in the main suit are that he acquired the land free of any claims and that the plaintiff/applicant has no claims on the suit land.

In my opinion, this gives rise 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 applicant avers in paragraph 9 of her affidavit supporting the application that the estate of the late Nyamayarwo will suffer irreparable loss and injury which cannot be atoned by way of damages if the injunction is not granted.

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 applicant's affidavit evidence is that that she and her family have been occupying the five acres of land which was initially a kibanja obtained from M. C Mayanja by her father the late Nyamayarwo Yusuf. There was no affidavit in reply filed by the respondent to rebut this, save for the submissions of the respondent's Counsel which this court can only regard as giving evidence from the Bar. If the injunction was not granted, in the event that the applicant/plaintiff is successful in establishing their rights on the suit land, she would incur irreparable loss to regain possession of the same. Financial compensation would not be adequate solace to atone her being evicted from the property since she is 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 applicant who is in occupation of the suit land. 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 24th day of January 2013.

Percy Night Tuhaise

JUDGE.