

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS APPLICATION NO. 802 OF 2012
ARISING FROM CIVIL SUIT NO. 440 OF 2012

GAHIJI JOSEPH.....APPLICANT

VERSUS

- 1. STEVEN SAAVA KIKONYOGO**
2. KIGAALA JOSEPH.....RESPONDENTS

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under Order 41 rules 1(a) of the Civil Procedure Rules (CPR), section 33 of the Judicature Act, and sections 64(e) & 98 of the Civil Procedure Act. It seeks orders that a temporary injunction be granted restraining the respondents/defendants from disposing off, sub dividing and transferring Block 265 plots 8257, 8255 & 8249 land at Bunamwaya through his agents or by himself pending determination of the main suit or until further orders of this court; and that costs of this application be provided for.

The application is supported by the affidavit of **Gahiji Joseph** the applicant. The respondents opposed the application through an affidavit in reply sworn by **Steven Saava Kikonyogo** the 1st respondent.

The background to the application is that the applicant claims to have interest in 2 acres and 30 decimals of land based on agreements he entered into with the 1st respondent but also endorsed by the 2nd respondent. The said land was to be surveyed or delineated from Block 265 plot 1243 land at Bunamwaya, Kyadondo measuring approximately 23 acres and belonging to the respondents as administrators of the late Nnalinya Kasalina Nkizi. The respondents are alleged to have transferred most of the land to third parties and the only land still registered in the respondents' names is Block 265 plots 8257, 8255 & 8249 land at Bunamwaya (suit land). The applicant/plaintiff filed civil suit no 440 of 2012 against the respondents/defendants for orders that the defendants sign mutation forms transferring to him the plaintiff's interest in the land, general damages, a permanent injunction against the defendants, and costs of the suit. The application is to deter the respondents from disposing off the suit land before the main suit is heard and disposed of.

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. 440 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 his supporting affidavit that he acquired a proprietary interest in 2 acres and 30 decimals of the suit land through an agreement he entered into with the defendants/respondents, which land was to be surveyed or delineated from Block 265 plot 1243 land at Bunamwaya, Kyadondo, measuring approximately 23 acres, after the respondents were registered on the land as administrators of the late Nnalinya Kasalina Nkizi. However the respondents are alleged to have transferred portions of 265 plot 1243 land at Bunamwaya, and remain registered in Block 265 plots 8257, 8255 & 8249 land at Bunamwaya (suit land).

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 claiming interest in the suit property a portion of which he claims to have acquired through agreements copies of which are attached as annexures **B** and **E** to his supporting affidavit. The *status quo* he seeks to maintain is that the respondents/defendants should be restrained from any further transfer or sale of the said land by the respondents until the main suit is disposed of. The applicant's Counsel, relying on the applicant's supporting affidavit submitted that if the injunction is not granted and the respondents go ahead to dispose of the property, the main suit will be rendered nugatory. The 1st respondent however avers in his affidavit in reply that the application is overtaken by events as the remaining land is in plots 8249 and 8255 and is registered in the respondents' names as beneficiaries of the estate of the late Kasalina Nkizi.

There are unnumbered annexures (search reports dated 24th September 2012 from the Registrar of Titles addressed to the respondent's lawyers) to the applicant's supporting affidavit showing that indeed plots 8249 and 8255 and registered in the respondents' names as beneficiaries of the estate of the late Kasalina Nkizi. Annexure **A** to the 1st respondent's affidavit in reply, which is a search report dated 24th September 2012 from the Registrar of Titles addressed to the respondent's lawyers also reveals that Block 265 plots 8256 and 8267 land at Bunamwaya is registered in the respondents' names but still as administrators of the estate of the late Kasalina Nkizi.

In my opinion, based on the foregoing evidence, there is no *status quo* to preserve in as far as plot numbers 8249 and 8255 of Block 265 are concerned as, to that extent, the application is overtaken by events. Any *status quo* deserving preservation therefore, all other matters being favourable, would only be with regard to Block 265 plots 8256 and 8267 which is still registered in the respondents' names as administrators of the estate of the late Kasalina Nkizi.

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/plaintiff's case in the main suit is that he is claiming proprietary interest acquired by agreement with the defendants/respondents in a portion of the suit land registered in the respondents' names. The applicant avers that the case has a possibility of success. The 1st respondent avers in his affidavit in reply that the application is overtaken by events as the remaining land is in plots 8249 and 8255 and registered in the respondents' names as beneficiaries of the estate of the late Kasalina Nkizi; that the alleged agreements cited by the applicant are null and void; and that there has never been consideration on the part of the applicant/plaintiff.

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 the validity or otherwise of the agreements between the plaintiff/applicant and the defendants/respondents.

The applicant avers in paragraph 12 of his affidavit supporting the application that the land is located in conveniently and strategically prime area of Bunamwaya and no amount of compensation or damages can be its equivalent if he loses the same. His Counsel submitted that it would be difficult to acquire another land. The respondent however avers in opposition to the application that the applicant will suffer no irreparable injury as no particulars of such injury are shown.

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 affidavit evidence adduced in this matter reveals that the land forms part of the estate of the late Kasalina Nkizi, and that portions of it have already been transferred to beneficiaries. Despite his averments, the applicant has not adduced convincing evidence that he will suffer irreparable loss if the land is transferred to third parties. The fact that the land is located in a prime area as averred by the applicant does not of itself render the applicant to suffer irreparable loss if it is transferred to third parties. In any case, the suit land being land forming part of a deceased person's estate which eventually has to be transferred to beneficiaries. It would be futile for this court to issue an injunction to restrain the administrators of the estate from transferring the land to its rightful beneficiaries who may be third parties not before court. See **Solome Tibarirane V NHCC [2007] HCB 109**.

I have also noted from annexure **A** to the 1st respondent's affidavit in reply that the respondent has lodged a caveat on the land in question under instrument no. KLA 556726 of 17/09/2012. I note from the application that the temporary injunction sought is to restrain the respondents/defendants or their agents from disposing off, sub dividing and transferring the suit land. The caveat lodged by the applicant as is evidenced in annexure **A** to the 1st respondent's affidavit in reply would achieve the same purpose. This would render the order for temporary injunction superfluous. In my opinion, granting a temporary injunction under the given circumstances would be of no practical effect since there is a caveat in place.

In the premises, for reasons given above, I dismiss this application with costs.

Dated at Kampala this 24th day of January 2013.

Percy Night Tuhaise

JUDGE.