THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
AT KAMPALA (LAND DIVISION)

MISCILLENOUS APPLICATION NO. 630 0F 2013

(Arising out of High Court Civil Suit No. 097 0f 2011)

FARIDA NANTALE …… APPLICANT

VERSUS

1. **ATTORNEY GENERAL**
2. **THE COMMISSIONER LAND REGISTRATION**
3. **UGANDA LAND COMMISSION**
4. **HOUSE OF DAWDA**
5. **ACCESS (U) LTD.**
6. **KAMPALA INTERNATONAL UNIVERSITY…...…. RESPONDENTS**

BEFORE: HON. MR. JUSTICE BASHAIJAK.ANDREW

RULING.

NANTALE FARIDA *(hereinafter referred to as the "Applicant")*filed this application under ***Ss.64 & 98 Civil Procedure Act (CPA) and Order 41 Civil Procedure Rules (CPR)*** seeking for orders that:-

(1) A temporary injunction doth issue maintaining the status quo on the suit land, formerly comprised in Kibuga Block 7 Plots 16A-28A Nsambya Road which was transformed into FRV 219 Folio 4 and then subdivided into various plots including LRV 4215 Folio 18 Plots 45, 26A-28A

NsambyaRoad and 4 –14 Kinyoro Road, Plot 24A Nsambya Road and other yet to be identified plots.

(2) The above status quo is that prevailing as at the date of filing this application where the land is vacant and any activities geared at altering such status quo be restrained.

(3) The costs of this application beprovided for.

The grounds above are amplified in supporting of the affidavit of the Applicant.Briefly, she deposes that pending the court's pronouncement on the validity of the Respondents' transactions in regard to the suit land, the 4th, 5th, and 6thRespondents forced themselves onto the suit land and evicted the tenants,and have since commenced massive excavation of soil from the suit land and also dug up huge gullies, which is not the type of use that the Applicantwouldwant to put it to once matter is decided in her favour, and thatshe will incur colossal expenses restoring the land.

Further, that declining to grant this application will only enable the Respondents to further alter the *status quo;*which is that as at the date of her affidavit the suit land is vacant without any structures thereon,even though the same is registered in the names of the 4th ,5th , & 6thRespondents; which registration the Applicant is challenging in the main suit.

KunnalKaria, the 5thRespondent's Company Secretary, opposed the application and made general depositions mainly asserting ownership of the suit land. He states that the 5th Respondent lawfully acquired the suit land comprised in ***LRV 4219 Folio 24, Plot 16 A – 22A, Nsambya Road, Kampala,*** and that they have taken physical possession, andare in process of commencing developments to put up a multi – sectoral complex estimated at USD 50 million, and have engaged a wide array of professionals on contractual basis, and that 5th Respondent stands to suffer more by any order granting an injunction.

The 6thRespondent's Resident Director, Mr. Nasser Basajjabalaba,also made depositions mainly asserting ownership of the suit land comprised in ***LRV 4215 Folio 18 Plots 26A – 28A Nsambya Road, and Plots 4 – 13 Kinyoro Road.*** That it has taken physical possession of the suit land and commenced massive developments thereon to expand its University, and hasalso engaged various contractors as well as other professionals on the land with contractual obligations, and that any injunction against it will lead to colossal loss of capital.

Furthermore, that contrary to the Applicant's averments, the 6thRespondent is not wasting, but enhancing the value of the suit land, and that the 6th Respondentstands to suffer more inconvenience if the temporary injunction is granted. Also, that the Applicant's application is speculative and brought in bad faith and ought to be dismissed as she has no interest in the suit land whatsoever.

Submissions.

The Applicant's joint Counsel, Mr. Othieno Brian and Nsibambi Peter,filed written submissions.Briefly, they submittedthat the Respondents did not respond to the specific depositions of the Applicant as regards the application for a temporary injunction, but that they delved into substantive mattersclaiming that they lawfully acquired and own the suit land, but that these are issues which ought to be determined in the main suit.

Further, that the Respondents admit to altering the *status quo*of the suit land by preparing to carry out massive constructions, and erroneously claim that these activities constitute the *status quo* which ought to be maintained. Counsel contended that on the contrary, the massive construction by the Respondents will no doubtalter the *status quo* on the suit land, which would tilt the balance of convenience in favour of the Applicant, since this is not the use she would want to put the suit land to in event she is adjudged the owner.

Furthermore, that just because the Respondents have signed contracts with a wide array of professionals to carry out the construction is no good groundto deny the injunction sought,because the Respondents did this even when they were aware that there was a subsisting injunction issued by the High Court restraining such alteration of the *status quo*. Counsel cited ***Muwema&Mugerwa Advocates & Solicitors v. Shell (U) Ltd. &O'rs, C.A.C.A. No. 018 of 2011*** on the effect of failure to respect court orders, that once a party knows of an order, whether null or valid, regular or irregular, he cannot be permitted to disobey it. Counsel opined that the Respondents thereforehave no clean hands.

The Applicant's Counsel maintained that the *status quo* which is sought to be preserved cannot be interpreted as one in aid of the Respondents who occupied the suit land after flouting a court order, where they were not even party to the suit. That they only became parties after forcing themselves on to the suit land and evicting tenants without a court order, which necessitated an amendment of the pleadings to include them as new entrants. That the *status quo* prevailing is that where the land is vacant though registered in the names of the 4th , 5th , and 6th Respondents, and that any activity geared at altering such *status quo* should be restrained.

On the principle of *prima facie* case with probability of success, Counsel relied on the case of ***KiyimbaKaggwa v. Haji Abdul Nasser Katende[1985] HCB43***; and submitted that the Applicant must show that there is a substantial question or questions to be investigated and with chances of winning the head suit. That the Applicant has raised serious triable issues in her application regarding her ownership of the suit land as against the Respondents', which require the investigation of the court.

Counsel also submitted that the suit land is in danger of being alienated given the trend of this the case. That the Applicant has shown that notwithstanding the

pendency of the head suit to which the 3rd Respondent was party, the said Respondent disposed of the same by lease to the 4th , 5th and 6th Respondents, and that declining to grant the injunction will permit the Respondents to further alter the *status quo,* and that there is nothing that would prevent the Respondents alienating the suit land to other parties.

Joint Counsel for the 6th Respondents Mr. ObedMwebesa, Mr. Alaka Caleb and Ms. Sarah Banenya, opposed the application that no sufficient grounds have been advanced to warrant granting the same.Amplifying on the affidavit in reply of Mr. Nasser Basajjabalaba dated 16/08/2013, they submitted that the purpose of a temporary injunction is the preservation of the suit property pending the disposal of the main suit. They relied on the cases of ***KiyimbaKaggwa v. Haji Katende(supra); Geila v. Cassman Brown & Co. Ltd. [1973] EA 358; Robert Kavuma v. Hotel International, S.C.C.A. No. 19 of 1990,*** tobuttress their submissions on principles for granting a temporary injunction.

Counsel further submitted that according to the pleadings, the Applicant has no plausible case against the 6th Respondent,which is the registered proprietor of the land comprised in ***LRV 4215 Folio 18 Plots 45, 26A – 28A Nsambya Road,***and ***Plots 4 – 13 Kinyoro Road,***which it acquired lawfully and is currently developing, and that under ***Section 59 of the RTA***, a certificate of title is conclusive proof of ownership in absence of fraud attributable to the transferee. To fortify this proposition,Counsel cited the case of ***Okello – Okello v. UNEB, S.C.C.A. No. 12 of 1987.***

Counsel also argued that the Respondents' currentphysical possession and ownership and use of the suit land should not be disturbed, and that thisconstitutesthe *status quo* that ought to be preserved.Counselcited***SaubaNabitindo v. Umar NassoloSekamate& A' nor, H.C. Misc. Application No. 516 of 2011 (Arising from H.C.C.S. No. 405 of 2010, per***

Percy Night Tuhaise J.that where the respondent has been in possession of the suit land and the applicant is neither occupying it nor accessing the same, preserving the *status quo* would be preserving the situation as it is that is…the Respondent continuing to occupy and use the land until the determination of the rights of the parties in the main suit**.**On strength of this authority, Counsel reasoned that the question of the Respondents breachingthe court order as submitted by Applicant's Counsel would not arise.

M/s Nangwala, Rezida& Co Advocates, Counsel for the 5th Respondent, also opposed the application and submitted that the *status quo* of the suit land is that the 5th Respondent is in possession and is currently developing the same into multi-sectoral complex, which was proved by Mr. Kunnal Karia's affidavit in reply for the 5th Respondent. Counsel argued that maintenance of the *status quo* would require that the 5th Respondent be left to continue developing the suit land until the determination of the main suit. Counsel also relied on ***Sauba Nabitindo v. Umar Nassolo Sekamate & John Jameson Senseko Kulubya case (supra);J.K. Sentongo v. Shell (u) Ltd. H.C.C.S. No. 31 of 1993[1995] KALR 01.***

On the principle of a *prima facie* case with possibility of success, Counsel submitted thatthe Applicant seeks cancellation of title, but that ***Section 176 RTA(supra)***bars a suit for ejectment or other recovery of land against a registered proprietor except where the suit is premised on fraud attributable to the registered proprietor or where the registered proprietor derived titles otherwise than as a transferee *bona fide* for value from or through a person so registered through fraud. Counsel argued that no fraud is pleaded against the 5th Respondent,which obtained the suit land as a transferee *bona fide* for value and paid all the requisite fees. That this makes the suit unsustainable in law.

Counsel attempted to raise matters of limitation and expiration of leases which, in my view, aresubstantive issues requiring investigation after parties have fully

adduced evidenceand the matter determinedon merit. This, however, cannot be by way of affidavits as is the case in this application. Needless to state, that where an action is founded on fraud, like in the main suit in this case, the matter ought not to proceed by way of affidavits. See: ***Sanyu Lwanga v. Yakobo Ntate Mayanja [1997]II KALR 01.***

Regarding the principle of irreparable injury, Counsel for the 5th Respondent submitted the suit land is not being alienatedor wasted, and that the 5th Respondent is currently developing the same into a multi-sectoral complex, the first of its kind in Uganda whose estimate value is USD 50 million. That if anything, the value of the suit land is being enhanced, and that therewould be noirreparable injury or otherwise that the Applicant would suffer for the enhanced value of the land, if the temporary injunction sought is not granted.

On thebalance of convenience, Counsel submitted that the burden of proving the inconveniences the Applicant will suffer if the injunction is notgranted is on the Applicant, and that the burden is an evidential one and must be derived from the affidavit evidence. Beyond these points, the submissions again veered off into substantive matters of ownership of the suit land which, as already pointed out, cannot be determined in an application of this nature.

Issues.

The issue for determination is whether the circumstances of the case warrant the granting of an order of a temporary injunction, and the other; which naturally flows from the resolution of the first one, is whether the Applicant has satisfactorilydemonstrated and / or met the conditions for the grant of the temporary injunction.

The applicable law.

Counsel for the parties hasably submitted on the applicable law, and there is no need for further elucidation.Emphasis is, however, placed on ***Section 38***

Judicature Act, where this court has the discretion to grant an injunction in all cases in which it appears to the court to be just and convenient to do so to restrain any person from doing acts. For ease of reference the section is fully quoted below.

"38 Injunctions.

(1) The High Court shall have power to grant an injunction to restrain any person from doing any act as may be specified by the High Court.

(2) …….

(3) Where before, at or after the hearing of any cause or matter, an application is made for injunction to prevent a threatened or apprehended waste or trespass, an injunction may be granted, if the High Court thinks fit –

(a) Whether or not the person against whom the injunction is sought is in possession under any claim of title or claims a right to do the act sought to be restrained under any colour of title; and

(b) Whether the estate claimed by the parties or any of the parties is legal or equitable."

The above cited sectionis echoed in substance by provisions of ***Section 64(c) CPA*** to the effect that in order to prevent the ends of justice from being defeated, court may, if it is so prescribed, grant a temporary injunction.

The general procedural considerations for the grant of temporary injunctions under ***Order 41 r. (1) (2) CPR***are to the effect that;

"Where in any suit it is proved by affidavit or otherwise:

(i) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(ii) that the Defendant threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors,

The court may, by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

Flowing from the law cited above, the clear purpose of the remedy of a temporary injunction is primarily to maintain the *status quo*of the subject matter of the dispute pending the final determination of the rights of the parties,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 Musokev.AhamadaKezala [1987] HCB 81.***

The phrase "maintain",as used in relation to temporary injunctions, in my view,ought not to be construed in the active ordinary sense where it would mean that activities sought to be restrained should continue at the same level or standard or even escalate; for if this was to be the case there would be no necessity for temporary injunctions. The phrase "maintain" should rather be construed in the passive ordinary context synonymous with the term "preservation"; which means to save, to keep something in its original state; in good condition and or safe from harm or danger. The interpretation, however, ought to take into account all facts of the case, including the history,the timing, and such other surrounding factors bearing on the case as a whole.An isolated interpretation risks the failure to prevent the ends of justice from being defeated.

"*Status quo*" invariably denotes the existing state of affairs immediately before a given particular point in time. See: ***Humphrey Nzeyi v. Bank of Uganda &A'nor, Constitutional Application No. 02 of 2013***. As it relates to land disputes, *status quo* is purely a question of fact, and the relevant consideration is the point in time at which the acts complained of as affecting or likely to affect or threatening to affect the existing state of things occurred. It means that *status quo* may be in

retrospect or in prospect, but again this too depends on the facts of a particular case.

The otherconsiderationupon which courts are usually persuaded in granting an injunction is whether in fact the applicant would suffer irreparable injury or damage. If the answer is in the affirmative, then court ought to grant the order. See:***Giellav.Cassman Brown & Co. [1973] E.A 358.*** Irreparable damage must mean that the injury or damage is so substantial and a material one such that it cannot be atoned for in damages. See:***NITCO Ltd.v. Hope Nyakairu [1992 – 1993] HCB 135***.

It should, however, be noted that even in some cases where damages aresought as a remedy in the main suit, the applicant could still demonstrate irreparable loss or damage or injury in some given casesin an application,andit does not operate as a bar to an order of temporary injunction being granted. Instances abound like where the subject matterof the application is of sentimental value or moral attachment and isincapable of monetary compensation and an injunction is granted,and the courtproceeds, in its discretion, to award damages to the injured party in the head suit. See ***Imelda NdiwalungiNakadde v. Roy Busulwa&A'nor [1996] KALR 46.*** The position seems to be now that temporary injunctions do not impose the limitation that where general damages are awardable in the main suit the applicant is necessarily barred from seeking a remedy of a temporary injunction citing irreparable injury as one of the factors. See: ***Humphrey Nzeyi v. Bank of Uganda & A 'nor (supra).***

The final point is that the applicant must demonstrate that there are serious issues to be tried. See:***Daniel Mukwayav. Administrator General, H.C.C.S No. 630 of 1993 [1993] IV KALR I.***In event the court is in doubt as to the above factors, then it ought to decide the matter by weighing doubts against certainties of the risks of

doing injusticeotherwise termed as the “balance of convenience”. See: ***Francomev. Mirror Group Newspapers [1984] IWLR 892***.

Consideration.

The Applicant in the instant case lays claim of the ownership to the suit land by virtue of being the Administratrix of late G.M. Mukoloboza’s estate, to which the suit land is said to belong, and that the Respondents forced themselves onto the suit land after flouting a court order earlier issued, and have started massive excavation of soil and dug up huge gullies in preparation for construction of structures. Further, that the type of use the Respondents are putting the suit land to is not the type that the Applicant would wish to put it,if the main suit is decided in her favour; and that the activities of the Respondents would ultimately occasion to her colossal restoration expenses.

The 5th and 6th Respondents, the only ones who responded to the application,do not dispute the activities on the suit land as deposed by the Applicant, but rather they tooassert ownership of the suit land. Mr. KunnalKaria, the Company Secretary of the 5th Respondent, in paragraph 3 of his affidavit in reply, states that the 5th Respondent is the registered proprietor of land comprised in ***LRV 4219 Folio 24, Plot 16A-22A Nsambya Road***, which is part of the suit land.Similarly, Mr. Nasser Basajjabalaba, the Resident Director of the 6th Respondent,affirms in paragraph 4 of his affidavit in reply that the 6th Respondent is the registered proprietor of land comprised in ***LRV 4215 Folio 18 Plots 45, 26A-28A***, which is also part of the suit land, having acquired it lawfully.

The two Respondents go on to state that they have commencedmassive development activities on the suit land involving heavy capital investment, and are in physical possession of the same, and that if any decision of court is to preserve the *status quo*, it ought to be their continued stay on the land carrying on their activities undisturbed.

The 1st , 2nd , 3rd and 4thRespondents did not respond to the application.In that case the position would be that where facts are sworn to in an affidavit and these are not denied or rebutted by the opposite party, the presumption is that they are accepted. See: ***Massa v. Achen [1978] HCB 297***. It follows that the 1st , 2nd , 3rd and 4thRespondents are presumed to have accepted the depositions of the Applicant; andthe orders issued herein will bind them as well.

After carefully examining the evidence and submissions of Counsel for the parties, I am satisfied that ownership issues and proprietary rights of the parties over the suit land raise serious questionsthat require investigationon merit.I am, however, reluctant to pronounce on the "possibility of success" of the case at this interlocutory stage as that would tantamount to an opinion on the prospects of success of either party, yet the same court will ultimately try the case. Therefore, it is sufficient to observe at this stagethat if the activities of the Respondents are unrestrained and the Applicant ultimately succeeds, it would place the Applicant in awkward position where she would no longer have the suit land in the same status as it was before the activities complained of commenced.

I am acutely aware of the fact that the development activities of the Respondents would no doubt enhance the economic value of the suit land,and thuswould not be reasonably categorized as "waste" or "damage" or "injury" in the literal sense. It is nonetheless trite lawthat where structures are put on the disputed land which is not to the applicant's liking, then such structures would cause an inconvenience and irreparable injury to the applicant once he or she is successful in the suit. See: ***Erisa Rainbow Musoke v. Ahmed Kezaala&O'rs [1987] HCB 81; Imelda NdiwalungiNakadde v. Roy BusulwaNsereko&A'nor (supra).***

ThetwoRespondentsalso raised the issue as totheir ownership of the suit land by virtue of registration under the ***Registration of Titles Act***, and that they have contracted a wide array of professionals who are all engaged on contractual basis,

and that stopping them would occasion huge financial losses. Based on that, the Respondents argued that the balance of convenience lies more with them than the Applicant, who is neither in occupation nor using the suit land.

With due respect, these arguments areuntenable in the circumstances of this case.Ownership issues lie in the domain of the head suit, and to pronounce on them at an interlocutory stage would be to pre – empt the outcome of the main suit. See:***Uganda Moslem Supreme Council v. Sheik Kassim Mulumba [1980] HCB 110***. Apart from the above, it would essentially serve todefeat the ends of justice to interpret the *status quo* to mean that the Respondents' continue theiractivities "regardless"; for then the *status quo* of the subject matter would be altered, which in turn would render the purpose of an injunction futile.I believe that this is the mischief ***S.64 CPA (supra)*** was intended to cure to prevent the ends of justice from being defeated.

More importantly, there is sufficient material upon which to conclude reasonably that the Applicantwould suffer more inconvenience/ injusticeby the refusal to grant the injunction sought in event she is finally adjudged the owner. Her intended purpose of the suit land would have been substantially altered by the construction and erecting of the unwanted structures thereon.It is immaterial that the investments would enhance the value of the suit land, because what is crucial ultimately is who actually owns the land, and the purpose that owner would wish to put the land to.

On the other hand, if the casegetsfinally decided in favour of the Respondents, they would not have sufferedmore injustice. They would instead have benefited from such a final order which would have removed all doubts and contestations as to their ownership of the suit land, andthey would safely and comfortably invest as they wish without fear of having to be thrown out any time.

Thecircumstances in this case, therefore,require that *status quo*ought to be interpreted to mean and refer to the state of affairs existing during the period immediately preceding this application, and not after, and this is what ought to be preserved.The Respondents knewor ought to have reasonably known of the disputed status of the suit landsince there was already a court order in place issued on 14/11/2012; extended on 21/12/2012, maintaining the *status quo*. A court order is an order issued*in rem,* and by commencing their activities on the suit landafter the issuance; and in spite of the said court order, the Respondents not only flouted the court order, but also knowingly exposed their investments to potential risks.They can only have themselves to blame for possiblelosses in the event of losing the case.

As was held in ***Imelda Ndiwalungi Nakadde v. Roy Busulwa Nsereko & A'nor (supra)*** where a party is aware of effort being made to recover the land through a pending suit especially where fraud had been pleaded and the likely consequences and the party attempts to alienate it so as to circumvent the outcome of the pending suit, then the property is in danger of injury. This is no different from the instant case where the 3rd Respondent being aware of the Applicant's effort to claim ownership of the suit land in a pending suit nevertheless proceeded to lease the suit land to the 4th , 5th , and 6th Respondents before the outcome of the main suit. There could be no better example of alienation.

It must be emphasized that the existence of the earlier said court injunction on the suit land prior to the Respondents' activitiesdiametrically distinguishes the instantapplication from the ***Sauba Nabitindo v. Umar Nassolo Sekamate & A' nor case (supra)*** where the respondent had been in possession of the suit land since 1999 long before the applicant filed for an injunction seeking to restrain the respondent from taking over the suit land. The applicant had ceased to be in possession in 2005 after eviction, which meant that the*status quo*to be preserved

was that existing at the time of filing the application, which was that the respondent was in occupation of the suit land. In the instant application, however, the Respondents commenced activities on to the suit land after a court order maintaining the *status quo* had been issued. Therefore, the***Sauba Nabitindo case (supra)***would notbe good reference in the instant application.

Similarly, the ***J.K.Sentongo &A'nor v. Shell (U) Ltd. case (supra)*** cited by Counsel for the Respondents is not helpful in the instant application. In that case the applicant sought for an injunction to maintain the *status quo* on a suit land where the respondent had been on the premises since 1957, and was presently not demolishing anything on the suit premises, because the demolition complained of took place sometime back and was over. The court held that that any order upsetting the above state of things would change the *status quo.* Again this is quite different from the instant application in which the Respondents commenced the activities sought to be restrained after the Applicant had filed a suit claiming ownership of the suit land, and an injunction maintaining the *status quo* had been issued.

The net effect is that the Applicant has satisfactorily met the conditions for the grant of a temporary injunction. Accordingly;

1. ***An order of a temporary injunction is hereby issued maintaining the status quo on the suit land.***
2. ***The Respondents and/ or their agents are accordinglyrestrained from conducting the activities complained of on the suit land till the final determination of the main suit.***
3. ***Costs will be in the cause.***

BASHAIJA .K. ANDREW
JUDGE
04/09/2013