

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISC APPLICATION NO. 181 OF 2009
(ARISING OUT OF CIVIL SUIT NO. 533 OF 2013)**

NANJOBE DAMALIE.....APPLICANT

VERSUS

1. MUGISHA FRANK

2. TUKUNDANE FRANCIS.....RESPONDENTS

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This application for an injunction was presented by Dominica Emiru who proceeded by written submissions. Therein the applicant seeks a temporary injunction restraining the respondents from dealing in the land comprised in Block 280 Plot 64 and all titles that arise out of its subsequent subdivisions. The application is supported by the affidavit of the applicant.

The brief facts are that the applicant was at one time the registered proprietor of land comprised in Block 280 Plot 64 at Kawoko (hereinafter referred to as the suit land). But sometimes during 2008 she realized that her title had been stolen and she reported the matter to police, a result of which two people were arrested and charged for their offence. That subsequently she confirmed that the defendants had purchased their interest in the suit land from those who had been convicted of stealing the title. That the defendants on realizing their mistakes, on 28/10/08 agreed to buy the suit land from her and settle the squatters thereon and in return she relinquish all her interest in the suit land and absolve the defendants of all criminal impropriety in acquiring the land. The agreement of which was reduced into writing that despite the undertaking the defendants only made partial payment towards the agreement and then embarked on alienating the suit land by making subdivisions and selling part of it. She therefore seeks an injunctive order against the acts of the defendants until disposal of the main suit.

The respondents did not file any affidavit in reply or submissions even after they sought land were granted more time to do so.

The law on temporary injunctions is contained in **Order 41 rules 1(a)** of the **Civil Procedure Rules**. The principles to be followed before granting a temporary injunction are well settled and quite well articulated in the submissions of counsel.

It is now settled law that when court is considering the application for a temporary injunction it must bear in mind that its purpose is to preserve the status quo in respect of the matter in dispute until determination of the whole dispute: See for example **E.L.T. Kiyimba Kaggwa Vs Haji A.N., Kateride (1985) HCB 43 and Commodity Trading Industries Vs Uganda Maize Industries and another [2001-2005] HCB 118**. The principles governing the grant of a temporary injunction are well settled and have been well argued by both counsel. In the case of **American Cyanamid Co. Vs Ethicon Ltd [1975] AC 396** Lord Diplock laid down guidelines for the grant of temporary injunctions that have been followed in Ugandan cases of **Francis Babumba and 2 others Vs Erisa Bunjo HCCS No. 697 of 1999** and **Robert Kavuma Vs M/S Hotel International SCCA No.8 of 1990** they include;

1. The applicant has to show that he has a *prima facie* case with a probability of success in the main suit.
2. The applicant has to show that he is likely to suffer irreparable damages if the injunction is denied.
3. If court is in doubt as to the above considerations it will decide the application on the balance of convenience.

In considering the above principles, the court should also bear in mind that that temporary injunctions are discretionary orders and always that the court should not attempt to resolve issues related to the main suit: See: **Prof. Peter Anyang Nyongo & Others Vs The Attorney General of Kenya & Others; East African Court of Justice Case Ref. No. 1 of 2006 (unreported)**

The applicant has to show that he has a *prima facie* case with a probability of success in the main suit.

In my view a *prima facie* case is not necessarily a tight case. It is a case in which the court need only be satisfied that there is a serious question to be tried. Wambuzi C J (as he then was) in the

case of **Robert Kavuma (supra)** explained it well when he stated that the applicant is required at this stage of trial to show a prima facie case and a probability of success but not success. (Emphasis mine) Also, in deciding this issue I have found the quote in the case of **GRACE MATOVU Vs THOPISTA NABBALE & ANOR HC.MSC. ALPPL. NO.471 of 2013** very useful. Therein his **Lordship** Justice Mulangira held that:

“considering the object of an interim injunction and nature of the proceedings at which it is considered, a more realistic and fair condition to satisfy the court is, that there a serious question to be tried rather than a prima facie case with a probability of success.

It was argued for the applicant that she has shown by annexure ‘APD1’ that she was at All material time the registered owner of the suit land and discovered the loss of certificate of title to the police. That their investigations unearthed a certificate of title with respect to Busilo Block 280 Plot 222 which was the residue by balance of the suit land following numerous unauthorized subdivisions. That she also demonstrated that the respondent in a bid to avert police investigations tricked the applicant into making a memorandum of understanding whereby she would discontinue pursuing the criminal case and which the respondent then failed to fulfill. That the respondent has only made a partial payment of Shs.5m toward the memorandum of understanding but has continued to subdivide and sell the suit land.

I have perused the plaint and confirmed that the basis of the claim is the breach by the respondents of the memorandum of understanding that they entered into with the applicant on 28/8/08. That same memorandum is relied on the applicant as “**APD2**”. The applicant claims that the respondents undertook but failed to pay her Shs.64 million in order to formalize their purchase of land comprised in Busiro Block 280 Plots 14 and 17 at Kawoko Bukasa Parish. As a result, the applicant sought cancellation of the respondents’ title and such other persons deriving title from them and general damages

With respect, I see little or no relation to the facts of the main suit and the injunctive order sought in this application. Although the land in both causes is off Busiro Block 280 the plots are seemingly different. The land in the main suit is described to be Busiro Block 64 Plots 17 and 14 and this is the land that is the subject of the memorandum of understanding. In the application, it is alleged that the applicant was the original owner of Busiro Block 280 Plot 64 which was subdivided into quite a number of plots. Neither plot 14 nor 17 are mentioned as having been

curved out of Plot 64. (See paragraph 1 of the application and paragraph 2 of the applicant's affidavit) The area schedule form attached as Annexure "APD1" is also not informative in a manner that would take the applicant's claims forward. It does show that there was once a land known as Block 280-281 Plot 64 which was sub divided into several plots, all of which are still in the applicant's names. Again the area schedule makes no mention of Plots 14 and 17.

I note that although Plot 14 is mentioned in both the main suit and application Plot 17 is not. Even then, no evidence is brought out in the two actions to show that the applicant did at any one time own Busiro Block 280 plots 14 and 17 or that the respondents derived their title in respect of those plots from the two people who the applicant claims did at one time steal more titles.

Secondly, the facts related in paragraphs two and three and part of paragraph 4 of Nanjobe's affidavit are missing in the plaint. In my view, the allegations that the applicant's title was stolen and later discovered sub divided by the respondents is a serious one especially where it is alleged in paragraph 4 that they signed the memorandum because they realized that they did not obtain title through legitimate means. It is strange and improper that such vital information is only introduced in the pleadings at the stage of the application and not in the suit itself.

Thirdly, the applicant in the main suit seeks cancellation of the respondent's titles due to their failure to furnish consideration as agreed in the deed of understanding. The claim in the main suit would tantamount to a remedy which in Section 176 RTA would require the applicant to have adduced fraud against the respondents. No facts of fraud have been pleaded.

Lastly, the facts pleaded seem to indicate that the respondents have already alienated part of the suit the suit land, sub divided it and disposed it off to other parties. No differentiation has been made to show which titles are still in the name of the applicant and those that have already been transferred. In fact, if I am to go by the area schedule form the numerous plots are indicated to be in the applicant's names and no evidence was adduced to show in whose names they were transferred to. Therefore, the orders sought may affect or purport to affect the interests of other parties that are not party to the main suit or this application.

I am conscious of the fact that the respondent did not oppose this application. They are deemed under to have acquiesced to its contents. See for example **Samwiri Mass Vs Rose Achen (1978) HCB 297**. However, under Order 9. Rule 10 CPR the applicant is still duty bound to prove her case on a balance of probabilities. The subject matter in the application not being the same the one in the main suit and memorandum of understanding creates a contradiction so

glaring that allowing the injunctive order would be a gross injustice to the respondents, not withstanding their silence. The fact that the land mentioned in the application is quite different from that mentioned in the memorandum of understanding would in my view, tilt the balance of convenience very much in disfavor of the applicant.

In view of what I have stated above, it has not been shown that the respondents are threatening to or have alienated Busiro Block 280 Plots 14 and 17 to the detriment of the applicant to warrant the issuance of an injunctive order.

EVA K. LUSWATA
JUDGE
7/7/14