THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO 1674 OF 2017

(ARISING FROM CIVIL SUIT NO. 838 OF 1017)

SUNSTONE LIMITED----------APPLICANT

VERSES

1. **NAKAMYA ROBINAH**
2. **MWERERI LUKMAN----------RESPONDENTS**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

This application was brought by chamber summons under Order 41 r1, 2 and 9 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act, seeking the following orders that;

1. A temporary injunction doth issue restraining the Respondents and or their agents, servants, employees or by whatever name called from disposing off and or alienating the suit land comprised in Kibuga Block No.7 plot No.1886 Land at Musoke Zone, Sebyala Road, Katwe Makindye and or wasting the suit land and/or in any way of interfering with the Applicants' use of the suit land or carrying on construction work on the suit land pending the hearing and disposal of the head suit or until further orders of this honorable Court are issued.

2. Costs of the application.

The grounds of this application are set out in the accompanying affidavit sworn by the Applicants' Director Gideon Baseka Kibirango on 14th November 2017.

The substance of the above affidavit is that the Applicant is the owner of the suit land and the Respondents have since trespassed on it, threatening to alienate or dispose of the same. He stated that the Respondents are also threatening to carry out construction work or waste the suit land before the hearing of the main suit.

He contends by affidavit evidence that the Civil Suit which is pending disposal has got a high likely hood of success and that if a temporary injunction is not granted, the Applicant will suffer irreparable damage and the main suit shall be rendered nugatory.

In addition to the above averments, the Applicants appended a sale agreement as annexure "**A**" photo copies of national identifications of the 1st Respondent and other persons as annexure "**B**", and print out as annexure "**C".**

Only the 2nd Respondent **(Mwereri Lukman)** opposed this application through his own affidavit where he deponed that the the application is misconceived, premature and does not meet the conditions for the grant of the orders sought. He, by affidavit evidence, claims that he owns the land adjacent to the suit land which is approximately 35 decimals which he inherited from his father.

That on 17th August 2017 and 20th October 2017, he purchased 22.5 decimals and 4.5 decimals of the said suit land from the 1st Respondent at a consideration of Ugshs. 200,000,000/- only and Ugshs. 50,000,000/- only (*fifty million* respectively. That he took all the essential and reasonable steps before buying the suit land and 22.5 decimals were vacant while 4.5 decimals were occupied by the Applicants' tenants whom he compensated.

That he took possession of the suit land and that at the material time, he is in possession as the rightful and lawful owner of the same. He claims that upon possession, he joined the land to his that he possessed prior to the purchase and constructed a perimeter wall and has commenced developments.

He contends further that the Applicant has no *prima facie* case with any likelihood of success since its claim is in the money deposited with the Applicant, and that if this application is granted, it will dispose of the main suit hence, which will make it bad in law **(***paragraph 10 &11 of the affidavit in reply***).**

He avers further that if the application is granted, he will suffer more damages considering that he is the lawful and rightful owner of the suit land and apparently in possession of the same. He states that the Applicant will not suffer any irreparable damage since the 1st Respondent is willing and able to compensate it in the event it is confirmed that the 1st Respondent was on breach.

He further states that the balance of convenience yields in his favour since he is the rightful owner of the suit land and the land has his developments already and that it would be in the interest of justice that the application is dismissed with costs.

The 2nd Respondent attached the 1st sale agreement marked annexure "A", and he also attached the 2nd sale agreement marked annexure "A2".

In rejoinder, Gideon Baseka K the Applicants' Director deponed that the 2nd Respondent was aware of the Applicants' purchase of the suit land and he is not a bonafide purchaser of the suit land as he was fraudulent and that the *status quo* is that no construction has been commenced and that it is the *status quo* which ought to be maintained by the issue of a temporary injunction.

In rejoinder still, he contended that the actions of the 2nd Respondent are intended to deprive the Applicant of its land and that the Applicant has an interest in the suit land of which it is not seeking for refund of the money.

Both Counsel addressed Court by way of written submissions as follows:-

Counsel for the 1st Respondent in his submission stated that a temporary injunction cannot be granted because the application has not met the conditions for the grant of a temporary injunction.

First, Counsel submitted that the affidavit of Gideon the Applicants' Director does not adduce any evidence as to any triable issue, that the Applicant brought the a suit for trespass, but in

paragraph 7 the Applicant is not in possession of the suit land and that at the material time, the 1st Respondent is in possession of the suit land and that a cause of action of trespass cannot succeed.

Further that the Applicant has no documents to prove ownership as they were not handed to him for failure to complete the purchase price and that there is no evidence on record adduced by the Applicant to prove the allegations of threats or eviction by the Respondents. He prayed that the application be dismissed for not disclosing a *prima facie* case against the 2nd Respondent.

He cited the case of ***Nitco Ltd versus Hope Nyakairu (1992-93 HCB135*** where it was held that; *despite the consideration mentioned, the Applicant must go further and show by his affidavit that he has a probability of succeeding in the main suit*. Counsel then stated that the Applicants' affidavit does not show that he will succeed in the main suit.

He went ahead to submit that the Applicant has not demonstrated that it will suffer irreparable injury and it has not proved that the land is in danger of alienation or waste damage as required under O.41r.1(a) of the Civil Procedure Rules.

That according to clause 9 of the agreement between the Applicant and the 1st Respondent, it was clearly stated that in the event of adverse claim by 3rdparties, the Applicant shall be fully compensated. Further, that the plaint contains prayers for damages and that this shows a possibility of monetary compensation in case of injury occurred and that this proves that damage is compensatory.

In support of this submission, he cited the case of ***Nambi versus Bujingo & Others, MA No.1015 of 2015,*** where *Justice Kaweesa* held that;-

> *"It is important to note that the pleadings contain a prayer of damages—these prayers show a possibility of compensation in case of injury. The condition is therefore not proved as well***".**

Counsel stated that the Applicants' claim has a monetary value and therefore is not irreparable injury within the meaning of the law.

With balance of convenience, Counsel submitted that the 2nd Respondent stands to lose more than the Applicant in the event that this application is granted since the orders sought have the

effect of unjustifiably denying the 2nd Respondent the authentic and legal proprietorship of the land and gainful use of the property.

With the *status quo*, he submitted that the 2nd Respondent is the registered proprietor of the suit land and has always been and is still in physical possession of the same. That the Applicant in the main suit prays for an order of vacant possession which means it is not in possession of the suit land.

He cited that case of ***Green Watch & Anor versus Golf Holdings Ltd MA No. 390 of 2001*** following the case of ***David Barikirahakye versus AG & Others*** where it was observed that;

> '*Granting a temporary injunction to restrain a Respondent from using land to which he has a certificate of title, which in law is conclusive evidence of ownership when fraud has not been proved, would be tantamount to contravening the provision of Section184 of the Registration of Titles Act*'.

In an application for a temporary injunction the Applicant has to satisfy the following conditions which Courts of law should consider before granting or rejecting a temporary injunction.

1. The first condition is that the Applicant must show a *prima facie* case with a probability of success.

2. Secondly, the Applicant must show that he is likely to suffer irreparable injury which would not be adequately compensated by an award of damages, if the injunction is denied.

3. Lastly, if Court is in doubt, it would decide the application on a balance of convenience. See ***Kiyimba Kaggwa versus Katende (1985) HCB 43*.**

It must also be noted that a temporary injunction may be granted in the Courts' discretion to maintain the *status quo* pending the disposal of the head suit. Further in considering the above principles, the Court should bear in mind the following guidelines:-

a) That temporary injunctions are discretionary orders and therefore all the facts of the case must be considered and balanced judiciously.

b) That the same being an exercise of judicial discretion, there are no fixed rules and the vetting may be kept flexible.

c) The Court should not attempt to resolve issues related to the main suit.

1. Prima facie case.

As far as the first condition is concerned, there is evidence that the Applicant entered into an agreement with the 1st Respondent/Defendant to purchase the suit land at a consideration of shs. 200,000,000/- only (t*wo hundred million*). The Applicant made the first installment of shs. 30,000,000/= only (*thirty million*) and the Applicant waited to receive a certificate of title in the names of the 1st Respondent and vacant possession of the premises which the 1st Respondent failed to do, instead sold the suit property to the 2nd Respondent who has fenced off the same.

In the case of ***Digital Solutions Ltd versus MTN Uganda Ltd Miscellaneous Application No. 546 of 2004*** on page 4, Court heard that, the Applicant must show a *prima facie* with a probability of success and in showing that the Applicant has a *prima facie* case, **"***Court must be satisfied on the basis of the material availed at this stage that there are serious questions to be tried between the parties with a probability that the question will be decided in favor of the Applicant***".**

Following paragraphs 2, 3 and 4 of the affidavit in support of the application, the Applicant claims to be the owner of the suit land and attached the sale agreement as proof of the same, he also claims that the Respondents have trespassed on the suit land and attached the sale agreement as proof of the same, he also claims that the Respondents have trespassed on the suit land and that they have threatened to carry on construction work before hearing of the main suit.

It was upon the above set of facts that the 1st Respondent counter claimed Civil Suit No. 838 of 2017 which is still pending, wherein she stated that, the Applicant committed breach of the agreement and that it conspired with a one Sarah of Buganda Land Board to defraud the 1st Respondent by asking for shs. 30,000,000/- only (*thirty million)* but gave a receipt of 17,000,000/- only (*seventeen million).*

The above shows that by the Applicant entering into an agreement with the 1st Respondent and paying the 1st installment of shs. 30,000,000/- only (*thirty million)* which the Respondents do not dispute, made the Applicant acquire an interest in the suit property which interest has to be protected by this Court hence establishing triable issues which must be resolved.

The fact the 2nd Respondent alleged knowledge of the purchase of the suit property by the Applicant and yet he went ahead to purchase the same, further leads weight to the finding that there is a *prima facie* case. For the above reason, I find that the Applicant has established a *prima facie* case with a likelihood of success.

2. Irreparable damages.

On irreparable injury, the Applicant contended that he bought the suit land and was paying in installments awaiting the grant of the certificate of title to complete the purchase price. Therefore if any developments on the suit land have not been stopped as the land will be put to waste, the Company/Applicant is likely to be embarrassed and suffer loss.

However, in view of the holding of this Court, in the case of ***Nambi versus Bujingo*** (*(supra)*, the pleading of an award of damages by the Applicant, presupposes that his injury is compensatable. This issue therefore is not proved.

3. Need to preserve the *status quo*

As far as *status quo* is concerned, the person in possession cannot be dispossessed without due process of the law. It is trite law that a bonafide possessor of property should not be dispossessed pending the suit unless there is some substantial reason.

From the interim order granted on the 26th March 2018, I note that the *status quo* was that the Respondents were in possession of the suit property which was maintained by Court.

The position of the Court of Appeal on this principle is found in the case of ***Godfrey Sekitoleko & Others versus Seezi Mutabazi (2001-2005) HCB vol.380*** which stated as follows;

> *"The Court has a duty to protect the interest of the parties pending the disposal of the substantive suit. The subject matter of a temporary injunction is the protection of legal rights pending litigation. In exercising its jurisdiction to protect legal rights to the property from irreparable damage pending the trial, the 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".*

From the above set of facts, it is clear that the suit property is at a great risk of being alienated and wasted through disposing it of or alienating the same, given the affidavit evidence of the 1st Respondent who claims to have commenced construction. Therefore it would be in the interest of justice for Court to preserve the *status quo* of the land in the current state without any developments being carried out by either party, pending the disposal of Civil Suit No. 838 of 2017.

4. Balance of convenience.

Lastly on the balance of convenience, which is resorted to where Court may have any doubt, whether to grant or not, has been defined to me as an examination of which party would stand to lose if the injunction is not granted or is denied.

In the instant case, if the application is denied and fraud in favour of the Respondents and they are allowed to proceed with the construction as seen in the affidavit of the 2nd Respondent, the Applicant would be more inconvenienced than the Respondents. In the event that the main suit is settled in its' favour, the Applicant would suffer more inconveniences in putting back the suit property to the previous status.

The balance therefore is in favour of the Applicant.

In conclusion therefore, I find that the Applicant has made out a case for grant of a temporary injunction. The application is accordingly allowed.

Costs in the cause.

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Henry I. Kawesa

JUDGE

24/05/2018.

MISC. APPL NO. 1674-2017-SUNSTONE LTD VS NAKAMYA R & ANOR (RULING)

24/05/2018:

John Sengooba for the 1st Defendant.

Sebuufu for the 2nd Respondent.

Applicants' Counsel (Kenneth Kajeke) absent.

Respondents absent.

Court: Ruling given to the parties as above.

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Henry I. Kawesa
JUDGE
24/05/2018.