IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Misc. Civil Application No. 0127 of 2019

In the matter between

1. MRS. PHILEMENA AKELLO OLAK
2. OKELLO SAMUEL
3. ONEN PATRICK
4. OLOYA MICHAEL
5. ABER CHRISTINE
6. OKWIR COLLIN
7. EZERIA AKOKO **APPLLICANTS**

And

1. BONNIE S. RWAMUKAAGA
2. NORTH BUKEDI COTTON CO. LTD
3. LIBRACOURT BAILIFFS ANDAUCTIONERS **RESPONDENTS**

Heard: 23 June, 2020.
Delivered: 23 July, 2020.

Civil Procedure *— Order 41 rules 1 and 3 of The Civil Procedure Rules, and section 33 of The Civil Procedure Act — Temporary injunctions— It is established by the law and by decided cases that the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the status quo between the parties, pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now, well settled. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in*

doubt, it will decide an application on the balance of convenience — The purpose of granting a temporary injunction is for preservation of the parties' legal rights pending litigation and to prevent the status quo from being upset in the meantime. An interlocutory injunction would be appropriate in circumstances where the court's ability to render a meaningful decision on the merits would otherwise be in jeopardy.— When considering preservation of the status quo, the court doesn't determine the legal rights to the property. Preservation of the suit property and the maintenance of the status quo between the parties though is not an end in itself. It is aimed at the need to protect the integrity of the trial as a dispute resolution process— an interlocutory injunction would not be appropriate in circumstances where the court's ability to render a meaningful decision on the merits is not in jeopardy.

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application made under Order 41 rules 1 and 3 of *The Civil Procedure Rules*, and section 33 of *The Civil Procedure Act* for grant of a temporary injunction pending the final disposal of High Court Civil Suit No. 019 of 2019 now pending before this court, between the same parties. The application is premised on grounds that the 2nd respondent has undertaken a survey, planted mark stones, is uprooting trees and other natural vegetation on approximately 2,000 acres forming part of the approximately 7,660 acres of land in dispute, as a precursor for undertaking commercial agriculture. It is contended that attempts to restrain the respondents have been met with threats of violence and intimidation, yet it is important that the *status quo* of the land be maintained until final disposal of the suit, since the applicants stand to suffer irreparable damage if the temporary injunction is not granted.

[2] By their respective affidavits in reply, the respondents are opposed to the grant of the order sought, contending that the 2nd respondent is a bona fide purchaser of the land in dispute, having purchased the same pursuant to a warrant of sale in execution of a court decree, executed by the 1st respondent trading under the

name and style of the 3rd respondent. The respondents deny having expressed any threats of violence or intimidation toward the applicants.

[3] The background to the application is that during the year 2010, a one Odoch Bosco Olak was sued by Watoto Child Care Ministries. Judgment was entered in favour of the plaintiff on 17th November, 2010 awarding the plaintiff a total of shs. 932,400,000/= inclusive of costs. The judgment debtor paid shs. 65,500,000/= leaving a balance of shs. 927,125,000/= to be recovered by way of attachment and sale of the judgment debtor's property. It is on that account that the land now in dispute was attached and advertised for sale on 26th February, 2019. By an order of sale dated 14th December, 2018 two thousand acres of that land were sold to the 2nd respondent on 31st July, 2019. Prior to that sale, all the applicants, save the 1st applicant, were involved in negotiations which on 2nd October, 2018 resulted in a family resolution offering to sell part of their land situated at Nyamukino village, in order to bail out the judgment debtor, who is a member of their family. Now the 1st applicant, as the widow of the late Engineer Victor Aliker Olak, who was the father of the rest of the applicants, claims that the land attached and sold to the 2nd respondent, forms part of the approximately 7,660 acres of un-registered land comprised in Nwoya Block 2 Plot 10 at Nyamukino village, Alero sub-county, that belong to the estate of the late Engineer Victor Aliker Olak. The applicants are all beneficiaries of that estate.

Conditions for grant of a temporary injunction.

[4] It is established by the law and by decided cases that the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties, pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now, well settled. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which

would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (see *E.A. Industries v. Trufoods, [1972] E.A. 420; Fellowes and Son v. Fisher [1976] I QB 122; American Cyanamid Co v. Ethicon Limited [1975] AC 396*; *Geilla v. Cassman Brown Co. Ltd [1973] E.A. 358* and *GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013*).

Prima facie case.

[5] What amounts to a *prima facie* case, was explained in *Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others, C.A. Civil Appeal No. 65 of 2011 [2001 – 2005] HCB 80* that what is required is for the court to be satisfied that the claim is not frivolous or vexations, and that there are serious questions to be tried. If the legal right sought to be enforced is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party. However, if the applicant's legal right is plain and free from doubt, then interlocutory relief would be more clearly appropriate. By finding that there exists a *prima facie* case in favour of the applicants, the court does not profess to anticipate the determination of the suit, but merely gives as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation other property in the meantime in *status quo*. The Court will not, therefore, except under very special circumstances, grant, upon an interlocutory application before decree, an injunction which virtually directs the defendant to perform an act. An interlocutory injunction is merely provisional in its nature and does not conclude a right.

[6] In the present case, the applicants' claim is for a declaration that the warrant of attachment issued in High Court Civil Suit No. 32 of 2010 was for the attachment and sale of land belonging to Odoch Bosco Olak, yet it is part of the unregistered land belonging to the estate of the late Engineer Victor Aliker Olak, comprised in Nwoya Block 2 Plot 10 at Nyamukino village, Alero sub-county, that was attached

instead and sold to the 2nd respondent. They contend the estate of the late Engineer Victor Aliker Olak was never party to the proceedings in that suit and therefore its property was not available for attachment in execution of a decree issued in that suit. They therefore seek the revocation of the warrant of attachment and order of sale dated 14th December, 2018, the resultant sale agreement dated 31st July, 2019 and ultimately eviction of the 2nd respondent from the land it is said to have unlawfully occupied since 7th August, 2019.

[7] In their joint written statement of defence, the 1st and 3rd respondents contend that land forming part of the estate of the late is attachable. An application for attachment and sale of that land was first issued on 20th July, 2011 following which the 2nd and 4th applicants filed an objector application. When that application came up for hearing on 23rd September, 2011 the two applicants sought time for the family to determine and delineate the part of the land that belonged to the judgment debtor, whereupon the court granted them a month within which to resolve that. Upon their failure to comply, the judgment creditor renews its application for execution, resulting in the sale that is now being challenged. When the land was re-advertised for sale, the family of the late Engineer Victor Aliker Olak convened a meeting at which a resolution was made on 2nd October, 2018 undertaking to sell off the judgment debtor's interest in the land attached, and pay off the outstanding judgment debt. The family still defaulted on their undertaking prompting the court to issue a warrant of attachment and sale two months later on 14th December, 2018. Only 2,000 acres out of the total 7,660 were sold to the 2nd respondent.

[8] Counsel for the 1st and 3rd respondents, argued that the Applicants' case is a disguised stay of an execution that has already been concluded. The Applicant's entire case is a disguised objector to an execution that the 1st and 3rd Respondents lawfully undertook under court orders. Indeed I find that in the underlying suit, it is clear that the applicants stand in the position of objectors to the judicial sale in execution of a decree of the Court. Under section 34 (2) of *The*

Civil procedure Act, the court may, subject to any objection as to limitation or jurisdiction, treat a proceeding filed for purposes of determining questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree as a suit. Whereas Under Order 22 rule 57 of *The Civil procedure Rules*, the Court has the mandate to release property from attachment once satisfied that it was not in the possession of the judgment Debtor; or in possession of the objector on account of or in trust of the judgment debtor, but for some other person (see *Khakale E. t/a New Elgon Textiles v. Banyamini W (in the matter of Mugunjo) [1976] HCB 31* and *Kasozi Ddamba v. M/s Male Construction Service Co., [1981] HCB 26*), the question of possession of the property at the date of attachment and its return is the only material question which the court has to consider in such proceedings. Questions of right and title to the attached property can only be agitated by way of a separate suit that may be filed by the unsuccessful party, be it third party claimant or decree-holder.

[9] Furthermore, according to section 44 (1) of *The Civil Procedure Act*, all saleable property, movable or immovable, belonging to the judgment debtor, or over which or the profits of which he or she has a disposing power which he or she may exercise for his or her own benefit, whether the property be held in the name of the judgment debtor or by another person in trust for him or her or on his or her behalf, is liable to attachment and sale in execution of a decree. The underlying suit thus addresses issues of title to the attached property and therefore there exists a *prima facie* case that raises serious issues for the determination of court. The claim is not frivolous or vexations, since there are serious questions to be tried, raised by the applicants in their plaint and contested by the respondents in their written statement of defence.

Irreparable damage.

[10] The next question for court to determine is whether the applicants will suffer irreparable damage if the injunction does not issue. Irreparable damage has been defined by *Black's Law Dictionary*, 9th Edition Page 447 to mean "damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement." It has also been defined as "loss that cannot be compensated for with money" (see *City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000*). Where the injury done to the applicants cannot be estimated and sufficiently compensated by a pecuniary sum. For purposes of this application, I construe it as damage that cannot be undone if the applicants prevail at a trial on the merits, or extreme or very serious damage that will result from a denial of the relief. The question then is whether it is proper to restrain the respondents from doing an act, which if it turned out they had no right to do, would be irreparable.

[11] The mischief complained of by the applicants is the alleged trespass onto their land by the respondents, thus preventing the applicants from the occupation and use of the 2,000 acres that form part of their land. By inference, the applicants claim they are being deprived of income that otherwise may have been obtained from the use of that part of the land. In the first place, the complaint relates only to a part and not the entire land. Secondly, the land in dispute is *prima facie* agricultural land and the activities complained of as being undertaken by the respondents are agricultural in nature. They are not of the type that could lead to the waste or destruction of the value or use of the land. The only difference is that the activities of the 2nd respondent complained of appear to be at a more extensive and commercial level than had hitherto ever been undertaken thereon. The difference between the applicants' and the respondents' claimed user of the land is therefore as to scale of the activities only, not the character of the user. That difference in scale can be quantified and compensated for by way of *mesne* profits, in the event that the applicants prevail in the main suit. *Mesne profits* is

most often defined as the value of the use or occupation of the land during the time it was held by one in wrongful possession and is commonly measured in terms of rents and profits. The amount of *mesne* profits for which a trespasser is liable is ordinarily the amount equivalent to the ordinary letting value of the property, which is quantifiable.

Whether ability to render a meaningful decision on the merits is in jeopardy.

[12] The purpose of granting a temporary injunction is for preservation of the parties' legal rights pending litigation and to prevent the *status quo* from being upset in the meantime (see *Busulwa Henry v. Rose Vicencia Nnakanwagi [1977] HCB 125; Kiyimba-Kagwa E.L.T. v. Haji Abdu Nasser Katende [1985] HCB 43; Musoke Erisa Rainbow v. Kezaala Ahamada & others [1987] HCB 81* and *Odido Alphnse v. Lebel (E.A) Ltd, Eclipse mercantile Co. Ltd & Ochada G. [1987] HCB 77*). The relief is not appropriate where the *status quo* has already been altered or interfered with (see *Waswa Tonny v. Kakooza Joseph [1987] HCB 79* and *Mulijibhai Madhivan & Another v. Teurani Naraindas t/a Paradise Novelties [1988-90] HCB 152*). It will not be granted where the order prayed for, if granted, would substantially dispose of the main suit (see *Batemuka Denis Kimuli v. Sarah Birobonwa Anywar & Ltd John C. Anywar [1987] HCB 71*).

[13] Preservation of the suit property and the maintenance of the *status quo* between the parties though is not an end in itself. It is aimed at the need to protect the integrity of the trial as a dispute resolution process. An interlocutory injunction would be appropriate in circumstances where the court's ability to render a meaningful decision on the merits would otherwise be in jeopardy. If the existing *status quo* is currently causing one of the parties irreparable injury and thereby threatens to nullify the integrity of the process, then it is necessary to curtail the injury by way of a mandatory interlocutory injunction. It is argued by counsel for the 1st and 2nd respondents that the current *status quo* is that the 1st respondent has already incurred costs executing a lawful court order, while the 2nd

Respondent has executed a purchase agreement, made payment and taken possession of the land. In short the *status quo* is that the 2nd Respondent purchased the land and took possession of the same.

[14] When considering preservation of the *status quo*, the court doesn't determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants' ability to assert their claimed rights over the land, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money.

[15] In this case, the possibility of irreparable loss as a result of the 2nd respondent's agricultural activities on the land has not been established as a real probability as opposed to a mere possibility, in the event that the interlocutory injunction is not granted. What the applicants have established is that if the property is sold, transferred, disposed of, encumbered or in any other manner alienated before determination of the suit, this will jeopardise the court's ability to render a meaningful decision on the merits. Such eventuality will compromise the applicants' ability to assert their claimed rights over the land. It is then necessary to restrain the respondents from affecting the 2,000 acres of land in dispute by contracts or conveyances or other similar acts, but not by way of restraining their agricultural activities thereon.

Balance of convenience.

[16] Lastly, it is now necessary to consider the balance of convenience for purposes of determining how extensive the ambit of the restraint imposed should be. Interlocutory relief depends on a comparison of the balance of the possible harms to the two parties. The decision whether to grant the relief is governed by the consideration as to the comparative mischief or inconvenience to the parties

which may arise from granting or withholding the injunction. The court is to regard the comparative injury which would be sustained by the respondent, if an injunction were granted, and by the applicants, if it were refused. The court will decline to grant the interlocutory relief where it finds that if the respondents are restrained and they eventually obtain a decision in their favour on the merits of the suit, they would by such prohibition suffer a prejudice that he cannot be compensated or made good to them.

[17] This balance of convenience and inconvenience contemplates the entry of an interlocutory order only if it appears that greater damage would arise to the applicants by withholding the injunction, in the event of the legal right proving to be in their favour, than to the respondents by granting the injunction in the event of the injunction proving afterwards to have been wrongly granted. The purpose of the test is to direct the court to whichever course promises the smaller probable loss. If the respondent's injuries from what turns out to be an erroneous injunction can be redressed later, there is no reason to deny interlocutory relief otherwise warranted. Conversely, where the final judgment can remedy the applicants' injuries, there is no need to grant immediate protection which may turn out to have been based on error.

[18] The decision whether or not to grant an interlocutory injunction should favour the course likely to inflict the smallest probable irreparable loss of rights. The court should consider and weigh the cost of the probability of an erroneous denial to the applicant against the cost of the probability of an erroneous grant to the respondents.

[19] The acts complained of as being undertaken by the respondents include surveying part of the land, clearing it of natural vegetation and planting of crops, all of which can easily be remedied since the crops can be harvested or taken off the land and the survey revoked. On the other hand, the hardship to the respondents is significant, if they were stopped in this summary manner. The

status quo has already been altered or interfered with since the respondents are already in possession of the land in dispute. The consequences that would be suffered by the respondents in attempting to restore their commercial farming activities to the state and condition in which they are now in the indeterminate future when this litigation finally ends, are simply more significant than the mischief complained of by the applicants. In these circumstances, if it turns out at the end of the trial that denial of the injunction was in error, the injury incurred by the applicants would be remedied by an award of *mesne* profits. On the other hand, if it turns out that grant of the injunction was in error, the respondents would have sustained irreparable injury since their only recourse would be to costs for the suit dismissed against them. The balance of convenience therefore militates against restraining the 2nd respondent's agricultural activities on the land.

[20] The only activities which may occasion irreparable injury to the applicants are those related to the mortgaging of, sale or otherwise creating third party interests in the land. I have considered the extent of the threat posed by the 2nd respondent's activities on the land, which threat is largely limited to selling, transferring, disposing off or through other ways alienating or creating encumbrances over the property. I consider this to be the extent of damage or injury which cannot be readily quantified in monetary terms or which cannot generally be cured by an award of damages.

Order:

[21] In the final result, for purposes of preserving the *status quo*, a temporary injunction is hereby issued, limited to restraining the respondents, their agents, workers, tenants or persons claiming under them, from selling, transferring, disposing off or through other ways alienating or creating encumbrances over the property until the final disposal of the suit. The costs of the application shall abide the outcome of the main suit.

Delivered electronically this 23rd day of July, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the applicants :

For the respondents: M/s ALP Advocates (1st and 3rd Respondents).