

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

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LAND DIVISION

CIVIL APPEAL NO. 24 of 2020

(ARISING FROM MISC. APPLICATION NO.401 OF 2020)

(ARISING FROM CIVIL SUIT NO. 246 of 2020)

10

MOSES KASOZI-----APPELLANT

V

15

1.MUHAMMAD BATTE

2.RUTH KATASI

3.ANDREW KAWUKI

4.BENGO YASIN

5.THE COMMISSIONER LAND REGISTRATION-----RESPONDENTS

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Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

RULING

25 This appeal was brought under Article 126(2)(e) of the 1995 Constitution, section 98, 79(1)(b) of the CPA Cap 71, section 33 of the Judicature Act Cap 13 and O.50 r 8 of the CPR seeking orders that;

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1. The learned Deputy Registrar's order dismissing Miscellaneous Application No. 401 of 2020 was contrary to the facts and the law governing temporary injunctions and ought to be set aside.

2. A temporary injunction be issued maintaining the status quo on the suit land and the register and restraining the Respondents, their workmen, agents and servants from carrying out construction of the suit land, fencing off, evicting, disposing of or otherwise interfering with the applicant's possession of the suit land until the disposal of the main suit.
3. Costs of the application be provided for.

The grounds of appeal are briefly as follows;

- a) The learned Deputy Registrar erred in law and fact in ignoring the fact that in rejecting the application for injunction, she was giving a green card to the 1st respondents to evict the applicants/appellants who are also settled on the suit land.
- b) The learned Deputy Registrar erred in law and fact when she relied on bad law to state that an order should not be issued which has the effect of preventing a title holder the right to use or develop the suit property.
- c) The learned Deputy Registrar erred in law and fact when she insinuated that in an application for a temporary injunction, all three grounds i.e. prima facie case, irreparable damage and balance of convenience must be proved.
- d) The learned Deputy Registrar erred in law and fact when she failed and/or refused to preserve the subject matter of the suit until logical conclusion of the suit.
- e) The learned Deputy Registrar erred in law and fact when she dismissed the application for a temporary injunction which had a cumulative effect of determining the question of ownership of the suit land in an application for a temporary injunction.
- f) The learned Deputy Registrar erred in law and fact when she found that the Appellant will not suffer irreparable damage despite him and his family being in physical possession with a homestead thereon since 2006, thereby; dismissing the application, allowing probable transfers of the suit property and eviction of the Appellant from the 3 acres he occupies on the suit land, whereas the 4th respondent occupies only about 50ft by 100ft by 50ft by 100ft.
- g) The learned Deputy Registrar erred in law and fact in finding that the balance of convenience favoured dismissing the application ignoring the fact that it would be

inconvenient if the status quo is altered and the Appellant evicted from physical possession.

h) The learned Deputy Registrar erred in law and fact when she misled herself on the law governing grant of temporary injunction.

5 i) It is in the interests of justice that the subject matter of the main suit be preserved to meet the ends of justice, the application/appeal be allowed and the temporary injunction granted in the terms therein.

10 Counsel for the 4th Respondent filed an affidavit in reply agreeing with the findings of the learned Deputy Registrar and praying that this court uphold the ruling of the court. No replies were filed by the 1st, 2nd, 3rd and 5th Respondents. Written submissions were filed by both Counsel for the Appellant and Counsel for the 4th Respondent.

RESOLUTION

15 I have taken note of the several grounds of appeal but I am of the view that these grounds can be adequately summarized in the question below which this court shall proceed to answer;

Whether the learned Deputy Registrar erred in law and fact when she declined to grant the temporary injunction sought by the Appellant?

20 Page 3 of the ruling indicates that the learned Deputy Registrar rightly stated the position of the law on temporary injunctions under Order 41 Rule 1 of the Civil Procedure Rules as follows; *'The purpose of the temporary injunction order is to preserve the status quo of the suit property until the parties' rights in the subject matter are determined in the main*
25 *suit.'*

She added that;

'The conditions to be satisfied by a party seeking temporary injunctive order have been discussed in several cases based majorly on Order 41 Rule 1 of the Civil Procedure Rules. These as laid down in the case of Kiyimba Kaggwa Vs. Hajji Abdul Nasser Katende
30 (1985) HCB Odoki J (as he then was) laid down the conditions for a grant of an order of a temporary injunction to be;

1. *The applicant must show a prima facie case with a probability of success.*
2. *The applicant is likely to suffer irreparable injury.*
3. *When the court is in doubt, it will decide the application based on the balance of convenience.'*

5 In her ruling, the learned Deputy Registrar found on page 5 of her ruling that the first condition had been satisfied by the Applicants.

On the issue of irreparable injury, the learned Deputy Registrar found on page 5 paragraph 7 of the ruling that;

10 *'From the pleading, the applicant is currently in physical possession of the suit land as per the pictorial evidence, and says to have stayed thereon since 2006.*

*In the plaint paragraph 5(b) provides that; the **vendor** now the 1st Respondent undertook to indemnify the purchaser now the **Applicant** for **any loss** or **3rd party claims** that may be occasioned by the **vendor's lack or defeat in title.**'*

15 Coupled with the prayers for mesne profits and additional general damages, in the plaint, the learned Deputy Registrar concluded that the Applicant could be adequately compensated in monetary terms. She relied on the case of Zam Nambi V Bujingo Ayub & 32 Others MA No. 1013 of 2015, where Justice Kawesa pointed out that a prayer for an award of damages or compensation by an applicant shows a possibility of
20 compensation in case of danger or injury, the learned Deputy Registrar found that the Applicants had failed to prove they would suffer irreparable injury.

25 Lastly, the learned Registrar found that balance of convenience favours party who is in possession of the suit property. She determined that; *'it is the Applicant who is in physical possession of some part of the suit land and the 4th Respondent too has legal possession, since he is the registered proprietor of the suit land.'* The learned Deputy Registrar then cited the case of Francis Kisitu v Kide Hardware (U) Ltd (1998) KALR 886 which held that if the status quo is to be maintained pending disposal of the suit, it must be done in such a manner not to deny the title holder the right to use or develop the suit property in the
30 meantime as such denial would amount to contravention of section 184 of the Registration of Titles Act Cap 205 now the equivalent of section 59 of the Registration of Titles Act.

Having found that the Applicant had failed to establish two out of the three conditions, she dismissed the application and declined to grant the temporary injunction order prayed sought.

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I have perused the submissions filed by Counsel and I shall proceed to render the evidence to the application to a fresh scrutiny. To do this, I shall rely mainly on the Uganda Civil Justice Bench Book, 1st Edition, January 2016 at page 55.

10 It is important to revisit the case of Kiyimba Kaggwa Vs. Hajji Abdul Nasser Katende (1985) HCB page 43 on temporary injunctions. The most important purpose of the grant of temporary injunctions is to preserve the matters in status quo until the question to be investigated in the main suit is finally disposed of. The court laid down the conditions in sequential order;

- 15 a. Firstly, that the applicant must show a prima facie case with a probability of success.
- b. Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated for in damages.
- 20 c. Thirdly, if the court is in doubt, it would decide an application on a balance of convenience.

Prima facie case

The applicant was duty bound to show that there is a prima facie case in the substantive suit with a probability of success. At this stage, court does not delve deep into the merits
25 of the case to see if the Applicant has a plausible case, rather, court determines that the claim is not frivolous or vexatious. And that there is a serious issue to be determined at the trial. See Daniel Mukwaya v Administrator General HCCS 630 of 1993 (Unreported). I have perused the pleadings of the parties in the application and the plaint indicates that the Applicant is claiming ownership of the suit land, a serious triable issue. I am therefore
30 satisfied there is a prima facie case with a probability of success. The learned Deputy

Registrar arrived at the same conclusion however, she should have done so without deeply delving into the merits and plausibility of the case as she did.

Irreparable Injury

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Contrary to the findings of the learned Deputy Registrar, irreparable injury does not mean that there must not be physical possibility of repairing the injury but means that the injury must be a substantial or material one that is one that cannot be adequately compensated for in damages. See *Kiyimba Kaggwa supra*.

10 In American Cyanamid v Ethicon Limited 1975 AC at page 396, court noted that the injunction would not be granted;

'If damages in the measure recoverable at common law would be adequate remedy and if the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage'.

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Such damage is usually not reversible and cannot be quantified. An injunction is therefore necessary to protect the parties from such harm.

In the instant application, the plaintiff/ applicant's cause of action is indicated under paragraph 4 (a) of the plaint as follows;

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'A declaration that the plaintiff is the lawful rightful owner of all land comprised in Busiro Block 463 Plot 75 at Maya measuring 3 acres'

The learned Deputy Registrar therefore misdirected herself when she stated that the compensation sought by the Applicant would be an adequate remedy and that the Respondents was in a financial position to pay it. The plaint indicates that the cause of action is for recovery of land. At this stage of the trial it is not possible to adequately quantify the damage that would be suffered. I am satisfied that the applicant demonstrated sufficiently that he would suffer irreparable injury if the injunction is not granted.

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Balance of Convenience

Having answered question 1 in the affirmative and question 2 in the negative, the learned Deputy Registrar considered the question of whether to grant the application on a balance of convenience. She found that the applicant was in physical possession of the suit land and the balance of convenience was tipped in favour of the person in possession of the property. Contradictory to that finding, the learned Deputy Registrar cited the case of Francis Kisitu v Kide Hardware (U) Ltd (1998) KALR 886 which held that *if the status quo is to be maintained pending disposal of the suit, it must be done in such a manner not to deny the title holder the right to use or develop the suit property in the meantime as such denial would amount to contravention of section 184 of the Registration of Titles Act Cap 205 now the equivalent of section 59 of the Registration of Titles Act*. She thereby declined to grant the application for temporary injunction.

In the case of Ndema Emanzi Rukandema v Mubiru Henry MA No. 225 of 2013, the learned Justice Tuhaise defined status quo at length and specifically stating;

‘Court’s duty is only to preserve the existing situation 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.’

Despite having found that the Appellant was in physical possession of the suit land and that he had established a prima facie case, the learned Deputy Registrar went ahead to dismiss the temporary injunction on the premise that the balance of convenience tipped in favour of the 4th respondent who is the registered proprietor of the suit land.

Counsel for the Appellant argued that the learned Deputy Registrar rightly observed that the Appellant was in possession of the suit land and he therefore stood to suffer more than the Respondents if the application was not granted thus granting the temporary injunction would ensure that the subject matter of the suit is preserved. Counsel for the 4th Respondent in reply submitted that since the 4th Respondent holds the title to the suit

land as the registered proprietor, whatever loss that will be incurred by the Appellant who has no title but only physical possession can be atoned for by the award of damages.

In Gapco (U) Ltd Vs Kaweesa Badru HCMA No. 259/2013 (Unreported), court held that;
5 *balance of convenience literally means that if the risk of doing an injustice is going to make the applicants suffer then probably the balance of convenience is favourable to him/her and the court would most likely be inclined to grant to him/her the application for a temporary injunction.*

10 The status quo was that the Appellant was in physical possession of the suit land. The learned Deputy Registrar acknowledged that. The court has a duty to protect the interests of parties pending the disposal of the substantive suit. The subject matter of a Temporary injunction is the protection of legal rights pending litigation. See Godfrey Sekitoleko v Seezi Mutabaazi [2001- 2005] HCB 80.

15 It was irregular for the learned Deputy Registrar to make any findings on the proprietorship of the suit land in her ruling. This was the triable issue. She invariably bestowed rights on the 4th Respondent which were the subject of the main suit.

20 In conclusion I find that the learned Deputy Registrar erred in law and fact when she declined to grant the temporary injunction sought by the Appellant under Miscellaneous Application No. 401 of 2020.

I, therefore allow this appeal and order as follows;

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1. **The ruling and orders of the learned Deputy Registrar in Miscellaneous Application No. 401 of 2020 are hereby set aside.**
 2. **A temporary injunction maintaining the status quo on the suit land and the register and restraining the Respondents or their agents, such persons acting in their capacity, from evicting, demolishing any buildings, further**
30 **constructing, advertising, offering for sale, transferring any interest or**

otherwise further dealing with the suit land comprised in Busiro Block 463 Plot 75 Land at Maya until the hearing and final determination of the main suit; is hereby issued.

3. Each party shall bear its own costs.

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Olive Kazaarwe Mukwaya

JUDGE

10 **11th January 2021**

Delivered by email to Counsel for the parties.

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