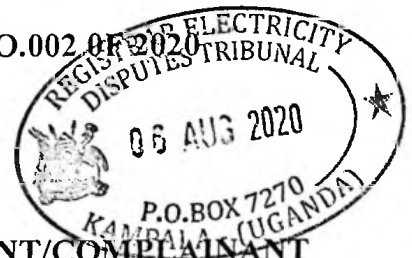


THE REPUBLIC OF UGANDA
THE ELECTRICITY DISPUTES TRIBUNAL
MISCELLANEOUS APPLICATION EDT NO.002 OF 2020



EDWARD BANDA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE ELDAD BANDA)APPLICANT/COMPLAINANT

AND

ATTORNEY GENERAL.....RESPONDENT.

RULING ON AN APPLICATION TO ISSUE A TEMPORARY INJUNCTION.

The Applicant Edward Banda, suing as the Administrator of the estate of the late Eldad Banda brought this application taken out by his Advocates, J.B. Byamugisha Advocates seeking:

- a) A temporary injunction do issue restraining the Respondent, the Rural Electrification Agency, or their contractors, agents employees or anyone claiming under them from trespassing, alienating, wasting away, digging up or planting electric poles or in any other way dealing with the land comprised in Freehold Register Volume HQT285, Folio 13, Block 122 Plot5, Mucha Gasharara Road at Kirwa, Bufumbira, Kisoro until the hearing and final determination of Complaint **EDT 10 of 2020** and,
- b) Costs of the Application to be provided for.

The Application was supported by the affidavit of Edward Banda dated 6th July 2020. Mr. Edward Banda testified in his affidavit that he was the Administrator of the estate of his late father, Eldad Banda and attached a copy of Letters of Administration as annexure "A" wherein the High Court of Uganda granted him authority to administer the deceased's estate. He also attached thereto a photocopy of the certificate of title to the above quoted Plot of land, registered in the names of Banda Eldad, which he marked as annexure "B".

He further deponed that sometimes in November 2019, the Rural Electrification Agency (REA) which he described as a semi- autonomous body, established under the Electricity Act, Cap.145 to operationalise the Government's rural electrification function acting through its employees, contractors, and or its agents illegally and maliciously damaged the land comprised in the above said certificate of title by trespassing on it whereby they cut down mature pines, dug deep holes and planted poles in these holes without the Applicant's consent. He testifies by his affidavit that REA did not desist from its trespass even after the Applicant's Advocates had written to it, and attached a copy of the letter which he marked as Annexure "C".

He further deponed that REA had however gone ahead and installed a high voltage three phase power line, which he claimed is a health hazard to the occupants of the residential house on the land. He attached copies of photographs showing what he claimed were activities that he had described and collectively marked them as "D".

Finally, he stated that if a temporary injunction is not issued to restrain the Respondent from trespassing and other activities mentioned herein above, the estate would suffer irreparable loss and the Complaint rendered nugatory.

The Applicant's said Advocates, filed an affidavit sworn by one Alex Odur in proof of service of the application on the Attorney General on the 7th July 2020 and attached therewith a copy of the chamber summons bearing a signature and stamp of the Ministry of Justice and Constitutional Affairs, Directorate of Civil Litigation.

Applicant's Counsel sought to proceed **ex-parte** against the Attorney General, the latter not having responded to both the application for issuance of the temporary injunction and the main Complaint **EDT 01 of 2020**.

The tribunal sitting on 17th July 2020 declined the request and requested the Applicant to serve the Attorney General once more and file a fresh affidavit of service, and in absence of a reply from the Attorney General, it would proceed to hear the application **ex-parte** on the date to be fixed by the tribunal.

When the matter came up on 28-07-2020, the date to which it was adjourned, Counsel Albert Byamugisha for the Applicant informed the tribunal that in compliance with the tribunal's directive, the Respondent had been served afresh on 21st July 2020 and an affidavit of service to that effect deponed by one Alex Odur had been filed in the tribunal on 22nd July 2020. He also pointed out that the Respondent like on the past occasions was not in the tribunal, although the Respondent had on 27th July 2020 filed in the tribunal an affidavit made by one Mugisa Lydia in response to the chamber summons. Ms. Mugisa's affidavit deponed that **REA** in its coming unto the land in issue, was merely carrying out its mandate and the Applicant would be put to strict proof of the other allegations he had made.

She further deponed that, the electricity poles erected by **REA** were not a health hazard to the occupants of the residential house and averred that if the application is granted, it will constitute a miscarriage of justice and should be dismissed with costs.

The tribunal took note of the absence of the Respondent on all occasions when this matter had come up for consideration, including on this day the 28th July 2020, although served with hearing notices as could be fathomed from the two affidavits of service referred to herein before, deponed by Mr. Alex Odur. The tribunal has also noted that the Respondent did subsequently on 27th July 2020 file and served their Affidavit in response to the Applicant's chamber summons; but had not appeared on the 28th July 2020 as had been required of them, and that no reason was given or forwarded to the tribunal for this absence. The tribunal in consideration of the above circumstances, permitted Counsel for the Applicant, Albert Byamugisha to proceed ex-parte.

Counsel for the Applicant was permitted to and did rely on a skelton submission that he had filed in the tribunal on 17th July 2020 to justify the grant of his application for temporary injunction.

Counsel for the Applicant submitted as follows:

The Applicant is the administrator of the estate of the late Eldad Banda, who was the registered proprietor of the land comprised in Freehold Register Volume HQT285, Folio 13, Block (Road) 122, Plot 5, Mucha Gashara Road in Kirwa, Bufumbira Kisoro (hereinafter the “land in issue”) and that:

Section 180 of the Succession Act Cap.162 provides that:

“the executor or administrator, as the case maybe, of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such.”

Article 20 of the Constitution of the Republic of Uganda provides that:

1. “Fundamental rights and freedoms of the individual are inherent and not granted by the State
2. The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of the Government and by all persons”.

Article 27 of the Constitution provides as follows:

1. “Every person has a right to own property either individually or in association with others.
2. No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied-
 - a) the taking of possession or acquisition necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and
 - b) the compulsory taking of possession or acquisition of the property is made under a law which makes provision for-
 - (i) prompt payment for fair and adequate compensation, prior to the taking of possession or acquisition of the property; and
 - (ii) a right of access to a Court of law by any person who has an interest or right over the property”.

He further argued that; The grounds for grant of a temporary injunction were stated in **American Cyanamid Co. v Ethicon Ltd (1975) AC 396** to include,

- (i) there is a serious question to be tried;
- (ii) an injunction will not be granted unless the Applicant will suffer irreparable injury;
- (iii) and where the Court is in doubt as to either, the matter is settled on a balance of convenience.

In respect to the first ground, the Applicant, as deponed in **paragraph 7** of the affidavit in support of summons, filed **Complaint No. EDT/10 of 2020** on account of **REA**, through its contractors, employees, trespassing on the estate property without the consent of the Applicant, in contravention of the Constitution. The Applicant further states in paragraph 3 malicious damages was occasioned to the suit land.

The Applicant states in **paragraph 5** and as evidenced by annexure marked “**D**”, the installation of high voltage three phase power lines. Irreparable injury was held in **Kiyimba Kaggwa V Hajji Katende (1985) HCB 43**,

“to mean substantial or material one, that is one that cannot be adequately compensated for in damages”.

Notwithstanding the damage through holes and destruction of trees already occurring on the suit land, the proximity of these high voltage electric lines to the residential structure exposes the occupants to a present and continuing serious health risk resulting from radiation emitted by electric current, risks that can cause cancer. Such injury cannot be atoned for by an award of damages.

The balance of convenience additionally weights in favour of the Applicant who is likely to suffer more if the application is not granted. The illegal activities of **REA** have already occasioned loss to the Applicant which include, *inter alia*, the destruction of mature pine trees, a deponed in paragraph 3 and in spite of the demand to desist- annexure “**C**” the illegalities are continued. The grant of temporary injunction is to preserve the status quo until the matter in the suit is finally disposed of, **Kiyimba Kaggwa V Hajji Katende (Supra)** and if in the interest of the Applicant the status quo be maintained.

Counsel for the Applicant further added that the Respondent in their affidavit of reply had not denied trespass nor stated that the Applicant was ever compensated as required by Article 26 of the Constitution, citing the case of **Uganda National Road Authority vs Irumba Asumani and Peter Magelah in the Supreme Court of Uganda. Constitutional Appeal No. 02 of 2014** to buttress his Skelton submission. He cited the following Principles enunciated in the above case to highlight his arguments:

“After considering the historical background in this country where people’s properties were compulsorily acquired by Government during the past regimes, the Constitutional Court concluded that the 1995 Constitution is very restrictive on the powers of the Government to acquire land compulsorily. The Constitution also provides for prior payment of compensation before taking possession or acquisition.

Before such compulsory acquisition takes place Article 26(b)(i) provides that:

“prompt payment of fair and adequate compensation; prior to the taking of or acquisition of property.” (on page 10 and 11) of the said judgment.

“According to Article 26 of the Constitution, compensation should have been made before the land was gazetted for acquisition by Government.”(on page 16) of the said judgment.

“Article 26 of the Constitution requires prior payment of compensation for the deprivation of property by the Government. Article 43 of the Constitution limits the enjoyment of fundamental rights and freedoms where it is demonstrably justifiable and is provided for by the Constitution. Article 43(2) (c) of the Constitution states that public interest shall not permit; “any limitation of enjoyment of rights and freedom prescribed by this Chapter beyond what is acceptable and demonstrably justification in a free and democratic society or what is provided in this Constitution.”

“The provisions are very clear and I cannot appreciate the arguments by Appellant’s Counsel that when one reads Article 26 and 43 together taking one’s land prior to compensation becomes constitutional. This in my view would be contrary to the rules of statutory and constitutional interpretation.”

“It is evident from Article 44 that Article 26 is not included among the non-derogable rights. That notwithstanding, it does not give powers to Government to compulsorily acquire people’s property, without prior prompt payment of fair and adequate compensation prior to the taking of possession of the property. In the instant appeal we are dealing with a project that had been planned for by the Government of Uganda before it was carried out.” “The Constitution Court was not dealing with emergency situations and disasters”. (page 19 and 20) of the said judgment.

Referring to line 26 on page 20 of the said Judgment, he asserted that we are dealing with a project that had been planned for by the Government of Uganda before it was carried out but that the Respondent never sought consent before coming unto that land and, digging it up and erecting poles and neither do they deny that the assertion by the Applicant that **REA** has installed a three (3) phase power line over the land on which is an occupied residential house and the wires constitute a health hazard to the occupants. He pointed out that the Respondent in its paragraph 3 of its affidavit in response limits its denial to electric poles erected by **REA** being a health hazard to the occupants of the residential house and does not respond to the assertion in respect of the wires being a health hazard.

He prayed that the application be allowed with costs. We did not have the benefit of a submission from the Respondent, for the reason that none was offered.

We have carefully perused the affidavits in support and in response respectively. We have also carefully considered the submissions as highlighted above together with principles enunciated in the case precedents he drew our attention to.

We particularly wish to associate with the views of Odoki.J. as he was then, when he held in **Kiyimba Kaggwa Vs Katende (1985) HCB 43** that “the granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve matters in Status quo until the question to be investigated in the suit can finally be disposed of”

We further associate ourselves with the holding in that case that; “The conditions for the grant of an interlocutory injunction are first that, the Applicant must show a prima facie case with a probability of success. Secondly, such 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”

Importantly for this particular application; Court in that case also held that “irreparable injury does not mean that there must not be physical possibility of repairing injury, but means that the injury, must be substantial or material one, that is one that cannot be adequately compensated for in damages”.

We also associate with his Lordship’s statement made *per curium* in his judgment in the above case that “It is not part of the Court’s function at this stage of litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature consideration”

The above notwithstanding, we find that there were serious questions as to trespass, compensation, damage to property and health hazards among others. We find that the Applicant’s submissions lead us to the conclusion that he has shown a prima facie case with a probability of success and that he is likely to suffer irreparable damage which may not be sufficiently atoned for by way of damages. We also find and are of the opinion that the balance of convenience is in favour of granting relief to the Applicant who is likely to suffer more damage if the land in question is interfered or continued to be interfered.

This application is thus granted. Costs of the application will be costs in the cause.

Dated at Kampala this 06th day of August 2020.

Signed:

Charles Okoth- Owor



Chairperson

Harriet Wanyoto



Member