

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 679/90

1. FRANCIS BABUMBA

2. JOHN BYEKWASO

3. YUSUF MWASA:.....:PLAINTIFF

VERSUS

ERUSA BUNJU:.....:DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE G.M. OKELLO

R U L I N G .

The applicants in this application, seek an order of this Court for a temporary injunction to restrain the defendant, her servants or Agents from breaking into, entering or evicting the plaintiffs/Applicants from the premises on Kibuga Block 8 Plot No. 113 Rubaga Road at Mengo in breach of the lease Agreement that exists between the parties.

The application v/as brought under 037 rr 1(a), 2(1), 3 and 9 of the CPR and section 36 (1) and 3 of the Judicature Act 11/67. It is supported by an affidavit sworn by John Joseph Kibalama Namusanga Byekwaso the 2nd Applicant/Plaintiff on 6th August 1990. The facts which gave rise to this application appeal- to be as follows:

On or about 10/2/55 the plaintiffs/Applicants entered into a Lease Agreement with one Szekeri Bunju the Landlord in respect of Plot No, 113, Kibuga Block No. 8 Rubaga Road at Mengo (hereinafter referred to as the suit Property) for a period of 49 years for

Residential **purpose** at a yearly rental of shs. 400/= **payable in** advance on the first day of March in every years. Besides some few covenants which are contained in the Lease Agreement itself, the Agreement is also subject to- the covenants and powers implied under the Registration of Title Act. The Lessor later died and Letters of Administration of his Estate was granted by this court to his widow now the respondent to this Application, on 8/8/85.

Soon after the grant of Letters of Administration a dispute broke out between the plaintiff/applicants and the respondent over an alleged breach of the Lease Agreement by the applicants regarding the user of the suit Property and nonpayment of rent. In consequence, the Respondent attempted forcefully to re-enter the suit Property before the expiry of the Lease, an act which the Applicants violently resisted by employing, armed guards who threw out the respondent and her property from the suit property and continued to keep her out of the same. In the meantime the applicants/plaintiffs filed the head suit against the respondent/defendant alleging, breach of the Lease Agreement by the Respondent. In that suit the plaintiffs/Applicants claim inter alia for a permanent injunction for the duration of the Lease, while the main suit is still pending, the Applicants/Plaintiffs filed this interlocutory application.

For the Respondent an affidavit in reply sworn by Sam Bitangaro on 12/9/90 as counsel duly instructed to conduct the defence of this case was filed.

Mr. Mugisha for the applicant attacked this affidavit and asked me to reject it. I propose to deal with this issue right away before I consider the merits or demerits of the application.

The gist of Mr. Mugisha's complainant is that Mr. Sam Bitangaro who is instructed to act as counsel to conduct the defence of this case and is appearing as such in the application also swore this affidavit on a contentious matter. Counsel referred to paragraph 3 of the affidavit and submitted that for an. advocate to act both as counsel and a witness in the same case is not only contrary to the rule of practice but that it also offends against Regulation 8 of the Advocates (Professional Conduct) Regulation 1977. He relied on Yunus

Ismail t/a Bombo City Store vs. Alex Kamukamu and others Civil Appeal No 7/87 Uganda Supreme Court unreported; Rv Secretary for State for India (1941) 2 ALL ER 546; Jafferah & Anor. vs. Borrison and Anor. (1971) EA 546 and Gandeshal vs Killing Coffee Estate LTD(1969) EA 299.

On his part Hr. Bitangaro contended that he did not violate regulation 8 of the Advocates (Professional conduct) Regulation 1977 because the averment in the affidavit are not contentious and that those other cases cited were therefore irrelevant.

It is a clear rule of practice reinforced by a rule of Professional conduct that an advocate should not act both as counsel and a witness in the same case. In RV Secretary of State for India (1941) 2 ALL ER 546 a junior counsel on one side was called as a witness to prove certain aspects of Indian Law and continued thereafter to act as counsel in the case-. No objection was taken to this procedure by counsel on the other side.

But Humphrey J. had this to say at page 556-

"I think it is right to point out that this was irregular and contrary to practice. A barrister may be briefed as counsel in a case, or he may be a witness in a case; He should not act as both counsel and witness in the same case."

The above view was adopted in Tunus Ismail t/a Bombo City Store above.

Apart from that, Regulation 8 of Advocates (Professional Conduct)

Regulation 1977 also, prohibits this procedure .in the following manner,

"No advocate stay appear before any court or tribunal in any matter in which he has reason to believe that he will be required us a witness to give evidence whether verbally, or by affidavit and if, while appearing in any matter it becomes apparent that he will be required as a witness to give evidence whether verbally or by affidavit he should not continue to appear. Provided that this regulation shall not prevent

an advocate from giving evidence whether verbally or by declaration or affidavit *011* formal or non-contentious matter or fact in any matter in which he acts or appears”

There can be no doubt that the above passage prohibits an advocate to act both as Counsel and witness in the same case except in a formal or non-contentious matter.

Paragraph 3 of the affidavit which was sworn by Sam Bitangaro and of which counsel for the Applicants ‘complaint reads as follows

“That j have perused the said John Byekwaso’s affidavit and state that in reply to paragraphs 5 and 6 thereof the defendant’s re-entry of the suit property was legal as the plaintiff was in rent arrears and the sub-lease provided for re-entry in any such event.”

Under paragraph 6 of his affidavit, Byekwaso asserted that the plaintiffs have not committed any breach of any of the covenants of the Lease Agreement. In effect they denied being in arrears of rent. In paragraph 12 of the plaint' the plaintiffs specifically asserted that they paid their rental though that the respondent rejected it. In paragraph 6 (a) of the w.s.d. however, the defendant alleged breach of the Lease Agreement by the plaintiffs by nonpayment of annual ground' renta.1.

It is clear from the above that the question whether the plaintiff are in arrears of rents is a contentious matter, on which counsel appearing in this case cannot testify as a witness.

In the instant case, the wording of paragraph 3 of Bitangaro’s affidavit clearly shows that the learned counsel deponed of the plaintiffs being in arrears of rent not as a matter of which he was informed by his client but rather as a matter from his own knowledge. This turns him into a witness on a contentious matter and therefore violates both the rule of practice as re-stated in Yunus Ismail above and also the rule of Professional conduct provided under Regulation 8 of the Advocates (Professional conduct" Regulations 1977.

In those circumstances I agree with Mr. Mugisha and I do reject the affidavit sworn by Mr. Sara Bitangaro in reply to the supporting affidavit to this application.

Having DISPOSED OF that issue, I now turn to consider the merits and demerits OF the application.

v

It is A WELL SETTLED principle⁵ that grant OF a temporary injunction is An EXERCISE of A judicial discretion for the purpose of preserving THE STATUS QUO of a subject matter in dispute under threat of BEING WASTED, DAMAGED or alienated until the investigation being CARRIED OUT BY COURT in, the dispute is finalised. For authority SEE: SERGEANT v. PATEL (1949) 16 EACA 63, Giela v. Cosman Brovm Co.. LTD (1973) EA 358. These are a few of the host of authorities on this POINT.

At the hearing both counsels agreed on the above principles. Noor Mohamed Jan Mohamed v. Madvani (1953) 20 SACA 8. and Kiyimba Kaggwa v. Katende (1985) NCB 44 which were cited by counsel for the applicants are some OF the numerous case authorities on this principle.

On the conditions for granting a temporary injunction, both counsels also rightly in my view agreed that for a temporary injunction to be granted the applicant must show:-

- (1) that he has a prima facie case with a probability of success in. the main suit; The term prima facie case means that there is a triable issue.
- (2) that UNLESS THE temporary injunction is granted the applicant WOULD SUFFER irreparable injury that is that injury WHICH WOULD NOT BE adequately compensated BY an AWARD OF DAMAGES
- (3) that if the court is in doubt as to whether the applicant would suffer irreparable or substantial injury which would not be adequately compensated by an award of damages, to decide the application on the balance of convenience between the parties that would be caused, by the grant or refusal of the temporary injunction.

The above are established conditions for grant of a temporary injunction. There are also numerous authorities for this proposition (See Giela v. Cosman Brown S. Co. Ltd (1973) EA 358, Buikwe Estate Coffee Works LTS vs Lutabi and Anor. MB 44/6I . EA

Industries v Trufoods LTD (1972) EA 420.

Re: Ikokoma Saw Mills Co, (1976) HCB 50

From the address of counsels to me, three areas of contention emerged in this application namely:-

(1) that the application is not properly before the court because as the prayers in the head suit contains prayer for a permanent injunction, granting a temporary injunction would prematurely determine the suit.

(2) That the applicant has not shown that he has a prima facie case with a probability of success in the head suit.

(3) that the applicant has not shown that he would suffer irreparable injury if the temporary injunction sought was withheld.

I shall consider the above issues in that order.

In No. 1 above, Mr. Bitangaro for the respond argued that the application is not properly before this court because as the prayers in the head suit contain a prayer for a permanent injunction, granting a temporally injunction would prematurely determine the head suit, he relied on the case of Patel v Lukwago (1984) HCB 44. He argued that Eva Mulira v Henry Karamuzi HCCS No. 114/87 unreported decides that a temporary injunction will be granted only where in the main suit there is no prayer for a permanent injunction. Counsel submitted that on this ground his application should be dismissed.

In his reply Mr. Mugisha submitted that the principle in *Eva Mulira v. Henry Karamuzi* above is that only where the grant of a temporary injunction would decide the whole case that the court will not grant a temporary injunction. He submitted that this was not the case in this case.

I have studied the authorities cited and I am of the view that Mrs Justice Alice Mpagi Bahigine was quite clear when she said in *Eva Mulira's* case,

“However where the effect of granting the (temporary) injunction will be to decide the whole suit, it is not the usual practice of the court to grant it.”

The effect of that decision is that where a grant of a temporary injunction would decide the whole suit, that grant ‘would not usually be made. This is the effect of the decision in *Patel v. Lukwago* above.

It should however be realised that whether a grant of a temporary injunction would prematurely dispose of the whole case depends on the facts of each case.

In the instant case, the applicants are still in the occupation of the suit property seeking to maintain that status quo until the investigation of the court into the question of the alleged breach of the Lease Agreement is finalised. From the facts available (affidavit of Byekwaso) a grant of a temporary injunction will not in my view decide the whole suit because the question of the alleged breach of the Lease Agreement would still have to be settled even if the temporary injunction is granted.

As regards ground 2 above counsel for the respondent contended that the applicants have not shown that they have prima facie case with a probability of success in the head suit

At this stage the court is concerned with whether or not the claim is not frivolous or vexatious but that there is a serious question to be tried as the court at this stage has very limited evidence only those provided by affidavit before it, it has to be satisfied from the evidence available that if that serious question which exists between 10 parties in the head suit went for trial at the time of the hearing the application with the evidence available before it whether the plaintiff/applicant would be entitled to judgment. If the answer is in the positive then the plaintiff/ applicant will have shown that he has a prima facie case with a probability of success and a temporary injunction can be granted.

In the instant case, the affidavit of JKN. Byekwaso sworn on 6/8/90 in support of this application shows that there is an unexpired Lease Agreement between the Parties, (See paragraph 2) in respect of the suit property. The affidavit further shows that the plaintiff/applicants are not in breach of any covenant of this Agreement (See paragraph 6), But

that the respondent has committed a breach of this Agreement by attempting to illegally re-enter the suit property.

There is no contrary evidence from the respondent since the affidavit of Sam Bitangaro sworn in reply to that sworn by Byekwaso was rejected. This leaves the evidence of Byekwaso unchallenged and from it I am satisfied that the plaintiffs/applicants have shown a prima facie case since the evidence reveals that there is a triable issue, I am also satisfied that the applicants have shown that they have probability of success in the main suit. To that end ground 2 also fails.

As regards ground 3 which is that the applicants have not shown that they would suffer irreparable injury if the temporary injunction Sought was not granted.

Irreparable injury has been defined to mean substantial injury which CANNOT BE adequately atoned for in damages (See Buikwe Estate Coffee Works Ltd and 2 Others vs Lutabi (1962) EA 328)

In paragraph 9 of his affidavit Byekwaso deponed to the effect that unless the temporary injunction was granted, and the defendant respondent succeeds in evicting them, they the plaintiff would suffer/no irreparable loss in view OF the scarcity of accommodation in Kampala.

It is common KNOWLEDGE that currently accommodation both for residential and commercial in Kampala is very scarce and that loss of such ACCOMMODATION COUNTS TO irreparable injury AS any amount of award of DAMAGES CANNOT adequately compensate THAT loss, This in my view IS SUFFICIENT evidence of irreparable loss if the grant is not made.-

On the balance of convenience, the available evidence shows that the applicants/plaintiffs are in occupation of the suit property. They have no alternative Accommodation. In my view refusing the grant of the temporary injunction sought would inconvenience the plaintiffs who would have to move their personal effects from the suit, property and look for alternative accommodation for their family more than the defendant/respondent who is not in occupation of the suit property now if the temporary injunction is granted.

In the whole analysis, a summary principle behind the grant of a temporary injunction should be that the court must be satisfied that it is fair AND just to grant the injunction considering the facts available AND LAW applicable..

In the instant application, I am satisfied having regards to the evidence available AND to the law applicable that it is only fair and just that THIS APPLICATION should be allowed and that the temporary injunction APPLIED for be granted. So I order. The Respondent is to PAY COST OF

this application.

G.M. Okello,

Judge.

20/9/90.

Ruling delivered in my chamber,
Mr. John Mugisha for the Applicant/Plaintiff present Mr. Sam Bitangaro for the
Respondent/Defendant- absent

G. M. OKELLO

Judge.

20/9/90

3:30 p.m

From the address of counsels to me, three areas of contention emerged in this application namely:-

- (2) That the applicant has not shown that he has a prima facie case with a probability of success in the head suit,
- (3) that the applicant has not shown that he would suffer irreparable injury if the temporary injunction sought was withheld,

I shall consider the above issues in that order.

In No. 1 above, Mr. Bitangaro for the respondent argued that the application is not properly before this court because as the prayers in the head suit contain a prayer for a Permanent injunction, granting a temporary injunction would prematurely determine the head suit. He relied on the case of Patel v. Lukwago (1987) HC3. He argued that Eva Jilulira v. Henry Karamuzi HCCZ No. 11/87 unreported decides that a temporary injunction will be granted only where in the main suit there is no prayer for a permanent injunction. Counsel submitted that on this ground this application should be dismissed.