

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL AT KAMPALA
MISCELLANEOUS APPLICATION No. 246 of 2023
[Arising from Civil Appeal No.168 of 2021]
5 [Out of High Court Civil Appeal No.0021 of 2015 at Gulu]

1. OLUM TREMORS
2. OLUM THOMAS
10 3. BAGONZANA ALEX } APPLICANTS

VERSUS

1. AKONGO MARATINA
2. ORACH SAM } RESPONDENTS

15
RULING OF CATHERINE BAMUGEMEREIRE, JA
(SITTING AS A SINGLE JUSTICE)

20 *Civil Procedure – Temporary Injunction – Exparte Application*

Introduction

This application was submitted as a notice of motion in accordance with Order 41, Rules 1(a), and Orders 50 and 52, Rules (1), (2), and (3) of the Civil Procedure Rules SI 71-1, alongside
25 Section 79(1)(b) and 98 of the Civil Procedure Act Cap 71, as well as Rule 2(2), 6(2)(b), and 53(b) of the Judicature Court of Appeal Rules. The application seeks specific orders as follows:

1. A temporary injunction does issue maintaining the status-
quo or restraining the respondents, and/or there agents/
30 servants/ workmen/ employees or any other persons acting for and on their behalf or instructions from trespassing or carrying out any construction, grading, selling, partitioning

- or alienating any part, portion of the suit land, and chasing/
evicting the applicant's from suit land situate at Apollo
Ground, West Village, Kitgum Municipality until the
determination of the appeal vide Civil Appeal No. 168 of
5 2021 pending before this court.
2. Costs of this application provided for.

Background

- In 1998, the applicant purchased a piece of land located at Apollo
10 Ground, Kitgum Town Council, from Apio Santa for UGX
100,000. Following the acquisition, the applicant assumed
possession and began utilizing the land. Subsequently, in 2012,
the respondent, asserting inheritance rights from her mother,
filed a lawsuit against the applicant for trespass and ownership
15 declaration. The trial court ruled in favour of the respondent.
Dissatisfied with the said judgement, the applicant appealed to
the High Cour vide Civil Appeal No. 0021 of 2015 which was
dismissed. The applicant then filed an appeal vide CACA No. 168
of 2021 in this court which is pending hearing and determination.
20 The applicants now claim that unidentified individuals, believed
to represent the respondents, have transported construction
materials to the designated property and have initiated
excavation activities with the intention of commencing
construction on the said property. Hence this application for a

temporary injunction against the respondents to cease their activities on the property until the resolution of this appeal.

The grounds supporting this application are detailed in both the
5 Notice of Motion and the affidavit supporting the application, sworn by Olum Thomas, which briefly states:

1. That the suit property in question is still under judicial consideration vide Civil Appeal No. 168 of 2021 and no judgment has been passed by this court.
- 10 2. That there's reasonable belief that the suit land is in imminent danger of being wasted or tampered with before judgment is delivered.
3. That there is reasonable probability of success of the appeal pending before this court.
- 15 4. That the application has been made without unreasonable delay.
5. That it is in the interest of justice that the orders prayed for are granted.

20 The respondent did not submit an affidavit in response. During the hearing on October 16, 2023, the applicant was represented by Mr. Ibrahim Abdul Majid, whereas the respondents, despite being duly served, did not file any replies. The counsel for the applicants filed written submissions which were relied on by this
25 court.

Submissions

Counsel representing the applicant argued that in application proceedings reliant on affidavit evidence, such as the current case, if there is no opposing affidavit, the evidence remains uncontested, echoing the decision in the case of **Makerere University v St Mark Education Institute Ltd & Others 1994 KALR 26**. The counsel for the applicant submitted that the whole purpose of a temporary injunction is for the preservation of the suit property pending disposal of the main suit. He further relied on **Robert Kavuma v M/s Hotel International SCCA No. 8 of 1990**, which delineates the criteria for the issuance of a temporary injunction. These criteria include demonstrating a prima facie case with a likelihood of success, showing potential for irreparable harm that monetary compensation cannot rectify, and considering the balance of convenience.

The counsel argued that, based on the affidavit presented, the applicants have indicated a pending appeal in the Court of Appeal that addresses significant legal and triable matters hence a prima facie case with a likelihood of success. The counsel further averred that the applicant's affidavit presents compelling evidence that any tampering or disposal of the disputed property during the legal proceedings would result in severe and irreversible damage to the applicant's rights and interests.

Counsel submitted that in cases of uncertainty, courts base decisions on the balance of convenience, which 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 them and the court would most likely be inclined to grant to them the application for a temporary injunction. The
5 counsel petitioned the court to issue a temporary injunction against the respondents, their agents, employees, and workers, preventing the eviction of the applicants from the property in question until the main suit reaches a conclusion. Additionally, the counsel requested that the applicants be awarded the costs
10 associated with the application.

Determination of the Application.

The powers of this court to exercise its jurisdiction and grant an order for an injunction are set out in Rule 6 (2) (b) of the Rules of
15 this court which provides that:

“Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may in any civil proceedings, where a notice of appeal has been lodged in accordance
20 with rule 76 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just”.

In the case of **E.L.T Kiyimba Kaggwa v Haji Abdu Nasser Katende [1985] HCB 43**, the court delineated the criteria for granting a temporary injunction, as outlined below:

- 5 i. The applicant must show a prima facie case with a probability of success.
- ii. 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.
- 10 iii. If the Court is in doubt, it would decide an application on the balance of convenience.

Concerning the establishment of a prima facie case with a probability of success, the case of **Gapco Uganda Ltd v Kaweesa & Anor (MA No.259 of 2013)** clarifies that the likelihood of success in a case is determined when:

“The court is satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried.”

20 Upon review, the primary issue in this case appears to revolve around a land dispute. The land in question originally belonged to a one Alur Jilder who died intestate, and according to Acholi custom, the land was jointly vested in her beneficiaries, her two daughters, Martina Akingo (1st respondent) and Apio Santa.

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The 1st applicants asserts her right to the land through inheritance from her late mother. The 2nd applicants, Olum Thomas, claims to have acquired the land through a documented purchase from Apio Santa on 9th June 1998. Subsequently, he constructed a
5 building on the property and has been dutifully paying ground rent to the town council. On the other hand, the 2nd respondent, Orach Sam, obtained ownership of the land through a purchase from the 1st respondent on 14th January 2010.

10 The learned trial judge determined that when Apio Santa purportedly sold the land to the 2nd applicants, she lacked the legal capacity to do so as the property was jointly owned with her sister, rendering the transaction null and void. Following the passing of one of the sisters, Apio Santa, Matina Akongo emerged
15 as the sole surviving beneficiary of the land, thereby possessing the authority to transfer clear ownership to the 2nd respondent. The judge concluded that the transaction between the 2nd applicants and the deceased beneficiary Apio Santa was marred by fraudulent activities as she had no capacity to sell land that
20 was jointly owned.

The applicants contested the conclusions drawn by the learned trial judge, citing a lack of evidence substantiating the 1st respondent's assertion of inheriting the land from Alur Jilder,
25 whom she claimed to be her mother. Furthermore, the applicants

argued that the testimonies provided by the 1st respondent were riddled with inaccuracies.

5 The applicants raised 4 grounds of appeal rooted in the above dissatisfactions. While I refrain from delving into the merits of the case at this point, I find that the applicant's claim is not frivolous or vexatious. This case raises serious question of law that ought to be tried. **See American Cyanamid Co v Ethicon Ltd (1975) WCR 316.**

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On whether the applicant will suffer irreparable damage if the temporary injunction is not granted the authority of **E.L.T Kiyimba Kaggwa v Hajji Abdu Nasser Katende [1985] HCB 43** is instructive. This is how irreparable damage was defined:

15 “Irreparable injury does not mean that there must not be a physical possibility of repairing the injury but means that the injury must be substantial or material one that cannot be adequately compensated for in damages”.

20 The applicant, in paragraph 8 of his affidavit in support of the application, stated that unknown people presumed to be agents of the respondents ferried building materials and dug into the suit property with the intention to commence construction on the suit property. Photographic evidence was attached to support their claim. It is on record that the second applicant possesses a
25 building on the suit land and has been consistently remitting

ground rent to the Town Council. It is trite law that when a party exercises its unfettered right of appeal, and there exists a reasonable chance of success in the appeal, it becomes incumbent upon the Court to issue orders that prevent the appeal
5 from becoming nugatory if successful. I find that the applicant has met this criterion.

In regard to the condition of a balance of convenience, I resonate with the court's finding in **Kiyimba Kaggwa v Haji A.N**
10 **Katende (supra)** that the balance of convenience lies more on the one who will suffer more if the respondent is not restrained in the activities complained of in the suit.

In light of the respondents' failure to provide submissions or an
15 affidavit, coupled with the applicant's purchase dating back to 1998 and the presence of a structure on the suit land since then, along with the consistent rent payments to the town council, it is my inclination to conclude that the applicants hold the advantage in terms of the balance of convenience.

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I can safely conclude that a compelling case has been presented for this court to exercise its discretion and grant a temporary injunction. Consequently, the following orders are hereby declared:

1. A temporary injunction doth issue maintaining the status quo or restraining the respondents, their agents and employees from trespassing or carrying out any construction, grading, selling, partitioning, or alienating any part, portion of the suit land and evicting the applicants from the suit land situate at Apollo Ground, West Village, Kitgum Municipality until the determination of the Appeal vide civil appeal No.168 of 2021 pending before this court.
2. The costs of this application shall abide the result of the Appeal.

Dated this 15TH day of FEB 2024.



CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL