

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT GULU
MISC. CAUSE NO. 001OF 2024

OMONY STEPHEN=====APPLICANT

-VERSUS-

1. AOL CHRISTINE

2. LAKOL JOSEPHINE OYAKA

3. ARYEMO ALICE OYAKA

4. JOSEPH ACAYE

5. DENIS OYAKA=====RESPONDENTS

BEFORE: HON. MR. JUSTICE PHILLIP ODOKI

RULING

Introduction:

[1] The Applicant brought this application under, Section 6 of the Arbitration and Conciliation Act, Cap 4; Sections 33 and 38 of the Judicature Act, Cap 13; Section 98 of the Civil Procedure Act, Cap 71 and Order 52 rules 1 & 2 of the Civil Procedure Rules S.I 71 -1. The application seeks for orders that an injunction and/ or interim measure of protection be issued to restrain the Respondents from disposing off land situate at Kirombe until the conclusion of the arbitral proceedings commenced against them.

The Applicant's case:

[2] The Applicant's case, as set out in the Notice of Motion and the affidavits of the Applicant (in support of the application and in rejoinder), is that the 1st – 3rd Respondents are children and beneficiaries of the estate of the late Oyaka Bule Yovan and the 4th and 5th Respondents are the administrators of the estate of the late Oyaka Bule Yovan.

[3] On the 15th December 2015 the Applicant entered into an agreement with the 1st - 3rd Respondent wherein he purchased from the 1st – 3rd Respondent land situate at Kirombe Custom Corner Village, Kirombe sub – ward, Layibi Division, Gulu Municipality, Gulu District (hereinafter referred to as “the suit land”). The suit land originally formed part of the estate of the late of the late Oyaka Bule Yovan. Paragraph 5 of the agreement provided that all disputes concerning the agreement arising between the parties would be referred to a single arbitrator in accordance with and subject to the Arbitration and Conciliation Act. Paragraph 6

of the agreement provided that if the vendor sold land that they are not legally entitled to, they would refund the purchase price with interest.

[4] It later turned out that the suit land had already been sold by a one Elliot Odoki (the eldest son of late Oyaka Bule Yovan) to Acaye Richard and Acan Beatrice, on the 13th January, 1999 and subsequently registered in their name. Sometime in 2011, a dispute arose between Acaye Richard and Acan Beatrice, on the one hand, and the 2nd Respondent, on the other hand, regarding ownership of the suit land. On the 17th November 2023 this court rendered a decision in High Court Civil Suit No. 0017 of 2011 declaring Acaye Richard and Acan Beatrice as the lawful owners of the suit land.

[5] On the 27th November 2023 the Applicant's lawyers wrote to the 1st, 2nd, 4th and 5th Respondents demanding for a meeting to discuss the steps or actions which the Respondents have put in place to protect the interest of the Applicant, but there was no response to the demand. On the 15th January 2024 the Applicant applied to Centre for Arbitration and Dispute Resolution to appoint a single arbitrator. The application has not yet been determined.

[6] According to the Applicant, on the 31st January 2024 he came across an advertisement published online on Facebook account of Gulu Real Estate Property Masters and WhatsApp group for the sale of land at Kirombe measuring 22 by 54 meters which is the residue of the estate of the late Oyaka Bule Yovan.

[7] The Applicant contended that the land which was advertised for sale is being held by the 4th and 5th Respondents in trust for the beneficiaries of the estate of the late Oyaka Bule Yovan, which includes the Respondents, and it is the only known land of the Respondents. He further contended that, he will suffer irreparable loss unless an interim measure of protection is granted; the arbitration will be rendered nugatory unless the application is granted; the arbitration raises a prima facie case with the likelihood of success; and the balance of convenience is in favor of granting the application.

Respondents' case:

[8] The Applicant withdrew the case against the 1st and 2nd Respondent. The 3rd Respondent did not file any affidavit in reply despite being served with the application. The 5th Respondent swore an affidavit in reply in his behalf and on behalf of the 5th Respondent. He deposed that,

the Respondents do not possess any land at Kirombe; the suit land was personal land belonging to Lakol Josephine Oyaka and not part of the estate of the late Oyaka Bule Yovan; the land which is the subject of the interim measure of protection belong to separate individuals and not the estate of the late Oyaka Bule Yovan; and the 4th and 5th Respondents are co – administrators of the estate of the late Oyaka Bule Yovan and they are not relevant parties to this application.

Legal representation

[9] The Applicant was represented by Mr. Julius Ojok of M/s Ojok Advocates, while the 4th and 5th Respondents were represented by Mr. Lloyd Ocorobiya of M/s Ocorobiya&Co Advocates.

Legal submissions:

[10] Counsel for the Applicant submitted that this application seeks an interim measure of protection to restrain the Respondents from disposing off the suit land out of which the arbitral award may be satisfied. Counsel submitted that the land is still part of the estate of the late Oyaka Bule Yovan since no inventory has been filed. Counsel further submitted that an interim measure of protection can be sought against third parties to the arbitration agreement. For that proposition of the law, he relied on the decision in **Capt. Joseph Charles Roy versus D&D International (U) limited, HCMA No. 0283 of 2018**. In addition, counsel submitted that property belonging to or money owed to a party to an arbitration in the hands of a third party can be a subject of an interim measure of protection. In support of his argument, counsel relied on the Indian case of **Gatx India PVT LD versus Ashiya Rail Infrastructure Limited and another 2014 (4) Arb LR 113**.

[11] Counsel for the 4th and 5th Respondent, on the other hand submitted that no evidence was adduced to prove that the land which is the subject of this application is being sold and that it is owned by the Respondents. According to counsel, the WhatsApp which was referred to does not describe the land being sold, the Applicant is not the author of the advert and the source of the advert is not known. Counsel further submitted that the 4th and 5th Respondents are not bound by the arbitration agreement. In addition, counsel submitted that to issue a blanket injunction on the land whose size is not determined would cause unnecessary hardship to the rest of the beneficiaries.

Analysis and determination of the court:

[12] The jurisdiction of this court to grant an interim measure of protection is found in Section 6 of the Arbitration and Conciliation Act, Cap 4 of the laws of Uganda which provides that:

“6. Interim measures by the court

(1) A party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure.”

[13] An interim measure of protection is an order granted by an arbitral tribunal or the court pending the outcome of the arbitration. According to Section 2(1)(f) of the Act, court means the High Court. The purpose of an interim measure of protection is to maintain or restore the status quo; preserve assets out of which a subsequent award may be satisfied; or preserve evidence that may be relevant and material to the resolution of the dispute at the arbitration. Whereas the power of the arbitral tribunal to award interim measure of protection extends only to the parties involved in the arbitration, the court order may be enforced against 3rd parties. See: **International Commercial Arbitration: An Asian – Pacific Perspective by Simon Greenberg and others, Cambridge University Press 2012.** See also **Capt. Joseph Charles Roy versus D&D International (U) limited, HCMA No. 0283 of 2018.**

[14] The Arbitration and Conciliation Act does not provide the conditions that must be met by a party who is seeking an interim measure of protection. It only provides that, ‘*the court may grant the measure.*’ This is an indication that the grant is at the discretion of the court. It is trite law that any judicial discretion has to be exercised judiciously. Be that as it may, Article 17A of the 2006 UNICITRAL Model law gives guidance on what a party requesting for an interim measure of protection must prove. First, that harm, not adequately reparable by an award of damages, is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted. Secondly, that there is a reasonable possibility that the requesting party will succeed on the merits of the claim. I consider that the above guidance relevant in the determination of any application for an interim measure of protection by this court.

[15] In the instant application, although the Applicant deponed that he will suffer irreparable loss unless an interim measure of protection is granted, he did not demonstrate how his loss is

incapable of being adequately compensated with an award of damages. To the contrary, the sale agreement between the Applicant and the 1st – 3rd Respondents envisaged that if there was failed consideration, the Applicant would be refunded the purchase price with interest. This can be awarded by the arbitrator in the form of damages.

[16] In addition, the Applicant has not adduced any evidence that the Respondents are incapable of paying any damages that may be awarded against them in the arbitration. Although the Applicant stated that the suit land is the only known land of the Respondents, it is very clear from his evidence that the suit land is estate property, being held in trust by the 4th and 5th Respondents for and on behalf of 17 beneficiaries. The exact share of the Respondents, in the suit land, is unknown. Therefore, granting this application would have the effect of restraining the other beneficiaries of the estate, who are not party to this application, from selling their own share in the suit land.

[17] Furthermore, the suit land is not the only estate property. According to the application for letters of administration by the 4th and 5th Respondent, which was adduced in Court by the Applicant, the estate has other properties. It has another customary land at Ajulu, Patiko, Aswa subcounty, Gulu District. The estate also has claims for cattle from Acholi War Debt Claimants and Household properties from which the beneficiaries may ultimately receive a share.

[18] As I have already stated above, the 4th and 5th Respondents are only holding the suit land in trust for the beneficiaries of the estate. Even if the arbitrator makes any award against 4th and 5th Respondent, the suit land cannot be attached to recover any amount awarded against them because they hold the property in trust for the beneficiaries. See: **Administrator General versus Kakooza Umoro HCMA No. 11 of 2017.**

[19] In my view, the case of **Gatx India PVT LD versus Ashiya Rail Infrastructure Limited and another** was cited by counsel for the Applicant out of context. In that case, the court made reference to an injunction or attachment with respect to property belonging to a party to arbitration but in the hands of a third party. In the instant case, the share of the Respondents in the suit property is unknown. In addition, the 4th and 5th Respondents are holding the property in trust for other beneficiaries who are not party to the arbitration.

[20] In the end, I find that this application has no merit. It is accordingly dismissed with costs to the 4th – 5th Respondents. The 3rd Respondent is not awarded any costs since she did not make any reply to the application nor did she appear in court for hearing.

I so order.

Dated and delivered by email this 6th day of March 2024

A handwritten signature in purple ink, appearing to read 'P. Odoki', with a long horizontal stroke extending to the right.

Phillip Odoki

Judge.