THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 329 OF 2001

(ARISING FROM HCCS 186 OF 2000)

JAMES MUSISI SENKAABA:::::::::::::::: APPLICANT/DEFENDANT

VERSUS

RUTH KALYESUBULA ::::::::::::::::::::RESPONDENT/PLAINTIFF

BEFORE: THE HON. MR. JUSTICE E.S. LUGAYIZI

RULING

This ruling is in respect of an application for a temporary injunction. The applicant made the application under Order 37, rules 1 and 2 of the CPR and section 101 of the CPA. The application was accompanied by an affidavit that was sworn by the applicant on 30th May 2001.

The background to the application is very briefly as follows. The applicant and the respondent had for some time been wrangling over the ownership of a customary holding (i.e a kibanja) which is allegedly on Block 303 Nsumbi Ganda. The applicant claimed the said kibanja as his on the basis that his sister who inherited it allowed him to build and live on it. On the other hand, the respondent claimed that she bought the said kibanja from its previous owner. As a result of that misunderstanding, the respondent sued the applicant for trespass under High Court Civil Suit No. 186 of 2000. However, before Court disposed of that suit, the respondent began to build a house on the kibanja and to cultivate it. In turn, the applicant brought this application with a view of obtaining Court's orders to restrain the respondent from building on the kibanja and cultivating it. At the time of hearing the application, Mr. Arthur Katongole represented the applicant and Mr. Sam Njumba represented the respondent. Both counsels were in disagreement as to whether or not Court should grant the application; and each of them gave his reasons for his stand; and those reasons are on record. Be that as it may, it is now well settled law that before an applicant may be granted a temporary injunction, he has to prove the following things,

1. That the purpose of the temporary injunction is to preserve the status quo until the head suit is finally determined. (See **Noor Mohammed Janniohamed v Kassamali Virjx (1953)** 20 EACA **80).**

2. That the applicant has a prima facie case, which has the probability of success. (See **Geilla v Cassman Brown Co. Ltd (1973) E.A. *358).***

3. That if the temporary injunction is not granted, the applicant would suffer irreparable injury, which damages cannot atone. **(See Noor Mohammed Janmohamed v Kassamali Virji (supra).**

4. If Court remains in doubt after considering the above three requirements of the law, it would decide the application on the balance of convenience. (S **E.A. Industries v Traffords (1972) E.A. 420).**

As court considers the above requirements of the law, it will take into account the evidence before it and the submissions of counsel.

With regard to the first requirement of the law, the affidavit in support of the application contains the following important facts. Firstly, that at present, the applicant owns a house on the kibanja in question. Secondly, that he and his family live there. Thirdly, that after the respondent filed the head suit she began digging and cultivating the kibanja. In court's opinion, the respondent implicity admitted those facts because she did not file a reply to the applicant's affidavit to deny or contradict them. (See Cleaver-flume **Lrn itish 1utoriaI' CoI1ee (Africa) Ltd** [19751 E.A. 323; **Badrudin and Another v Pyarali [*19751* E.A. 271; and Senendo v Attorney General 119721 E.A. 140). In** essence, therefore, the status quo in respect of the kibanja is simply this. The applicant is, the one who, presently, has possession of it. Nevertheless, the Question that, must, be urgently answered is whether or not the application, which is the subject of this ruling is for the purpose of maintaining the status quo until the head suit is disposed of. In paragraph 6 of the applicant's affidavit, the applicant deposed as follows,

"That this affidavit is sworn in support of an application for a temporary injunction restraining the Respondent ... from further cultivation on the kibanja ... until the determination of HCCS No. 186/2000 . .

As earlier on pointed out, the respondent did not produce any evidence to contradict the above facts. It is therefore clear that the application is intended to stop the respondent, for the time being, from wresting possession of the suit premises from the hands of the applicant. In the circumstances, Court is satisfied that the applicant proved, on a balance of probabilities, that the purpose of the application is to preserve the status quo until the head suit is finally determined.

With regard to the second requirement of the law, Court has this to say. The applicants athdavit reveals that he owns a house on the iibanja in 4utiun; **aIlu** is, presently, in effective possession of the said kibanja. In addition, the plaint in the head suit (which is, of course, part of the record) also shows that the applicant's interest in the kibanja is based on the permission his sister (who inherited that kibanja) gave him to use it. In Court's view, the foregoing is sufficient to provide reasonable ground to believe that the applicant has a prima facie case with the probability of success. In the circumstances, Court is satisfied that the applicant succeeded in proving the second requirement of the law.

With regard to the third requirement of the law, it is important to lay out below what the applicant deposed in paragraphs 4 and *5* of his affidavit. It is as follows,

"4. That they are continuing to dig and cultivate even more of any arable land left and at such a rate that shortly I and my family may have no where to cultivate anything at all.

5. That if the Respondent goes ahead to put up a building and to cultivate every bit of arable land available on the disputed kibanja I and my family will soon have no where to cultivate food for survival".

The above two paragraphs suggest that if Court does not intervene in the matter the respondent is likely to build up and cultivate the whole of the kibanja with a view to effecting a strangle hold upon the applicant and his family. That is likely to happen because the applicant and his family would have no more space on the kibanja and will therefore be unable to grow food. Eventually, they will starve to death. The existence of the above facts and their full implications were not denied by the respondent who did not file an affidavit in reply to the applicant's affidavit. Therefore, Court is willing to find that the applicant and his family are likely to starve to death iç Court does not intervene in these matters. Court is of the opinion that death is amatter that an award of damages cannot atone. In the circumstances, Court is satisfied that the applicant proved, on a balance of probabilities, that if the temporary injunction is not granted to him to restrain the respondent from carrying on activities on the kibanja in question, the applicant will suffer irreparable injury which damages cannot atone.

After reaching the above conclusion, Court would have straight away granted the temporary injunction to the applicant. However, for the sake of addressing every issue that this application raises, Court will also consider below the fourth requirement of the law.

With regard to that requirement of the law, it is not disputed that the applicant owns a house on

the kibanja in question where he is, presently, living with his family. That aside, the applicant and his family are depending on the said kibanja for survival. Therefore, it seems that if the respondent was left to interfere with that kibanja in the way she is doing, at this point in time, the applicant and his family will suffer grave consequences, and they may even die. On the contrary, the respondent who is seeking to oust the applicant from the kibanja in question is an outsider who has no possession of it. She does not live on it and has not provided any evidence to show that she, presently, depends on that kibanja for survival. Perhaps, the most she can boast of in respect of the kibanja in question is her alleged interest which is the subject of the head suit; and the endeavours she has, so far, made with a view to interfering with the said kibanja. That is all. After carefully considering what each party to the
application has at stake, Court thinks that the applicant would lose more if the application was refused than what the respondent would lose if it was granted.
In the circumstances, the balance of convenience seems to lie in favour of
granting the application; and it is hereby ordered so. It is further ordered that the costs of this application will abide the outcome of the head suit.
Read before: At 9.03 a.m
Mr. Katongole for the Applicant
Mr. S. Njuba for me Kesponatii
Mr. Senabulya

17/08/2001