

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**  
**MISCELLANEOUS APPLICATION NO. 393 OF 2011**  
**ARISING FROM CIVIL SUIT NO. 216 OF 2011**

**STEVEN PEPE.....APPLICANT**

**VERSUS**

- 1. THE COMMISSIONER LAND REGISTRATION**
- 2. BADIRU SSALI**
- 3. THE ADMINISTRATOR GENERAL.....RESPONDENTS**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This was an application by chamber summons brought under Order 41 rules 1 and 9 of the Civil Procedure Rules and section 98 of the Civil Procedure Act, cap 71, for orders that:-

1. A temporary injunction be granted against the 1<sup>st</sup> Respondent/Defendant, his/her agents and or servants and his/her assignees, from cancelling the Plaintiff's certificate of title comprised in Block 19 Plot 5 Gomba, land at Kalyabwalo until the determination of the main suit.
2. Costs of this application be provided for.

The application is supported by the affidavit of the Applicant **Steven Pepe** which contains the grounds of the application which are briefly:-

"1. That the Applicant is a bona fide purchaser for valuable consideration and is the registered proprietor of the land and developments comprised in Block 19 Plot 5 Gomba, land at Kalyabwalo (hereinafter referred to as the suit land). A copy of the certificate of title is attached hereto as **Annexure "AA"**.

2. That in 1991 the Applicant purchased the suit land from Badiru Ssali the registered proprietor. A copy of the sale agreement is attached as annexure **"BB"**.

3. That the 1<sup>st</sup> Respondent/Defendant has summoned the Plaintiff to appear for public hearing on 28 -06 -2011 and show cause why his certificate of title to the suit land

should not be cancelled. Copies of summons are attached as annexure “CC1”, “CC2”, “CC3” & “CC4”.

4. That the Applicant shall suffer substantial or irreparable loss which an award of damages will not adequately atone if the 1<sup>st</sup> Respondent or his/her agents are not constrained by court from cancelling or otherwise interfering with his certificate of title to the suit land.

5. That the Applicant/Plaintiff has filed a civil suit in the High Court (Land Division) vide CS No. 216 of 2011, wherein he seeks inter alia a declaratory order that he is a bona fide purchaser for valuable consideration and is legally registered as proprietor of the suit land and for a permanent injunction against the 1<sup>st</sup> Respondent or his/her agents from cancelling his certificate of title to the suit land. A copy of the plaint is attached and marked as annexure “DD”.

6. That if the application is not allowed the Applicant’s/Plaintiff’s certificate of title to the suit land is at danger of being cancelled and his rights to the suit property greatly prejudiced and his suit rendered nugatory.

7. That the Applicant’s said suit has a high likelihood of success.

8. That it is just and equitable that a temporary injunction be issued to restrain the 1<sup>st</sup> Respondent/Defendant from cancelling the Applicant/Plaintiff’s certificate of title to the suit land pending the determination of the suit.”

The application is opposed by the Respondents who filed two affidavits in reply respectively deposed to by **Kakerewe Yusuf**, Registrar of Titles on behalf of the 1<sup>st</sup> Respondent/Defendant; and **Mathias Mickey Mwanje**, Assistant Administrator General, on behalf of the 3<sup>rd</sup> Respondent. The 2<sup>nd</sup> Respondent/Defendant, **Badiru Ssali**, did not file any affidavit in reply, nor was he present or represented when this application was called for hearing. The affidavit of service and other court records indicate that he was not served.

In the instant case, the facts as deduced from the chamber application and affidavits on record are that the Applicant is the registered proprietor of the suit property comprised in Block 19 Plot 5 Gomba at Kalyabwalo which he purchased from the 2<sup>nd</sup> Respondent/Defendant a one **Badiru Ssali** in 1991. He has since occupied and developed the property. The Applicant claims that the 1<sup>st</sup> Respondent/Defendant has threatened and continues to threaten to cancel the Applicant’s name as registered proprietor on the certificate of title to the suit property and re instate **Paulo Kiddu Musisi** as the registered proprietor. The Applicant filed Civil Suit No. 216 of 2011 against the Respondents seeking inter alia a declaratory order that he is a bona fide purchaser for valuable consideration and is legally on the suit property as registered proprietor. The Respondents on the other hand maintain that the transfer of the suit land to the names of **Badiru Ssali** and his eventual sale and transfer of the same to the Applicant is tainted with fraud, which is the reason why they want it reinstated to the names of the late **Paulo Kiddu**

**Musisi** the original registered proprietor whose estate is being administered by the 1<sup>st</sup> Respondent/Defendant. The Applicant has filed this application seeking to preserve matters in *status quo* until the main suit is heard and determined. He seeks to prevent the 1<sup>st</sup> Respondent from cancelling the Applicant's name as proprietor of the suit property until the main suit against the Respondent is determined by this court. The Applicant is therefore alleging the danger of alienation of the suit property by the Respondent.

I have carefully addressed the adduced affidavit evidence on the matter and the circumstances surrounding the case, as well as the submissions of Counsel and the relevant legal provisions.

The law on temporary injunctions is now settled law as is deduced from the numerous case decisions on the matter. The gist of a temporary injunction is the preservation of the suit property pending disposal of the main suit. In addressing this, courts have set out conditions to be fulfilled before the discretion of granting the temporary injunction is exercised. These are that the Applicant must show that there is a *prima facie* case with probability of success; that the Applicant might otherwise suffer irreparable damage which would not easily be compensated in damages; and, if court is in doubt, it will decide the question on the balance of convenience. In addition, Order 41 of the Civil Procedure Rules (CPR) requires the existence of a pending suit. Order 41 provides that where it is proved to court that in a suit the property in dispute is in danger of being wasted, damaged or alienated by any party to a suit, the court may grant a temporary injunction to restrain, stay, and prevent the wasting, damaging and alienation of the property. The case in point is **Kiyimba Kaggwa V Haji Katende [1985] HCB 43**.

The foregoing are the principles that will be applied in the course of addressing this application.

The pendency of a suit is not in issue, in this case, Civil Suit No. 216 of 2011 filed by the Applicant/Plaintiff against the Respondents/Defendants.

On the question of whether there is a *status quo* to be preserved, the Applicant avers in his supporting affidavit that there is a danger of his certificate of title being cancelled by the 1<sup>st</sup> Respondent who has summoned him to show cause why his certificate of title should not be cancelled (paragraphs 3, 6 and 8). He contends that he is a *bona fide* purchaser for value and that the cancellation if effected would greatly prejudice his rights to the suit property and render the suit against the Respondents/Defendants nugatory. He prays that the *status quo* be preserved until the main suit is disposed of. The 1<sup>st</sup> Respondent in paragraphs 10 and 12 of his affidavit in reply avers that the Applicant was erroneously registered as proprietor and has no proprietary interest to justify grant of a temporary injunction. In paragraph 11 the 1<sup>st</sup> Respondent avers that the 1<sup>st</sup> Defendant/Respondent duly gave notice to the Applicant of her intention to cancel the Applicant's certificate of title and that the Applicant was called for a hearing which was conducted on 28<sup>th</sup> June 2011 as per annexures "F" and "G" to the said

affidavit. The same position is echoed in paragraphs 13, 14, 15 and 16 of the 3<sup>rd</sup> Respondent's affidavit in reply where it is also averred that the Applicant is not a *bona fide* purchaser for value.

In **Commodity Trading Industries V Uganda Maize Industries & Anor [2001 - 2005] HCB 118**, Bamwine J stated that the *status quo* is not about who owns the suit property but the actual state of affairs on the suit premises prior to the filing of the main suit. In **Sekitoleko V Mutabaazi & Ors [2001 - 2005] HCB 79**, the Court of Appeal stated as follows:-

*“The court has a duty to protect the interests of parties pending the disposal of the substantive suit. The subject matter of a temporary injunction is the protection of legal rights pending litigation. In exercising its jurisdiction to protect legal rights to property from irreparable or serious damage pending the trial, the court does not determine the legal rights to property but merely preserves it in its actual condition until legal title or ownership can be established or declared.”*

A good portion of the averments and submissions from all parties delves more into the merits of the case. As per the decision in the **Commodity Trading Industries V Uganda Maize Industries & Anor, supra**, it would be premature for this court to address them. This will be done when the main suit is heard on the merits. However, the discernible *status quo* that the Applicant seeks to preserve is that his certificate of title should not be cancelled by the 1<sup>st</sup> Respondent until the main suit is disposed of.

As to whether the suit establishes a *prima facie* case with probability of success, case law is to the effect that though the Applicant has to satisfy court that there is merit in the case, it does not mean that one should succeed. It means the existence of a triable issue or a serious question to be tried which raises a *prima facie* case for adjudication. See **Kiyimba Kaggwa V Haji Katende, supra**.

The pleadings in the main suit indicate that the Applicant/Plaintiff is seeking declaratory orders that he is a *bona fide* purchaser for valuable consideration and legally registered proprietor of the suit property, and a permanent injunction restraining the 1<sup>st</sup> Defendant or his agents, who have indicated to the Plaintiff their intentions to cancel the title, from cancelling his title to the suit land. The Respondents on the other hand aver that the Applicant is not a *bona fide* purchaser for value, that his claim is tainted with fraud, and that he had constructive notice of Badru Ssali's fraudulent transactions. In her submissions on this matter learned Counsel for the Applicant contended that the questions to be determined in the main suit, that is, whether the Applicant committed or participated in the alleged irregularity, error or mistakes are serious questions to be investigated in the main suit and the Applicant has a high chance of succeeding.

In opposition, the 3<sup>rd</sup> Respondent maintained that the Applicant's claim is tainted with fraud, and that he had constructive notice of Badru Ssali's fraudulent transactions. She accordingly argued that the Applicant's hands are not clean, and thus he does not have a prima facie case with a high chance of success.

A cursory examination of the adduced affidavit evidence reveals that the 1<sup>st</sup> Defendant/Respondent, in her capacity as Commissioner for land registration, by a notice dated 30<sup>th</sup> July 2010, informed the Applicant and a one Badiru Ssali of her intention to effect changes on the register in respect of Gomba Block 19 Plot 5 land at Kalyabwalo, the suit property in this matter. The notice specifically stated that the rectification of the register would be effected by, among other actions, cancelling the transfer of Plot 5 to Stephene Pepe registered under instrument KLA 316028 of 4/12/2006. The same notice also requested the Applicant to let the 1<sup>st</sup> Defendant/Respondent know if there is any objection to the proposed action. This was followed by summonses to the Applicant to attend a public hearing. A public hearing chaired by the 1<sup>st</sup> Defendant/Respondent was eventually conducted on 28<sup>th</sup> June 2011. The Applicant and his Counsel attended the hearing and did participate in the proceedings. At the close of the hearing, the 1<sup>st</sup> Defendant/Respondent informed the Applicant and his Counsel that they would communicate their decision.

It is perhaps of importance to note that the Applicant filed this application on 21<sup>st</sup> June 2011, that is, after receipt of the notice but before the public hearing was conducted. However, the hearing had already been conducted by the time this application was heard. According to the application and its supporting affidavit, it was the said notice and the subsequent summonses that formed the basis of this application, for they were annexed to the application as "CC1", "CC2", "CC3" and "CC4".

I find that the Registrar was exercising the administrative powers conferred upon her under the Registration of Title Act, cap 230, and the Land Act, cap 227 as amended by Act 1 of 2004, when he/she gave a notice to the Applicant about his/her intention to cancel the certificate of title. Sections 73 to 75 of the Registration of Titles Act together with section 91 of the Land Act accord special powers to the Registrar of Titles/Commissioner Land Registration to cancel certificates of title among other things. In particular, sections 73 of the Registration of Titles Act and section 90 of the Land Act empower the Registrar Of Titles/Commissioner Land Registration to call in duplicate certificates of title for, among others, the purpose of rectifying or cancellation, as the case requires. In exercising such powers the Commissioner Land Registration is bound to give the required notices of the intention to take an appropriate action to any party likely to be affected by any decision. The Commissioner is also bound to conduct a hearing in accordance with the principles of natural justice and to communicate his/her decision in writing to the parties affected before executing the decision he /she may have

reached. Section 91(10) & (11) of the Land Act also provides for a right of appeal, and that a transfer is not to be effected until the determination of the appeal. Needless to say there are several other options to resort to, including judicial review, if any party is aggrieved by the Commissioner's decision.

In the instant application, the notice to cancel the certificate, which is the basis of this application, did require the Applicant to voice his objections as required under the said legal provisions. Indeed, by the time this application was heard the public hearing where the Applicant was heard had been conducted but the 1<sup>st</sup> Respondent was yet to communicate her findings. In the circumstances, until the Commissioner communicates his/her decision, it would be mere speculation to conclude that the Commissioner would or would not cancel the certificate of title, or to grant a temporary injunction on an apprehended decision which could fall either way. Thus, in view of the nature of the given circumstances of this particular case, this court is in no position to make a finding that there are serious triable issues for determination in the main suit. I find that the Applicant has failed to show that he has a prima facie case against the Respondents. Also see **Naguru Nakawa Estates Residents Association V Attorney General & 2 Ors Misc Applic. No. 627 of 2010**, Eldad Mwanguhya j; **Fracis Kayanja V Diamond Trust Bank of Uganda Ltd HCT - OO - CC - MA 300 - 2008**, Lameck Mukasa J.

It may also be noted that the pleadings in the main suit indicate that the Applicant/Plaintiff is seeking declaratory orders that he is a *bona fide* purchaser for valuable consideration and legally registered proprietor of the suit property, and a permanent injunction restraining the 1<sup>st</sup> Defendant or his agents, who have indicated to the Plaintiff their intentions to cancel the title, from cancelling his title to the suit land. The instant application also seeks court to restrain the 1<sup>st</sup> Respondent from cancelling the Applicant's certificate of title until the main suit is heard.

It is my opinion that, in the given circumstances, that a grant of a temporary injunction would have the effect of disposing of the entire suit without hearing the main suit on the merits. There are case decisions to the effect that a temporary injunction is not available where making such order would tantamount to making the final order of court when the case is heard and completed. See **Jashbai Patel & Anor V Joseph Lukwago [1984] HCB 44**; **Dennis Kimuli Bahemuka V Sarah Biribonwa Anywar [1987] HCB 71**; **UMSC V Sheik Mulumba [1980] HCB 110**.

I note that the Applicant also invoked section 98 of the Civil Procedure Act seeking this court to exercise its inherent powers. The exercise of inherent powers by court is a matter within the discretion of the court. In the exercise of this discretion, the court must act judiciously and according to settled principles, bearing in mind that the decision to make must be based upon common sense and justice. The court has to look at all circumstances of the case. See **Standard Chartered Bank of Uganda Ltd V Ben Kavuya & Barclays Bank(U) Ltd. [2006] HCB Vol. 1 134**.

In the circumstances, and for the reasons given above, without having to go into the other legal criteria for granting temporary injunctions, I would decline to grant the temporary injunction.

The application is dismissed with costs. The interim order earlier issued by this court in respect of this application is hereby vacated.

I so order.

**Dated at Kampala** this 6<sup>th</sup> day of October 2011.

Percy Night Tuhaise

**JUDGE.**