

UGANDA / JUDGMENT

Bank of Africa (U) Ltd v Clive Mutiso & Ors (HCT-00-CC-MA 244 of 2007) [2007] UGCommC 61 (17 June 2007)

[2007] UGCommC 61

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

HCT-00-CC-MA 244 of 2007

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\par THE REPUBLIC OF UGANDA

\par

\par IN THE HIGH COURT OF UGANDA AT KAMPALA

\par (COMMERCIAL COURT DIVISION)

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\par HCT-00-CC-MA-0244-2007

\par (Arising from Civil Suit No. 152 of 2007)

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\par BANK OF AFRICA UGANDA LTD :::::::::::::::::::: APPLICANT

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\par 1. CLIVE MUTISO

\par 2. CENTRE HOTELS LTD

\par 3. SIR HENRY MORGAN & ASSOCIATES LTD

\par 4. ORGANIC FOREST HONEY LTD

\par ::::::::::::::: RESPONDENTS

\par

\par BEFORE: {\b\ul\insrsid6758744\charrsid31649 THE HONOURABLE MR. JUSTICE
 YOROKAMU BAMWINE}{\b\insrsid6758744\charrsid31649

\par

\par {\b\ul\insrsid6758744\charrsid31649 R U L I N G:

\par {\b\insrsid6758744\charrsid31649

\par {\insrsid6758744\charrsid31649 This application was brought by way of Chamber Summons
 under 0.41 rr 1}{\insrsid31649\charrsid31649 , 2, 3}{\insrsid6758744\charrsid31649

and 9 of the Civil Procedure Rules and other enabling laws. It seeks an order of a temporary
 injunction to restrain the respondents, their agents or persons claiming under them from wastin

g, damaging or alienating, removing or disposing of their properties comprised in Singo Block}
 {\insrsid6623029\charrsid31649 293 Plot 47 Land at }{\insrsid788741\charrsid31649 M}
 {\insrsid6623029\charrsid31649 yanzi}{\insrsid4016719\charrsid31649

and Land comprised in Block 491 Plot 2 at Kiziba, Kyaggwe pending disposal of the main suit. It is
 also prayed that costs of the application be provided for.}{\insrsid6758744\charrsid31649

\par {\insrsid4016719\charrsid31649

\par The application is supported by the affidavit of one Stephen Kasenge, the Audit and
 Compliance Manager of the applicant Bank. The respondents also filed affidavits through Clive
 Mutiso, the 1}{\super\insrsid4016719\charrsid31649 st}{

\insrsid4016719\charrsid31649 respondent herein and Richard John Lynton Tucker, a Director in
 the 3}{\super\insrsid4016719\charrsid31649 rd}{\insrsid4016719\charrsid31649 respondent.

\par

\par {\i\insrsid4016719\charrsid31649 Representations:

\par {\insrsid4016719\charrsid31649 Mr. Faisal Mukasa for the applicant.

\par Mr. Augustine Kibuuka-Musoke for the respondents.

\par

\par The grounds on which the application is based, according to the affidavit of Stephen Kasenge, are that

the respondents intend to remove or dispose of the properties listed herein with a view to defraud the applicant from whom the first and second respondents fraudulently obtained advance payments against uncleared effects.}\insrsid15543681\charrsid31649

The deponent states that the app

licant will suffer irreparable injury if the land is alienated, transferred or disposed of. Before the hearing date, I went through the pleadings. When the application came up for hearing, the applicant sought to apply for adjournment to file a rejoinde

r to the affidavit in reply.}\insrsid4016719\charrsid31649

\par }\insrsid6893737\charrsid31649

\par I was of the view that this application could be disposed of on the basis of the available pleadings. }\insrsid13924983\charrsid31649 Accordingly, I adjourned the application for a ruling on the matter. Hence this ruling.}\

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\par In paragraph 9 of Mr. Kasenge's affidavit, he avers:

\par }\pard \qj \li1122\ri1034\sl360\smult1\widctlpar\aspalpha\aspnum\faauto\adjustright\ri1034\lin1122\itap0\pararsid31649 {\b\i\insrsid13924983\charrsid31649 \93

9. THAT the properties mentioned above are the only properties known to belong to the first respondent in Uganda and I was informed by the first respondent whom I know to be a foreign national that he intends to sell all his land in Ug

anda (which includes the Land described in paragraph 6 above).\94

\par }\pard \qj \li0\ri0\sl360\smult1\widctlpar\aspalpha\aspnum\faauto\adjustright\ri0\lin0\itap0\pararsid31649 {\insrsid13924983\charrsid31649

\par Mr. Mutiso has had opportunity to file a reply to Mr. Kasenge's affidavit. In paragraph 10 of his affidavit, he avers:

\par }\pard \qj \li1122\ri1034\sl360\smult1\widctlpar\aspalpha\aspnum\faauto\adjustright\ri1034\lin1122\itap0\pararsid31649 {\b\i\insrsid13924983\charrsid31649 \9310. THAT in reply to paragraph 9 of the affidavit I state that the pr

operties mentioned in 9 above are not my properties and I do not have any interest in them.'

It is noteworthy that although Mr. Kasenge avers that Mr. Mutiso informed him that he, Mr. Mutiso, intends to sell all his Land in Uganda, including the suit property, all that Mr. Mutiso states in reply is that the property sought to be preserved is not his. He does not deny or admit giving information to Mr. Kasenge about the intended sale or how he came to be linked with it.

or admit giving information to Mr. Kasenge about the intended sale or how he came to be linked with it.

I consider this to be a material omission in Mr. Mutiso's affidavit, presumably deliberate.

The genesis of the applicant's concerns about the suit Lands can be gauged from the plaintiff's pleadings (plaint), para 8 thereof. Under para 8 (vi), the plaintiff avers that upon insistence on documentary proof of the source of funds by the plaintiff, the first defendant presented to the plaintiff a document that purported to be a lease agreement between the 2nd defendant and one Blue Field Associates for land comprised in Block 491, Plot 2 at Kiziba, Kyaggwe. It is averred that the document was executed by the 1st defendant on behalf of the 2nd defendant on one hand and the 5th defendant as an agent of Blue Field Associates on the other hand. The lease agreement is attached to the plaint.

It is noteworthy again that the plaintiff's case against the defendants is that the 1st

{\super\insrsid9466393\charrsid31649 st}{\insrsid9466393\charrsid31649 defendant banked a forged bank draft in favour of the 2}{\super\insrsid9466393\charrsid31649 nd}{\insrsid9466393\charrsid31649

defendant with the plaintiff/applicant for USD 400.000 and that upon trusting the documents that the first defendant produced before the plaintiff to }{\insrsid7696563\charrsid31649 prove}{\insrsid9466393\charrsid31649

the source of funds, the plaintiff paid the 1}{\super\insrsid9466393\charrsid31649 st}{\insrsid9466393\charrsid31649 and 2}{\super\insrsid9466393\charrsid31649 nd}{\insrsid9466393\charrsid31649 defendants USD 385,914.61. The plaintiff\`quote

s case is that the draft bounced }{\insrsid7696563\charrsid31649 after}{\insrsid9466393\charrsid31649 the defendants }{\insrsid7696563\charrsid31649 had taken}{\insrsid9466393\charrsid31649 the money }{\insrsid7696563\charrsid31649 on }{

\insrsid9466393\charrsid31649 it}{\insrsid7696563\charrsid31649 .}{\insrsid1316938\charrsid31649 }{\insrsid9466393\charrsid31649 Trusting as I do that the question whether or not a plaint discloses a cause of action must be determined upon perusal of the plaint alone and anything attached as to form part of it, it is clear to me that the plaintiff\`quote s pleadings do sufficiently link the 1}{

\super\insrsid9466393\charrsid31649 st}{\insrsid9466393\charrsid31649 defendant with the bank draf

t that bounced and the suit property herein. For this reason alone, I would think that the plaintiff is entitled to an order that would preserve the suit property pending determination of the main suit. In an application under 0.41 r. 1, it must essenti

a

lly be shown that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit. It would appear to me that such party need not be the registered owner thereof to be prevented from disposing of it during the pendency

of the suit. In my view, if an order such as the one sought herein is granted and the real owner shows up and wants to dispose of the suit property in exercise of his rights as owner, whether or not such owner is party to the proceedings, he can still be

heard by Court in the matter with a view to discharging the property from the order. In the circumstances of this case, I see no reason to }{\insrsid5784199\charrsid31649 deny granting the order sought herein.}{\insrsid16072392\charrsid31649

\par }{\insrsid5784199\charrsid31649

\par I note that grant of a temporary injunction is a matter within the discretio

n of Court. The discretion must of course be exercised judicially. The applicant must show that he/she has a prima facie case with a probability of success; and that the applicant might otherwise suffer irreparable damage which would not be adequately c

ompensated in damages.

\par

\par If the Court is in doubt on any of the above two issues, it will decide the application on a balance of convenience. The purpose of an application for a temporary injunction} {\insrsid14710938\charrsid31649

should in the first instance be to preserve the status quo.} {\insrsid5784199\charrsid31649

\par } {\insrsid14710938\charrsid31649

\par Applying the above principles to the } {\insrsid87354\charrsid31649 instant case} {\insrsid14710938\charrsid31649 , especially as to whether or not the applicant has a prima facie case with a probability of } {\insrsid31649\charrsid31649 success;}{

\insrsid14710938\charrsid31649 Court is not concerned with whether or not the claim is frivolous or vexatious} {\insrsid16136311\charrsid31649 u} {\insrsid14710938\charrsid31649 s. That, I think, can await the hearing of the suit. The Court\quote

s concern at this stage is whether or not there is a serious question to be tried. Form the pleadings, such a question exists.

\par

\par As to whether the applicant might suffer irreparable damage which would not be adequately compensated in damages, Court is in some doubt. There is no evidence of how much property} {\insrsid1316938\charrsid31649 , if any, } {\insrsid14710938\charrsid31649

the defendants own} {\insrsid1316938\charrsid31649 in Uganda} {\insrsid14710938\charrsid31649 . } {\insrsid1316938\charrsid31649 H} {\insrsid14710938\charrsid31649 owever, Court has been told that the 1} {\supersid14710938\charrsid31649 st}{

\insrsid14710938\charrsid31649 defendant, thought to be the brain behind the alleged fraud, is a foreigner. It has not been denied that he, the first defendant, has intimated to Mr. Kasenge th} {\insrsid1316938\charrsid31649 e plans}{

\insrsid14710938\charrsid31649 to} {\insrsid15539332\charrsid31649 sell the suit property. } {\insrsid1316938\charrsid31649 1} {\supersid1316938\charrsid31649 st} {\insrsid1316938\charrsid31649 defendant} {\insrsid15539332\charrsid31649

has denied ownership of the property, implying that he personally does not stand to lose anything or suffer any inconvenie

nce in the event that any intended sale or alienation is put on hold pending determination of the suit. The balance of convenience is therefore in favour of granting the }

{\insrsid9333776\charrsid31649 order sought.}{\insrsid1071381\charrsid31649

I hasten to add that one property, Block 491 Plot 2 at Kiziba, Kyaggwe, is stated in the plaint as linked to the alleged fraudulent deal. }{\insrsid16136311\charrsid31649 However,}

{\insrsid1071381\charrsid31649 sufficient }{

\insrsid16136311\charrsid31649 ground}{\insrsid1071381\charrsid31649 has been }

{\insrsid16136311\charrsid31649 given}{\insrsid1071381\charrsid31649

in this application to warrant encumbering Singo Block 293 Plot 47 Land at Myanzi as well. The same shall be }{\insrsid16136311\charrsid31649 included in}{\insrsid1071381\charrsid31649 the order herein}{\insrsid16136311\charrsid31649 .}{

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\par }{\insrsid9333776\charrsid31649

\par In t

he final result, Court is satisfied that the purpose of this application is to maintain the status quo pending determination of the suit. On perusal of all available records, I have come to the conclusion that the applicant has brought itself within the

scope of the law under which applications for temporary injunctions are granted. I allow the application and grant the order sought. Costs herein shall abide the outcome of the main suit.

\par

\par Yorokamu Bamwine

\par }{\b\insrsid9333776\charrsid31649 J U D G E

\par }{\insrsid9333776\charrsid31649 18/06/2007

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