

UGANDA / JUDGMENT

Nakawooya v Segawa & 3 Ors (Ma No. 35 of 2011) [2012] UGHC 9 (19 January 2012)

[2012] UGHC 9

COURT

High Court of Uganda

BEFORE

Tuhaise, J

CASE / FILE NUMBER

Ma No. 35 of 2011

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO.35 OF 2011

(ARISING OUT OF CIVIL SUIT NO.21 OF 2011)

NAKAWOOYA JOSEPHINE.....APPLICANT/PLAINTIFF

VERSUS

1. OBRIAN SEGAWA
2. HENRY BAZIGA MUYINGO T/A BAZIGA ENTERPRISES
3. STANBIC BANK
4. BEMUGA STRICT AUCTIONEERS

AND COURT BAILIFFS..... RESPONDENTS/DEFENDANTS

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under Order 41 rules 1, 2 & 9 of the Civil Procedure Rules (CPR); section 98 of the Civil Procedure Act; sections 14 and 15 of the Judicature Act; and sections 38 and 39 of the Land Act as amended by sections 38A and 39 of the Land (Amendment Act). It seeks an order for a temporary injunction restraining the Respondents, their agents, employees, servants, or any person claiming or deriving interest from them from selling, exchanging, transferring, pledging, mortgaging, entering into any contract of sale,

exchange, transferring, mortgaging, or lease of; or entering into any transaction whatsoever in respect of the suit land known and described as Kibuga Block 19 plot 150, land located at Nateete, Rubaga Division Kampala District measuring 0.08 hectares and or evicting the Applicant together with her family and tenants from there or interfering with the Applicant's security of occupancy, occupation and possession of the same until the hearing and determination of the main suit. It also seeks that costs of the application be provided for.

The grounds of the application are set out in the affidavit of the Applicant **Nakawooya Josephine**, and there is an additional affidavit of **Kiyonga Herman**, the Applicant's father.

The application is opposed by the 3rd and 4th Respondents who filed affidavits in reply deponed to by **Carol Lwanga** and **Mugume Stephen** respectively. The 1st and 2nd Respondents did not file any affidavits in reply though they were served, and hence this application was heard **ex parte** in their respect.

The facts as deduced from the application and supporting affidavit are that the 1st Respondent/Defendant is the registered proprietor of the suit family land comprised in Kibuga Block 19 plot 150, land located at Nateete, Rubaga Division Kampala District measuring 0.08 hectares, as per annexure A to the Applicant's affidavit. The Applicant is a spouse of the 1st Respondent/Defendant. In 2005 the Applicant together with the 1st Respondent/Defendant built 5 houses on the suit land some of which it was agreed would be matrimonial homes while others would be for renting. In 2009, 6 more houses for renting were built by the Applicant and the 1st Defendant/Respondent. In February 2010, the 1st and 2nd Respondents, trading under the name and style of Baziga Enterprises mortgaged the suit property together with the matrimonial home to the 3rd Defendant/Respondent for a credit facility of U. Shs. 150,000,000/=. The 1st and 2nd Respondents subsequently failed to repay the installments of the loan. On 22nd November 2010 the 4th Respondent, acting on the 3rd Respondent's instructions advertised the mortgaged property for sale. The 4th Respondent issued an eviction notice to all occupants and has in the company of intending buyers visited inspected and measured the suit property and given instructions to the occupants to vacate and stop paying rent. The Applicant has never consented to any exchange, pledge and/or mortgage of the suit property. The Applicant is expecting their second child and stands losing her interest in the suit property.

The Applicant seeks to preserve matters in **status quo** until the main suit is heard and determined. She avers that the acts of the Respondents are high handed and are causing the Applicant substantial pain, together with impending irreparable loss and damage. She also avers that the balance of convenience is in her favour in that while the Respondents only have to stop the above acts, the Applicant and her family will lose the family land and be rendered destitute without sustenance.

The law on temporary injunctions is now settled law as deduced from numerous case decisions. 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 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. It 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 pendency of a suit is not in issue, in this case Civil Suit No. 21 of 2011 filed by the Applicant/Plaintiff against the Respondents.

On the question of whether there is a **status quo** to be preserved, the Applicant avers in her supporting affidavit that the 4th Respondent, acting on the 3rd Respondent's instructions advertised the mortgaged property for sale. He has issued an eviction notice to all occupants and instructed them to stop paying rent. He has in the company of intending buyers visited inspected and measured the suit property. She contends that she stands losing her interest in the suit property. In his affidavit in reply, Mugume Stephens, a partner of the 4th Defendant avers in paragraphs 3 and 4 that the application is in bad faith as the suit property was sold even by the time an interim order was served on them by the Applicant who was aware of the development. This is corroborated by the affidavit in reply of Carol Lwanga, a Legal Officer of the 3rd Respondent who avers in paragraphs 3 and 4 that after the Borrower defaulted on the mortgage, the suit property was sold to a one Sebastiano Munulo on 2nd February 2010, and that there was spousal consent from a one Namubiru Shakira (Annexure A to Lwanga's affidavit in reply). This affidavit evidence has not been rebutted by the Applicant who had an opportunity to do so through a final affidavit in rejoinder but she apparently chose not to file one.

In exercising the discretion of whether or not to grant a temporary injunction, court does not look at the legal rights to property, but merely preserves the property in its actual condition until the main suit is disposed of. See **Godfrey Sekitoleko & Ors V Seezi Mutabaazi [2001 -2005] HCB Vol 3 p. 80; Wasswa V Kakooza [1987] HCB 79**. Thus, with respect, the submissions of both Counsel, aspects of which touched on rights to the suit property, are pre mature and will only be addressed when the case is heard on the merits.

In the instant application the 3rd and 4th Respondents' affidavit evidence which has not been rebutted by the Applicant is that the suit property sought to be preserved has already been sold off.

There is a wealth of authorities to the effect that a temporary injunction is not available to the Applicant where the **status quo** has already been disturbed. In **Mugenyi V Wandera [1987] HCB 78** it was held that the purpose of an injunction is to preserve the **status quo** until the dispute is resolved, and it would not help in the said case where barricades had already been fixed. Similarly, in **Wasswa V Kakooza, supra**, a temporary injunction was not available to the Applicant where the **status quo** had already been disturbed through the Applicant being forced out of the

suit premises.

In the premises, and on the basis of the foregoing authorities, I find that the *status quo* the Applicant seeks to protect through grant of a temporary injunction has already been disturbed as the suit property she seeks to prevent from sale or alienation has already been sold off to a third party. An order of temporary injunction in the circumstances would be in vain. On that ground alone, this application would fail as there is no *status quo* to preserve. I agree that this application has been overtaken by events.

Having made the finding that there is no *status quo* to preserve, there is no need to proceed to address the other principles regarding grant of a temporary injunction.

The application is dismissed with costs.

Dated at Kampala this 19th day of January 2012.

Percy Ntuhaise

JUDGE.

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