

UGANDA / JUDGMENT

Nakibuuka v Sematimba & Ors (Miscellaneous Application No. 52 of 2014) [2014] UGHCFD 36 (30 June 2014) [2014] UGHCFD 36

COURT

HC: Family Division (Uganda)

BEFORE

Tuhaise, J

CASE / FILE NUMBER

Miscellaneous Application No. 52 of 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT KAMPALA

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 52 OF 2014

ARISING OUT OF CIVIL SUIT NO. 29 OF 2014

THEMI NAKIBUUKA SEBALU..... APPLICANT

VERSUS

1. PETER SEMATIMBA

2. MUYENGA RESORT HOTEL LTD

3. THE COMMISSIONER LAND REGISTRATION.....RESPONDENTS

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under section 218 of the Succession Act cap 162, section 98 of the Civil Procedure Act cap 71, section 33 of the Judicature Act, and Order 41 rules 1, 2 & 9 of the Civil Procedure Rules (CPR).

It seeks various orders, namely a temporary mandatory injunction directing the 1st and 2nd respondents to vacate the business premises of Muyenga Club situated on Kyadondo Block 244 Plot Nos. 1791, 1792, 5867, and 3646 at Muyenga, comprising part of the estate of the late Paulo Sebalu; a further temporary mandatory injunction directing the 1st and 2nd respondents to give an inventory and full account of the assets and liabilities of the said Muyenga Club; a temporary injunction restraining the 1st and 2nd respondents, their agents, servants or any person acting on their authority, from interfering, intermeddling or managing the business of the said Muyenga Club operated under Muyenga Club Ltd; the appointment of Former Deputy Chief Justice Alice Mpagi Bahigeine, Prof. Gordon Wavamuno, Mr. Njuki Samuel, and the applicant Themí Nakibuuka Sebalu as administrators **pendete lite** of the estate of the late Paulo Sebalu to preserve and manage it in the meantime; for further orders deemed fit by court; and that costs of the application be provided for.

The application is supported by the affidavits of Themí Nakibuuka Sebalu the applicant, Prof Gordon Wavamuno, Edward Lule, and Munyami Muderwa Meddie. It was opposed by the 1st respondent who filed an affidavit in reply on his behalf and on behalf of the 2nd respondent, to which the applicant filed an affidavit in rejoinder. The 3rd respondent did not file any affidavit in reply. Counsel filed written submissions within time schedules set by this court except the applicant counsel's written submissions in rejoinder which were submitted a day before the scheduled date of ruling. The late submissions were however addressed by this court in the interests of dispensing substantive justice without due regard to technicalities.

The background to the application is that the applicant, a daughter of the late Paulo Sebalu, filed civil suit no. 29/2014 against the defendants for fraudulent transfer of land comprised in Kyadondo Block 244 Plot nos. 1791, 1792, 5867, and 3646 at Muyenga (suit property) allegedly belonging to the estate of her late father, where Muyenga Club, also claimed to be part of the estate, is located. She subsequently also filed the instant application, together with Miscellaneous Application 53/2014 seeking various interim orders, which was heard **ex parte**. It was substantially allowed on 04/03/14 by the Deputy Registrar of this court, save for the prayer directing the 1st and 2nd respondent to vacate the suit property. After the execution of the interim orders, the respondents filed Miscellaneous Application No. 112/2014 praying this court to set aside the ruling of the Registrar on grounds that it disposed of the entire suit. The application was however withdrawn, after which the hearing of the instant application commenced.

The gist of a temporary injunction is to preserve the **status quo**, that is, to preserve the property in dispute, pending the final 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 there is a **prima facie** case with probability of success, and that the applicant might otherwise suffer irreparable damage which would not easily be compensated in damages. If court is in doubt, it will decide the question on the balance of convenience. See *Kiyimba Kaggwa V Haji Katende* [1985] HCB 43; *American Cynamid V Ethicon Ltd* [1975] All E R.

In addition, Order 41 of the Civil Procedure Rules 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 pendency of a suit, in this case civil suit no. 29 of 2014 filed by the plaintiff/applicant against the defendants/respondents, as outlined above, is not disputed.

I will first address the issue of appointment of administrators **pendete lite** which is challenged by the respondent who contends that it is not a temporary relief to be granted by this court. The 1st respondent averred in paragraph 7 of his affidavit in reply that the prayer to appoint administrators **pendete lite** is in no way a temporary relief to be granted by this court as it seeks to appoint administrators to administer a property and company that is not part of the estate of the deceased. His counsel submitted that it is an abuse of court process to have issues of the estate like appointment of administrators of the estate of the deceased and to give an inventory of the assets and liabilities of the estate.

The applicant responded in paragraph 3(h) of her affidavit in rejoinder that this court has jurisdiction to hear this case and make any orders it deems fit including but not limited to appointing administrators **pendete lite**. Her counsel submitted that in **Wilson Tayebwa & 5 Others V Kyatwoha & 2 Others Misc Application No 60/2012 arising from HCCS No. 14/2012**, Kainamura J, court did grant orders appointing administrators **pendete lite** while determining an application for temporary injunction. He also submitted that the main suit challenges the fraudulent intermeddling by the 1st respondent in the estate of the applicant's late father when he forged transfer forms and was fraudulently registered onto the suit property.

This application was brought under various provisions of the law stated above, including section 218 of the Succession Act, section 98 of the Civil Procedure Act cap 71, and section 33 of the Judicature Act.

Section 218 of the Succession Act provides that:-

“a court may, *pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, *appoint an administrator of the estate of the deceased person, who shall have all the rights and powers of a general administrator other than a right of distributing the estate, and every such administrator shall be subject to the immediate control of the court, and shall act under its direction.”

*****(*emphasis mine).***

I have carefully perused the judgment in the **Tayebwa** case cited by the applicant's counsel. With respect, I find the circumstances of the said case distinguishable from the current situation. In that case, the learned trial Judge held that an application under this section will be granted only when there is a dispute as to the validity of a will or as to the right to administer. It is limited to the duration of the pendency of the suit in question. Thus, though court granted the order to appoint administrators **pendete lite** in the course of entertaining an application for temporary

injunction, the main suit was challenging the applicants/defendants' caveating of the respondents/plaintiffs' application for letters of administration. The dispute was on the right to administer the deceased's estate.

The head suit in the instant case, as pleaded in paragraph 6 of the amended plaint, shows that the plaintiff/applicant's claim against the defendants arises from a fraudulent transfer of land belonging to the estate of late Paulo Sebalu and intermeddling with his estate. The plaintiff seeks this court to order cancellation of the 1st defendant's name from the register of the suit land including handover of the certificates of title; vacation of the 2nd defendant from the premises and management of Muyenga Club located on the suit premises orders; filing an inventory and account of the late Sebalu's estate, a declaration that the suit property belongs to the said estate, a permanent injunction restraining the 1st defendant from intermeddling with the Sebalu estate; general damages for the 1st defendant and 2nd defendants' intermeddling with the estate of Sebalu; and costs of the suit.

It may be noted that court the instant suit is not going to adjudicate on who is entitled to administer the estate of the late Sebalu. There is no evidence on record indicating when the applicant or the administrators *pendete lite* will cease to act as such. The applicant's affidavit evidence is that they have obtained a certificate of no objection, and are in the process of applying for and obtaining a grant for letters of administration of the estate of her late father vide Mengo/AC/459/2014. She averred that copies of the application and the minutes of the family meeting are annexed to her affidavit as B and C respectively. There is no such annexure on record, except the copy of the minutes of the family meeting. Administrators *pendete lite* are normally appointed in the interim, pending litigation on who is to administer the estate. The court to grant an interim order appointing administrators *pendete lite*, in my opinion, should be the court where the suit or petition for administration of an estate or for grant or revocation of probate or letters of administration, is pending. That infers that the interim period of such administrators would end on the trial court making final orders on administration of the estate.

The main suit in the instant case, on the face of it, does not involve any litigation about administering the estate, such that even if the suit was to be disposed of, there would be no instance of revoking or obtaining grant of letters of administration or probate, or determining anything about the administration of the estate. The orders sought concerning the estate are mainly declaratory, to arise from the determination of the questions of fraud and proprietorship of the club and the suit property. This would defeat the very purpose of appointment of administrators *pendete lite*, who are normally appointed pending litigation on administering an estate. If administrators *pendete lite* are appointed in a vacuum, they could end in a situation of administering the estate in perpetuity despite the temporary nature of their duties.

In my opinion, the main suit has nothing to do with the validity of the will of grant of letters of administration a deceased person, or obtaining or revoking any probate or any grant of letters of administration. I agree with the respondent's counsel that the prayer on appointment of an administrators **pendete lite** is not appropriate in this matter where neither a will, nor a grant of letters of administration, nor any question about the administration of the late Paulo Sebalu's estate is pending before this court.

The applicant invoked sections 98 of the Civil Procedure Act and section 33 of the Judicature Act. This requires this court to exercise its inherent powers. The exercise of inherent powers lies in the discretion of court. In the exercise of this discretion, court must act judiciously and according to settled principles, bearing in mind that the decision must be based upon common sense and justice. See **Standard Chartered Bank (U) Ltd V Ben Kavuya & Barclays Bank (U) Ltd [2006] HCB Vol 1 p. 134**. In this case, for reasons given, I do not see the need to exercise discretion or inherent powers since I find the legal provisions on the matter clear.

This takes me back the other temporary reliefs sought by the applicant against the respondents. On the question of whether there is a **prima facie** case with probability of success, the applicant avers in her supporting affidavit that she has filed a case against the respondents about the fraudulent transfer of the suit property belonging to the estate of the late Paulo Sebalu where Muyenga Club is located. She states in paragraph 6 of her affidavit, and pleads in the plaint, that her late father never signed a transfer of the suit property in favour of the 1st respondent. She alleges that the 1st respondent forged her late father's signature. This is denied by the respondent who, in his affidavit in reply and pleadings, avers he lawfully transferred the suit land in his names after the late Paulo Sebalu, who was his uncle, gifted it to him during his lifetime.

The foregoing are, in my opinion, serious triable issues pointing to a **prima facie** case for adjudication. In that regard, I agree with the applicant's counsel that the head suit raises a serious and compelling case of fraud which merits a full investigation at the trial. It is not for court at this stage to go into the merits of the main suit. This will be done when the main suit is heard on the merits. Thus I have refrained from addressing all that affidavit evidence and submissions from either side, on who is the rightful owner of the suit property.

It is the applicant's evidence, in paragraph 3(f) of her affidavit that the estate will suffer irreparable harm and injury which cannot be remedied by an award of damages if the orders sought are not granted. She also avers in paragraph 10 of her affidavit in support, and 3(i) of her affidavit in rejoinder, that she is entitled to the largest share of her late father's estate, and that the respondent's continued intermeddling with the estate of her late father, specifically the affairs of Muyenga Club, will occasion irreparable loss and damage to herself and other beneficiaries of the estate. This is also reflected in paragraph 11 of a further affidavit in rejoinder sworn by Professor Wavamuno. It is challenged by the 1st respondent in paragraph 8 of his affidavit in reply, that the applicant had not demonstrated that she will suffer irreparable loss.

Irreparable injury does not mean that there must be physical possibility of repairing injury. It means that the injury must be substantial or material, that is, one that cannot be adequately compensated in damages. If the applicant's allegations turn out to be true, continued intermeddling with an estate would occasion irreparable loss and damage to beneficiaries of the estate, particularly the main beneficiary, and would lead to injury that cannot be adequately compensated in damages, should the main case be decided in her favour.

Ordinarily applications of this nature aim at preserving the *status quo*. Thus, even if the foregoing principles are in place, a temporary injunction can only be allowed if there is a *status quo* to preserve, otherwise the order would be in vain. Court's duty is only to preserve the existing situation pending the disposal of the substantive suit. In determining whether there is a *status quo* to be preserved, court does not determine the legal rights to property. It merely preserves it in its actual condition until legal title or ownership can be established or declared.

The plaintiff/applicant's prayer to restrain the 1st and 2nd respondents, or their agents, servants or any person acting on their authority from intermeddling with the estate of the deceased Paulo Sebalu was, as indicated in both the main application and the application for interim order, made as a prohibitive/restrictive injunction, unlike the prayers to vacate the business premises and to give an inventory of the assets and liabilities, which were made as mandatory injunctions.

It is the applicant's evidence, in paragraph 5 of her supporting affidavit that the respondents have taken over management and control of Muyenga Club Ltd without legal authority, infringing the applicant's interests as a beneficiary. The 1st respondent disputes the applicant's claims on the suit property and business, stating that he is the proprietor of the same. He also denies that the two are part of the deceased Sebalu's estate. He averred that the manner in which the order was executed to evict him from the suit property was illegal.

The applicant maintains in paragraph 3(d) of her affidavit in rejoinder that the execution of the interim order to stop the intermeddling with the deceased's estate was done lawfully and witnessed by the Local Area Council. She annexed the police report about the execution of the interim order as annexure AR 8 to her affidavit. Annexure AR 8 states that the interim order was served. The persons found on the suit property were asked "to stop trespassing" and they complied and left. It was submitted for the applicant that the estate is now preserved in good state. The respondents' counsel on the other hand submitted that the interim order does not mention eviction and what the applicant attempted to do did not leave her with clean hands, in addition to being an illegality.

The 1st respondent's affidavit evidence about use of the interim order to evict him from the suit premises has not been rebutted by the applicant. Thus, while the interim order to restrain the 1st and 2nd respondents and their agents from interfering, intermeddling with or managing the business of Muyenga Club situated on the suit premises, the manner in which it was executed amounted to actually evicting the 1st respondent from the suit property without due process. The practice of abusing interim orders is rampant in this country and has caused public concern, to the extent that courts have rightly decried the dangers of abusing interim orders. See **Hussein**

Badda V Iganga District Land Board & 4 Others MA 479/2011, Zehurikize J.

This jeopardized rather than preserved the **status quo**. It also, on the face of it, had the effect of disposing of some of the final orders in the main suit before the same was heard on the merits, particularly the order “compelling the 1st and 2nd defendant to vacate the **premises** and **management** of Muyenga Club Ltd comprised in the suit property.”

This court notes from the application, however, that the applicant’s prayers against the 1st and 2nd respondent to vacate the suit property, and to give an inventory and full account of the assets and liabilities of Muyenga Club were sought as mandatory injunctions. Mandatory injunctions are positive orders, like orders for specific performance, unlike prohibitory orders which are orders of restraint.

The applicant’s counsel submitted that there is no distinction in principle between granting a prohibitory and mandatory injunction. I agree with this position. In **Philip H. Petit; Equity and the Law of Trusts 4th edition Butterworths at page 401**, the author states that there is no distinction between granting a prohibitory or mandatory injunction. Every injunction requires to be granted with care and caution but it is not more needed in one case than the other. The court will not hesitate to grant a mandatory injunction in an appropriate case but whenever it does so it must be careful to see that the defendant knows exactly what he has to do, not as a matter of law but as a matter of fact.

Binod Mohan Prasad in **Mulla The Code of Civil Procedure seventeenth edition**, at pages 254 to 257, states that courts can in exceptional cases grant a mandatory injunction on an interlocutory application. Such injunctions can be issued only in case of extreme hardship and compelling circumstances, mostly in those cases when the **status quo** existing on the date of the institution of the suit is to be restored. He cites a Calcutta case, **Indian Cable Co Ltd V Sumira Chackraborty AIR 1985 Cal 248**, where the tenant was in peaceful possession, but had been wrongfully thrown out. His possession was restored on an interlocutory application. In other words, if it has to be granted at all on interlocutory application, a mandatory injunction is granted mostly to restore the **status quo**, and not to establish a new state of things.

According to the author, the grant or refusal of an interlocutory mandatory injunction ultimately rests in the sound judicial discretion of the court to be exercised in the light of the facts and the circumstances of each case. For instance, when a grant of a mandatory interlocutory injunction means granting substantially the relief claimed in the main suit, the court will be very slow and circumspect in the matter of granting any such prayer. This should be after notice to the other party and after hearing both parties.

The foregoing principles have, to an extent, been applied by courts in this country. In **Despina Ponticos [1975] 1 EA 38** the appellate court upheld a judgment of the High Court which had granted a mandatory injunction on grounds that the defendant had no defence. The appellate court stated that courts will not order mandatory injunctions which the defendant may be incapable of complying with. Secondly, the defendant must be capable to comply with such an order. In granting such an order the court must take into account the conduct of both parties.

Also see **Makubuya E. William t/a Polla Plast V Umeme Miscellaneous Application No. 234/2012**, Madrama J.

This court can indeed grant temporary mandatory injunctions in exercise of its inherent powers under section 98 of the Civil Procedure Act, section 33 of the Judicature Act, including its discretionary powers under Order 41 of the Civil Procedure Act.

It is already a finding of this court that the eviction of the respondent or his agents from the suit premises was a departure from the language of the interim order which did not direct the 1st respondent to vacate the business premises of Muyenga Club situated on the suit property. This rendered the manner in which the interim order was executed illegal.

An injunction is an equitable remedy granted at court's discretion. It was held by the Constitutional Court in **Hon. Anifa Bangirana Kawooya V Attorney General & Another Miscellaneous Application No. 46/2010 arising out of Miscellaneous Application 42/2010** that such remedy cannot be granted to a party who has demonstrated openly by his or her conduct that he or she is undeserving of the equitable relief. It is an important maxim of equity that a person who relies on equity must come to court with clean hands. The courts will always deny the applicant an interlocutory injunction if the applicant comes to court with dirty hands.

This court cannot keep a blind eye or be a silent spectator to the manner in which the interim order restraining the 1st respondent from intermeddling was abused and wrongly executed. The applicant, in her affidavits, did not distance herself from the illegal manner in which the interim order was executed. It is a well laid out principle of law that a court should not condone an illegality once it has been brought to court's attention. See **Makula International V Cardinal Nsubuga [1982] HCB 11**.

In my opinion, the applicant does not deserve an equitable remedy from this court. This illegality overrides all questions of pleading including all admissions made thereon, as stated in the **Makula International** case.

In the premises, for reasons I have already given, I dismiss this application with costs. The interim orders earlier issued by the Registrar of this court are vacated.

Dated at Kampala this 30th day of June 2014.

Percy Night Tuhaise

Judge.

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Prepared on 13 October 2026 · Esheria