

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

**MISC APPLICATION No 411 of 2016
(Arising From Civil Suit No. 143 of 2016)**

**1. HERBERT MUTEKANGA
2. NTENDE FIDAH** ===== **APPLICANTS**

VERSUS

**1. BASALIRWA HARRIET
2. CHONGQUING INTERNATIONAL
CONSTRUCTION COMPANY** ===== **RESPONDENTS**

BEFORE: HON. JUSTICE MICHAEL ELUBU

RULING

This application is filed under Section 98 of **The Civil Procedure Act** and Order 41 rr 1, 2, 3 and 9 of **The Civil Procedure Rules**.

The Applicants are **HERBERT MUTEKANGA** and **NTENDE FIDAH**. The two Respondents on the other hand are **BASALIRWA HARRIET** and **CHONGQUING INTERNATIONAL CONSTRUCTION COMPANY**.

The Applicant prays for orders that:

- a) A Temporary Injunction doth issue restraining the Respondents and or stopping their employees servants and agents from selling, alienating, disposing of, wasting, excavating murram or crashing stones or interfering with the suit land situate at Kannage-Butegana village, Nabwigulu Sub County, Bugabula in Kamuli district, in whichever manner until final disposal of the main suit.
- b) Costs be provided for.

The application is based on several grounds which are particularised by the affidavit sworn by Mutekanga Herbert in support of the application. He states that the civil suit filed by the applicants has a high chance of success and that the suit land has been the applicant's ancestral home from time immemorial. He adds that the cemetery where their ancestors are buried is there. That the second respondent is opening roads to excavate murram and blast rocks from the suit land and if they are not restrained the head suit will be rendered nugatory. That the respondents are destroying food and cash crops to pave way for their activities, as a result the status quo ought to be maintained till final determination of the matter otherwise the applicant will suffer irreparable damage. The balance of convenience in this matter rests with the applicants.

The two respondents made replies to the affidavits of the first applicant.

The first respondent avers that the Suitland is not part of the estate of A J Mugezitemwa as he had given it as a gift *inter vivos* to the first respondent and her sister and brothers. She adds that the grave yard is registered in another person's names. As such there is no basis for granting the application. She states it would also cause substantial loss to the 2nd Respondent whom she had sold the land and is executing road works in Kamuli town and has contractual obligations to conclude the contract within a set timeframe.

That the applicants lack a cause of action and have mismanaged the estate of the deceased as she has alleged in her counterclaim.

The 2nd respondent through an affidavit sworn by one Yu Meng oppose the application. He is the 2nd respondent's project manager for the tarmacking of roads in Kamuli which project was to be completed within 18 months from June 2016. That the applicants had secured an interim order for 30 days from the 10th of August 2017. When the order expired the applicants did not have it renewed. As the applicants appeared to have lost interest in the matter, the respondents applied for the order to be vacated, which it was on the 5th of December 2016. The 2nd respondent then started quarrying the suit rock whose dome has now

been flattened without a query from the applicants. The 2nd respondent has done ¾ of the project which should be completed by the end of 2017. That as a result of the foregoing, the application has been overtaken by events, is nugatory following the applicants loss of interest in the application as seen from the failure to extend the interim order. That the suit rock has been quarried substantially changing the status quo in favour of the 2nd respondent. In such circumstances the balance of convenience should be exercised in favour of the respondents who are building road works which are a public utility. In the event of the matter going against the respondents, the applicants can be compensated in money terms. As a result the matter may be resolved through the main suit as this application has been overtaken by events.

Counsel on both sides, Mr Michael Bakidde for the applicants and Haji Juma Munulo for both respondents, addressed the court but I shall not reproduce their submissions here. They will be referred to as the court determines the application.

Grant of an order of Temporary Injunction is regulated by Order 41 of **The Civil Procedure Rules**. The grant of these Interlocutory Injunctions is discretionary in nature which discretion is exercised based grounds which have been laid out in a number of cases. They are:

- That there is a serious issue to be tried or investigated in the headsuit.
- That there would be irreparable damage or injury which cannot be adequately compensated by damages to the applicant if the relief is not granted.
- The Court would have to weigh where the balance of convenience lies.
- That where the other factors are balanced the Court would order that the status quo is preserved (See: **Kiyimba Vs Katende [1985] HCB 44**).

On the first head the applicant submitted that the respondents, specifically the 2nd respondent has encroached on the land from which they are extracting rock aggregate. It is submitted farther that they have not explained how they got the

land. That in effect the second respondent is a trespasser and the head suit as a result has a likelihood of success.

The respondents submit that this application is overtaken by events as the applicants had originally been granted an interim order which when it expired they did not renew.

It is clear to this court that there are contrasting claims made in this matter; both parties claim ownership of the suit land. For that reason I will not dwell on the first ground as these claims ought to be properly investigated in the trial. There are therefore serious issues for investigation in the head suit.

Secondly it would have been advisable to preserve the status quo pending the trial of the merits in the head suit but that has substantially changed in the period from filing to date. I have seen pictures filed by the respondents who allege the rock has been substantially quarried and almost flattened as opposed to what it was at the beginning when the matter was first filed.

The question therefore is whether irreparable damage has been visited on the applicants. The major contention in the application is that the land has been destroyed by the respondents quarrying the rock and creating roads to excavate murrum and the rock aggregate.

From the affidavit of the 2nd respondent, it would appear that the applicant was cognisant of the start of the quarrying by the 2nd applicant but for months after the lapse of the Interim order took no action to extend the order to halt the quarrying which had started at that stage. This partly explains why so much of the rock on the suit land was flattened by the time the matter came up for hearing.

I have also seen evidence from the respondents alleging that the rock is used to tarmac roads in the Kamuli Town Council. The applicants state however that this should not compromise their interests as it is a private matter between the 2nd respondent and the Town Council. While this may be true, it is also clear that the applicants sat on their rights by not extending the interim order

originally issued to preserve the status quo leaving this state of affairs to advance for this long. The respondents' contract runs to December 2017. This is when the roads are to be handed over.

After carefully considering all these matters, I find that the status quo has been greatly altered and cannot be maintained at what it was at the start of this dispute.

I also find that the balance of the danger of doing an injustice in my view tilts in favour of the respondents considering that they are executing road works which should be complete by December 2017. Additionally the applicants had opportunity to hold this matter in status quo by extending their interim order which they did not do.

Lastly, should the trial court find in favour of the applicants, then they can properly be compensated in damages for the rock and murram taken and for the restoration of the land. There is no danger of irreparable damage.

In sum I find that the application lacks merit and is dismissed. Costs in the cause.

Michael Elubu

Judge

23.11.17

5/11/17

Plaintiff about fence of 1st applicant
and 1st resp.
Pr. summary of the Plaintiff
Order: clear.

Costs: Being allowed in the presence of the above.
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