

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA AT KAMPALA**  
**CIVIL APPLICATION NO.28 OF 2019**  
**(ARISING OUT OF CIVIL APPLICATION NO. 27 OF 2019)**  
**(ARISING OUT OF CIVIL APPEAL NO.13 OF 2018)**

**MALE H. MABIRIZI K. KIWANUKA..... APPLICANT**

**VERSUS**

**THE KABAKA OF BUGANDA.....RESPONDENT**

**RULING OF DR. KISAAKYE, JSC**

Male Mabirizi Kiwanuka (hereinafter referred to as the applicant) filed this application against the Kabaka of Buganda (hereinafter referred to as the respondent). The applicant sought from this Court several orders reproduced later in this Ruling. Among the orders he sought is an injunction to halt the Door to Door collection of ground rent (otherwise known as Busuulu) program, which was launched by the respondent on 15<sup>th</sup> November 2019.

The application was brought by Notice of Motion under the provisions of Article 28(1), 44(c), 126(1), 2(a) and (e) of the Constitution; sections 4, 6, 7 and 8 of the Judicature Act; Rules 2(2), 42(1) and (2), 43(1) and (2) of the Supreme Court Rules.

In his Notice of Motion, the applicant pleaded that his application is based on the following grounds:

1. *There is a pending Civil Application No. 27 of 2019 between parties to the instant application seeking for an order of injunction to be restrained herein.*
2. *The substantive application and Civil Appeal No. 13 of 2018 will be rendered nugatory if this application is not granted.*
3. *There is an imminent danger of going ahead with the actions complained against before determination of the substantive application and the appeal itself because on 15<sup>th</sup> November 2019, the applicant launched a program where, effective 18<sup>th</sup> November 2019, he will be conducting door-to-door collection of ground rent/busuuulu on all settlers on official mailo land despite the pendency of the dispute through the appeal is in this Court.*
4. *The applicant will suffer irreparable damage if the application is not granted.*
5. *The balance of convenience is in favour of the applicant.*
6. *The actions of the respondent, in pendency of the substantive application and the appeal and in light of the background of the dispute amounts to abuse of Court process.*
7. *It is in the interest of protecting the sanctity of our Constitution, Courts, promotion of fair hearing and rule of law that the application be granted.*

*8. The application has been brought without delay.*

This application was also supported by an Affidavit sworn by the applicant on 18<sup>th</sup> November 2019, which listed 51 additional grounds.

Both parties filed and adopted their written submissions during the hearing of the application. The applicant represented himself, while the respondent was represented by Christopher Bwanika and Charlotte Nalumansi.

On 16<sup>th</sup> January 2020 when this application first came up for hearing, the applicant made an application seeking for a protective Order against the respondent with respect to prayer 1(a) of his Notice of Motion, in order to preserve the status quo.

The prayer in paragraph 1(a) that the applicant sought to be granted is an Interim Order of injunction to be issued restraining the respondent, the Buganda Land Board and any other agent acting with either express or implied authority from the respondent from continuing with the door-to- door collection of ground rent (Busuulu) from the settlers on official mailo land.

The applicant submitted that the exercise of door to door collection of Busuulu was scheduled to end on 31<sup>st</sup> January 2020 and yet the hearing of this application had been re-scheduled for 12<sup>th</sup> February 2020. I declined to grant the application and indicated that I would give my reasons in my Ruling.

The first reason for my refusal to grant the applicant's prayer related to the fundamental right of fair hearing. Article 28(1) of our Constitution guarantees all persons a right to fair hearing. This right is non – derogable under Article 44(c) of the same Constitution. Allowing the applicant's prayer would have had the effect of granting relief that the applicant seeks in this application before giving the respondent an opportunity to be heard first.

Secondly, granting the applicant's prayer 1(a) at that preliminary stage would have the effect of granting this application before I had heard the opportunity of hearing its merits or otherwise. It is for these two reasons that I declined to grant the applicant's prayer.

### **Respondent's Preliminary Objections**

Counsel for the respondent filed written submissions and raised three preliminary objections in respect of the application.

The first preliminary objection was that the applicant has no locus standi to bring this application before this Honourable Court seeking to restrain the respondent and Buganda Land Board as he prayed in paragraph 1(a) and (b) of the Notice of Motion.

The second preliminary objection was that the present application was res judicata because the applicant had presented to the High Court similar applications relating to the exercise of collection of ground rent/busuuulu by the respondent from the Bibanja holders living on official mailo.

The third preliminary objection raised by the respondent was that this application was an abuse of Court process. Counsel for the respondent contended that this application and its substantive application No. 27 of 2019 were not properly before this Court because they do not arise from Civil Appeal No. 13 of 2018.

Counsel for the respondent relied on ***Omondi v National Bank of Kenya Ltd & Ors, Milimani Commercial Courts No. 958 of 2001, Rwanyarare James v Attorney General & Another Constitutional petition No. 11 of 1997, Uganda Land Commission v James Mark Kamoga and Anor. S.C. C.A 08/2004*** and ***William Johnson v Gore Wood & Co (a firm), [2001]2 W.L.R. 72***, among others, to support these preliminary objections.

In response, the applicant filed written submissions and objected to the preliminary objections. He relied on several authorities which include ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd, [1969] E.A. 696, Ssekikubo & 4 Others v A.G. & 4 Ors, Supreme Court Constitutional Application No. 04 of 2014, Katabazi & Ors v The Secretary General, East African Community & Anor, EAC No. 1 of 2007*** and ***E.B. Nyakaana & Sons Ltd v Kobusingye & 16 Ors, Supreme Court Misc. Application No. 13 of 2017***, among others.

He contended that the points raised were not preliminary objections rather these are matters that the respondent should have raised in his defense. The applicant relied on ***Katabazi & Ors v The Secretary General East African Community & Anor (supra)*** and contended that a preliminary objection must be

a pure point of law. He contended that in this case, counsel for the respondent was relying on evidence in the affidavit.

The applicant further contended that even if these were points of law, they were not capable of defeating his application, because the locus of his application was based on his pending appeal and the substantive application.

On the issue of res judicata, the applicant relied on ***Katabazi & Ors v The Secretary General East African Community & Anor*** (*supra*), and contended that his application was a different matter because he was seeking for interim Orders pending the disposal of Civil Application No. 27 of 2019 which is before this Court.

On the objection of abuse of Court process, the applicant relied on ***Uganda Land Commission v James Mark Kamoga and Anor*** (*supra*) and contended that this application cannot be classified as abuse of Court process. The applicant contended that he was seeking to preserve his right of appeal to this Court which is provided for under the provisions of ***section 77(1) of the Civil Procedure Act.***

The applicant prayed that the three preliminary objections be overruled.

I allowed the parties to argue the merits of their respective cases before disposing of the preliminary objections. In view of my decision on this application, I have not deemed it necessary to deal with the merits of the preliminary objections. Suffice it to say here that in light of the fact that the preliminary objections

required me to review other Rulings of lower courts which are not part of this application, I came to the conclusion that the matters raised in the preliminary objections relevant to this application would be best dealt with alongside the substantive submissions of the parties, highlighted in the next section.

### Applicant's Submissions

The applicant contended that the Court of Appeal set aside the discovery order on ground that his underground Civil Suit, which was not one of the grounds of appeal, was incompetent.

Relying on Annexures to his affidavit in rejoinder, the applicant contended that the respondent was collecting ground rent/busuuulu as far back as 2010 and contended that the respondent wanted the people to continue paying the ground rent/busuuulu and had threatened to evict those who failed to pay.

Relying on ***Alcon International Ltd v The New Vision Printing & Publishing Co. Ltd & Anor, Supreme Court Civil Application No. 04 of 2010***, the applicant contended that this Court can issue an order restraining several actions for the purpose of maintaining the status quo until the determination of the appeal.

Relying further on ***Francis Ngaruko v Attorney General of the Republic of Burundi, East African Court of Justice First Instance Division Application No. 3 of 2019***, the applicant submitted that status quo is the period immediately preceding the issue of the writ.

The applicant further relied on his affidavit in support and contended that he is one of the beneficiaries to the Trust held by the respondent. Relying on ***Male H. Mabirizi K. Kiwanuka v Attorney General of the Republic of Uganda, East African Court of Justice First Instance Division Applications No. 4 & 6 of 2019***, the applicant contended that the averments in his Affidavit in support are sufficient evidence of his interest and threat of eviction. The applicant contended that he had demonstrated that the threat was real and submitted that the respondent should be restrained from further actions until the main application is heard.

#### Respondent's Submissions

In reply, counsel for the respondent contended that the Court of Appeal only set aside the orders for discovery, but it did not dismiss the applicant's suit in the High Court.

Counsel for the respondent further submitted that the appeal before this Court not against the dismissal of the applicant's main suit in the High Court which should be brought before the Court of Appeal. Rather, the said appeal seeks to set aside the Judgement and Orders of the Court of Appeal which set aside the discovery Orders made by the High Court.

Counsel for the respondent further contended that the matters and Orders the applicant is seeking for from this Court are extraneous to the Civil Appeal before this Court.

Counsel for the respondent further submitted that the Orders that the applicant was seeking for in this application are the



same Orders that the applicant was seeking for in High Court suit which was dismissed.

Relying on our decision in ***Yakobo Senkungu and Others v Cerencio Mukasa, Supreme Court Civil Application No. 5 of 2013***, counsel for the respondent contended that the interim orders sought would instead of maintaining the status quo alter it, contrary to the doctrine that an injunction should not alter the status quo.

The respondent's counsel submitted that the status quo which prevailed when the applicant filed his appeal in 2018 could not be preserved, because the door to door collection of ground rent/busuuu which was scheduled to run from 18<sup>th</sup> November 2019 to 31<sup>st</sup> January 2020, had already been concluded and the application had therefore been overtaken by events.

On the issue of balance of convenience, counsel for the respondent contended that there was no contest in Court in as far as the collection of ground rent/busuuu from settlers on the official Mailo is concerned, Misc. Cause No. 162 of 2016 having been dismissed.

On the issue of irreparable damage, counsel for the respondent contended that although the applicant contended in paragraphs 38 and 39 of his Affidavit that no amount of damages could compensate the respondent's assumption of ownership of that land, the applicant's evidence did not meet the standard of irreparable damage.

Counsel for the respondent contended that for any ground rent the respondent's agents collect, they issue receipts. He submitted that this money can be refunded if the applicant was successful in his appeal. Counsel for the respondent submitted that an injunction should only be granted where the damage cannot be compensated by the payment of money, which was not the case.

Counsel for the respondent also contended that the danger of issuing the order is that it would affect other people who are not complaining about the program of collecting ground rent. He prayed that the application be dismissed with costs.

#### Applicant's Rejoinder

In rejoinder, the applicant reiterated his earlier arguments and contended that his High Court suit was dismissed because of the Court of Appeal decision in Civil Appeal No. 184 of 2017. He maintained his contention that the orders he was seeking for in this application were therefore not extraneous.

Relying on our decision in ***Julius Rwabinumi v Hope Bahimbisomwe USC Civil Appeal No. 10 of 2009***, the applicant challenged the submissions of counsel for the respondent that millions of people would be affected by the interim Orders that he was only seeking for under this application. He contended that there were no pleadings by the respondent to this effect before the Court.

The applicant further contended that he was only seeking for the halting of the door to door collection of the Busuulu and not for a

refund of moneys already collected or the cancellation of leases already issued by the respondent through the Buganda Land Board. He relied on the decision of ***Kasibante Moses v Katongole Singh Marwaha & Anor, Kampala Election Petition No. 23 of 2011***, where Court made an order to stop the recount.

The applicant contended that the respondent's claim that he is empowered to collect ground rent/busuuulu is the dispute before this Court because the respondent is a Trustee and not a landowner as he claims.

### **Consideration of the Application**

I note at the onset that by the time I heard this application on 12<sup>th</sup> February 2020, the door to door collection of busuuulu exercise should have ended. Both parties agreed that this exercise was slated to run from 18<sup>th</sup> November 2019 to 31<sup>st</sup> January 2020. As counsel for the respondent rightly submitted, this application had already been overtaken by events.

This reason would have been sufficient to summarily dismiss this application. However, I have found it necessary to briefly consider and discuss other reasons that warranted the dismissal of this application even if it had not been overtaken by events. Both parties made lengthy submissions and also relied on many authorities in support of the merits of their respective cases. In filing this application, the applicant contended that it is arising out of Civil Appeal No. 13 of 2018, which is currently pending before this Court. Appeal No. 13 in turn arises from the

Judgment of the Court of Appeal in Civil Appeal No. 184 of 2017, which was delivered on 1st October 2018. This appeal was between the same parties and the respondent was the appellant therein.

A review of the lead Judgment of Egonda Ntende JA clearly shows out that the appeal arose out of discovery proceedings before the High Court and that it was based on 5 grounds of appeal. The learned Justices of Appeal allowed the appeal with costs and set aside the order of discovery that had been made by the High Court. It therefore follows that any appeal arising from Civil Appeal No. 184 of 2017 must be in respect of the above orders. Turning to the present application, the applicant sought for the following orders from this Court against the respondent:

1. *An Interim Order of injunction be issued restraining the respondent, his agency known as Buganda Land Board, any other agent and any other person, body or organ acting through him and deriving express or implied authority from his name or through him from:*
  - a) *Continuing with the Door- to-Door collection of Ground Rent (Busuulu) from the settlers on official mailo land registered in the name of the Respondent pursuant to Article 246(3)(a) of the Constitution, the Institution of Traditional Leaders Act, 2011 and the Traditional Rulers (Restitution of Assets and Properties) Act, Cap. 247.*

*b) Carrying out any activity portraying him as a Registered owner of Official Mailo land registered in the name of the respondent pursuant to Article 246(3)(a) of the Constitution, the Institution of Traditional or Cultural Leaders Act, 2011 and the Traditional Rulers (Restitution of Assets and Properties) Act, Cap 247, including but not limited to*

- i) Imposition of registration, at a fee with threats against the people living on the afore stated official mailo land,*
  - ii) Collection of a 10% charge of the sale value of land/kibanja on the afore stated official mailo land,*
  - iii) Holding out himself as a landowner of the afore stated official mailo land,*
  - iv) Collecting moneys from non-lessee Baganda people living on the afore stated official mailo land.*
- until final determination of Civil Application No. 27 of 2019.*

*2. The costs of this application be provided to the applicant.*

None of the above prayers being sought by the applicant related to the issue of discovery. It is therefore not true that this application arises out of Civil Appeal No. 13 of 2018.

I also found no merit in the applicant's argument that he decided to file his application in this Court because (a) his suit in the High Court was dismissed by Adonyo J, basing on the Court of Appeal decision that his suit was incompetent, and (b) that the respondent had taken advantage of the dismissal of the applicant's suit to continue with all the activities the applicant had sought to stop in his suit and even introduced new schemes such as the door to door collection of Busuulu as shown in the respondent's affidavit in reply.

Much as the appellant may have felt aggrieved by the decision by the High Court to dismiss his Suit, his remedy does not lie in presenting his dissatisfaction with that decision directly to the Supreme Court. The mandate of the Supreme Court in Civil matters is limited to hearing appeals from decisions of the Court of Appeal and not the High Court. This is clearly provided for under Article 132(2) of the Constitution, which states as follows:

*"132. Jurisdiction of the Supreme Court.*

*(1) ...*

*(2) An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law."*

It therefore follows that if a matter was not canvassed at the Court of Appeal, it cannot be competently raised in this Court. Similarly, no application can lie to this Court on a matter arising out of a decision of the High Court, unless that matter has first been heard and decided by the Court of Appeal.

This Court has powers to grant interim orders staying the orders of the Court of Appeal. However, the orders for which interim orders are sought should be arising from an appeal before this Court which arises from a decision of the Court of Appeal.

For all the above reasons, this application could not have succeeded.

Turning to the issue of costs, the applicant had also prayed that his application be allowed with costs. However, he also prayed that if his application is not allowed, the Court should not grant any costs to the respondent because this application falls under matters permitted by Article 50 of the Constitution.

Counsel for the respondent also prayed for costs of this application to be awarded to the respondent.

I note that although the applicant represented himself, he exhibited a good knowledge of the law in arguing his application. He should have known or consulted those who are more knowledgeable about the competency of his application vis a vis the mandate of this court. He also opted to continue to pursue the full hearing of his application even when there was evidence on record that the exercise was expected to have ended before the application had been heard by this Court.

I have considered the prayers the applicant made in this Court with respect to costs. I agree with the reasoning of the lower courts in Civil Appeal No. 187 of 2016 and in High Court Misc. Application No. 162 of 2016 respectively, that the applicant did

not take the necessary steps to bring his application under Article 50 of the Constitution.

I accordingly dismiss this application with costs to the respondent.

Dated this 18<sup>th</sup> day of June 2020

  
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Justice Dr. Esther Kitimbo Kisaakye,  
Justice of the Supreme Court