THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO.509 OF 2020

(ARISING FROM MISCELLANEOUS CAUSE NO.239 OF 2020)

WATER & ENVIRONMENT MEDIA NETWORK (U) LTD---------- APPLICANT

VERSUS

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY---------- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this application by way of Chambers summons against the respondent under Section 33 of the Judicature Act cap 13 and Section 98 of the Civil Procedure Act, and Order 41 r 2(1), & 9 of the Civil Procedure Rules, for orders that;

a) A temporary injunction doth issue restraining the respondent, their agents, servants' representatives or persons claiming title under them from implementing the 1st respondent Certificate of Approval of the Environmental and Social Impact Assessment (ESIA) issued to Hoima Sugar Ltd on the 14th day of August 2020 in respect of Kyangwali MIXED LAND USE PROJECT until the disposal of the application for judicial review.

b) Costs of the application be provided for.

The grounds in support of this application are set out in the affidavit of Mutale Joshua, the programs officer of the applicant dated 4th September 2020 which briefly states;

1. That on 14th August 2020, the 1st respondent issued a certificate of approval for Environmental and Social Impact Assessment (ESIA) to Hoima Sugar Ltd to among others things grow sugar cane on part of and areas around Bugoma Central Forest Reserve.

2. That applicant who is passionate about environmental protection, conservation and enjoyment of a right to clean healthy environment where displeased with the said decision of the respondent to issue a certificate of approval of ESIA and have applied for Judicial review.

3. That the lead Agency on forest conservation the National Forestry Authority (NFA) at a meeting on the 26th day of June 2020 intimated to the applicant that NEMA had ignored them and had commenced the process of an ESIA study by Hoima Sugar Ltd despite having the legal mandate under Schedule 4 Part 2 paragraph 6(c) of the National Environment Act 2019 to evaluate project briefs that involve establishment of plantations in a forest. NFA shared with the applicant a copy of the ESIA report and approval for the terms of reference approved by NEMA.

4. That Hoima Sugar Ltd through their agents and servants are threatening to implement the impugned decision of the Respondent by bringing tractors on the land to clear it in line with their project.

5. That if the conduct is not stopped, they threaten to change the land use of the part of and areas around Bugoma Forest which has the effect of rendering the application for judicial review nugatory.

6. That the essence of the application challenges the process by which the respondent arrived at a decision to issue a certificate of approval of ESIA to the Hoima Sugar Ltd.

7. That the application has a high likelihood of success since one of the contentious issue is whether the 1st respondent can issue a certificate of

approval of ESIA without ever giving the public a chance to be heard about the drastic change of land use.

In opposition to this Application the Respondent through Francis Ogwal Natural Resources Manager (Biodiversity) of the respondent filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. This admits issue a certificate of approval for Environmental and Social Impact Assessment (ESIA) to Hoima Sugar Ltd but denies authorizing or allowing Hoima Sugar Ltd to grow sugarcane on Bugoma Forest land.

2. That the land where the Kyangwali Mixed Land Use Project is situate on Plot 216, Block 2 Buhaguzi Kyangwali Sub-County, Kikuube District and is the official property of the Omukama of the kingdom of Bunyoro.

3. That the application for judicial review is speculative, baseless, frivolous and vexatious and full of falsehoods. The ESIA report was subjected to sufficient review, comments were sought and obtained from the relevant stakeholders, a baseline survey was carried out and the Executive Director properly exercised his powers under the National Environment Act and the Rules made thereunder.

4. That the respondent denies ever ignoring NFA. The respondent and NFA are sister agencies under the Ministry of Water and Environment. Their relationship is that of regulator (NEMA) and lead agency (NFA). The Executive Director of the respondent submitted the ESIA report to NFA and other stakeholders. NFA and stakeholders replied with comments most of which were incorporated in ESIA

5. The respondent is not mandated to incorporate comments from Lead Agencies or stakeholders wholesomely. The respondent exercises statutory functions to incorporate comments which are in the best interest of the

environment and society to ensure a sustainable environment management and sustainable development in Uganda.

6. That the developer Hoima Sugar Ltd obtained a lease from the Omukama of Bunyoro Kitara Kingdom and it is both in possession of the property, the Environment and Social Impact Assessment has already been approved, and the development of Kyangwali Mixed Land Use Project is already in progress.

7. That as a result of the review of the ESIA report, the respondent carried out a baseline verification survey, robust mitigation measures have been put in place which include a restriction of the respondent to carry out its activities on the grassland area which is about 9 square miles out of the 22 square miles which the developer (Hoima Sugar Ltd) owns.

8. That there is no controversy on the land since the issue of ownership of land was resolved by the High Court Civil Application No. 266 of 2019 and there is stay of execution orders of court. The matters raised by the lead agency were taken into consideration in the review of the ESIA.

9. That the respondent made public consultations and received sufficient comments from several agencies and all views were taken into consideration. Public hearings in the ordinary fashion could not be convened owing to the enactment of Public Health Control of COVID-19 Rules, SI No. 83 of 2020. But Public meetings were held by the developer prior to COVID-19.

10. That the balance of convenience lies in favour of the developer on possession of its land and continue with the developments since ESIA certificate was approved and issued.

In the interest of time the respective counsel were directed to file written submissions and i have considered the respective submissions. The applicant was represented by *Mr Kasadha David* whereas the respondent was represented *Mr Javason Kamugisha*.

The applicant submitted in support of his application for temporary injunction siting, Odoki J (as he was then) in **Kiyimba Kaggwa vs Hajji Katende Abdu Nasser H.C.C.S NO. 2109 OF 1984** enunciated the rules for grant of a temporary injunction as follows;

> *"…1. The granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of.*
>
> *2. The conditions for the grant of the interlocutory injunction are;*
>
> *i. firstly that, the applicant must show a prima facie case with a probability of success.*
>
> *ii. Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.*
>
> *iii. Thirdly if the Court is in doubt, it would decide an application on the balance of convenience…."*

Therefore as a discretionary measure, the main purpose of a temporary injunction is to preserve the status quo so that the main suit is not rendered nugatory.

The applicant contended that the status is that the certificate of Approval issued by the respondent is yet to be substantially put in effect. The beneficiary who is Hoima Sugar Ltd is just planning and or threatening to implement it by bringing tractors on the land. So the land is largely still covered with vegetation cover and yet to be substantially changed. It is that status quo that needs to be maintained until this court disposes off the application for judicial review.

The applicant's counsel further submitted that In the said application, the crux of the matter is whether the Respondent can legally issue to Hoima Sugar Ltd with a

certificate of approval for ESIA to utilise land on or around Bugoma Central Forest Reserve for sugar cane plantation, inter alia, without ever calling for a public hearing or Public Consultations and therefore these are triable issues.

The applicant submitted that should this court be in doubt, it should find that the balance of convenience is in favour of the applicant. This is because incase the temporary injunction is not granted, Hoima Sugar Ltd through the authority of the Certificate of approval issued by the respondent will be at liberty to carry out its proposed sugarcane planting activities which will require it to cut down trees and thus drastically changing the land use. The applicant, the public surrounding Bugoma CFR and the proposed project stand more to lose if land use with its projected effects takes place without hearing from them.

The respondent opposed the application and contended that a temporary injunction is being sought against a wrong party.

Secondly, the respondent's counsel submitted that the respondent carried out a baseline verification survey, robust mitigation measures have been put in place which include a restriction of the respondent to carry out its activities on the grassland area which is about 9 square miles out of the 22 square miles which the developer (Hoima Sugar Ltd) owns.

That the respondent made public consultations and received sufficient comments from several agencies and all views were taken into consideration. Public hearings in the ordinary fashion could not be convened owing to the enactment of Public Health Control of COVID-19 Rules, SI No. 83 of 2020. But Public meetings were held by the developer prior to COVID-19.

Determination

The granting of a temporary injunction is an exercise of judicial discretion as was discussed in the case of **Equator International Distributors Ltd vs Beiersdorf East Africa Ltd & Others Misc.Application No.1127 Of 2014**.

Discretionary powers are to be exercised judiciously as was noted in the case of **Yahaya Kariisa v Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29.**

It should be noted that where there is a legal right either at law or in equity, the court has power to grant an injunction in protection of that right. Further to note, a party is entitled to apply for an injunction as soon as his legal right is invaded as was discussed in the case of **Titus Tayebwa v Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009**.

The Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried. **(See American Cynamide versus Ethicon [1975] ALL ER 504).**

The whole purpose of granting an injunction is to preserve the status quo as was noted in the case of **Humphrey Nzeyi vs Bank of Uganda and Attorney General Constitutional Application No.01 of 2013**. Honourable Justice Remmy Kasule noted that an order to maintain the status quo is intended to prevent any of the parties involved in a dispute from taking any action until the matter is resolved by court. It seeks to prevent harm or preserve the existing conditions so that a party's position is not prejudiced in the meantime until a resolution by court of the issues in dispute is reached. It is the last, actual, peaceable, uncontested status which preceded the pending controversy.

In the present case the parties in controversy before court are the applicant and respondent but from the reading of the entire application there is third party involved in this controversy Hoima Sugar Limited. Surprisingly this party has been left out of the suit and indeed the applicant ignorantly or deliberately has chosen to leave out such an important party.

This court would be condemning a party who is not before it without according them a hearing contrary to the Constitution of Uganda and rules of natural justice. The said third party bought land or obtained a lease from the Omukama of Bunyoro and wishes to use the same for sugarcane growing and other activities under the proposed Kyangwali Mixed Land Use Project.

They sought permission from the respondent to clear the intended project and the same has been cleared with terms and conditions set out in the Certificate of Approval of Environmental and Social Impact Assessment.

I agree with the respondent's counsel that a temporary injunction is being sought against a wrong party and for this ground alone it would fail as this court would not exercise its discretion to grant a temporary injunction against a non-party.

Secondly, the application for temporary injunction is wholly premised on distorted facts or misleading facts or deliberate falsehoods. It is clear that from the facts as presented by the applicant that some important information was left out either deliberately or ignorantly. In such circumstances the court should be slow to grant an injunction premised on facts which are in dispute.

The applicant contends that the respondent has issued a certificate for approval of Environmental and Social Impact Assessment to Hoima Sugar Limited to among others grow sugarcane on part of Bugoma Forest Reserve. The respondent has denied this and contended that the land where the Kyangwali Mixed Land Use Project is located is plot 216 Block 2 Buhaguzi Kyanwali Sub-county, Kikuube District is the official property of the Omukama of the Kingdom of Bunyoro and there is a copy of the certificate of title.

In addition contends that the said third party (Hoima Sugar Limited) is threatening to implement a decision by bringing tractors on the land to clear it in line with the project. According to the respondent, they carried out a baseline verification survey and the activities of the respondent have been restricted on grassland area which is about 9 square miles out of the 22 square miles which the developer (Hoima Sugar Ltd) owns.

Therefore, it is not true that they are going to cut down trees as alleged but they are going to use that specific area marked out in the Environmental and Social Impact Assessment. This implies the temporary Injunction is sought on speculative grounds and the same are yet to happen as they contend.

It is trite law that for an application to be maintained three conditions must be satisfied by the Applicant as was discussed in the case **Behangana Domaro and**

Anor v Attorney General Constitutional Application No.73 of 2010 that is; - The applicant must show a prima facie case with a probability of success, that the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and if the court is in doubt, it would decide an application on the balance of convenience. But the main purpose is to preserve the status quo.

"*Status quo"* simply denotes the existing state of affairs before a given particular point in time. The purpose of the order for temporary injunction is primarily to preserve the status quo of the subject matter of the dispute pending the final determination of the case, and the order is granted in order to prevent the ends of justice from being defeated. *See*: ***Daniel Mukwaya v. Administrator General, H.C.C.S No. 630 of 1993; Erisa Rainbow Musoke v. Ahamada Kezala [1987] HCB 81***.

The status quo in this matter is that the respondent has issued a Certificate of Approval of Environmental and Social Impact Assessment to Hoima Sugar Limited and the same has not been cancelled. Any injunction attempting to stay the said certificate would amount to granting the final orders being sought in the main suit.

An order of temporary injunction is intended to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a *fait accompli* before the final hearing.

The court would have to preserve the status quo prevailing at the moment but this would not stop the court from quashing or giving any orders sought in the main suit. The main cause/application will not be rendered nugatory since in matters of judicial review the court is at liberty to grant any remedies that fits the circumstances of the case. It does not mean that since the project has started then the court cannot stop the same in the interest of justice.

There are no hard and fast rules that can be laid down for granting interim reliefs or temporary injunctions in public law matters or judicial review applications. The exercise of the power to grant temporary injunction must be exercised with

caution, prudence, discretion and circumspection. The circumstances of each case will determine whether to grant them or not bearing in mind the various existing factors. The grounds for grant may sometimes defer from the grounds in ordinary civil suits and the same are considered with caution and appropriateness of the case.

This court deprecates the practice of granting temporary injunctions which practically give the principal relief sought in the main cause/application for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, public interest and a host of other considerations. Where there is a serious dispute on the facts, it cannot be said that a prima facie case had been made out for the grant of temporary injunction.

The facts in this case as shown earlier are disputed and this court needs to interrogate them farther in order to establish the truth. A *prima facie* case with probability of success, case law is to the effect that though the Applicant has to satisfy Court that there is merit in the case, it does not mean that one should succeed. It means there should be a triable issue, that is, an issue which raises a *prima facie* case for adjudication. Once the facts are controversially disputed, a prima facie case cannot be made out and the court would be involved in giving a guess without evaluating the same at this preliminary stage.

The balance of convenience simply means that the applicant has to show that failure to grant the temporary injunction is to his greater detriment. In ***Kiyimba Kaggwa v Haji A.N Katende [1985] HCB 43*** court held that the balance of convenience lies more on the one who will suffer more if the respondent is not restrained in the activities complained of in the suit.

The respondent will not suffer any prejudice but there are third party rights to a non-party and it is that party who is targeted by the injunction. The Third party shall be prejudiced and affected by the order of temporary injunction and are going ahead to plan and put in effect the Kyangwali mixed Land Use Project which has already been permitted on certain terms and conditions.

The court should always be willing to extend its hand to protect a citizen who is being wronged or is being deprived of property without any authority of law or without following procedures which are fundamental and vital in nature.

The court's power to grant a temporary injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of temporary injunction being equitable remedy, it is in discretion of the court and such discretion must be exercised in favour of the plaintiff or applicant only if the court is satisfied that, unless the respondent is restrained by an order of injunction, irreparable loss or damage will be caused to the plaintiff/applicant. The court grants such relief *ex debitio justitiae*, i.e to meet the ends of justice. See ***Section 64 of the Civil Procedure Act***.

In the result for the reasons stated herein above this application fails and is dismissed with costs.

It is so ordered.

Dated, signed and delivered be email at Kampala this 2nd day of October 2020

SSEKAANA MUSA
JUDGE
2nd/10/2020