THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-0173 OF 2006
(Arising out of HCT-00-CC-CS-0137-2006)

ATTORNEY GENERAL
EX – RELATOR ::::::::::::::::::::::::::::
APPLICANT

1. **COTTON DEVELOPMENT ORGANISATION (CDO)**
2. **UGANDA GINNERS & COTTON EXPORTERS ASSOCIATION LTD**

VERSUS

UGANDA COTTON KLUB (U) LTD ::::::::::::
RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

This application is of some unusual nature in the sense that it lacks any comparable precedent in this country.

It was brought by way of Chamber Summons under 0.37 rr 2 and 9 of the Civil Procedure Rules and S. 98 of the Civil Procedure Act and, I'm advised, S. 33 of the Judicature Act, Cap 13. It seeks an order of a temporary injunction

against the Respondent restraining it from continuing to carry out its business in breach of law, in particular the construction of a ginnery in Pallisa District. It is also prayed that costs be provided for.

The application is supported by the affidavits of Joseph Matsiko, the Ag. Director of Civil Litigation in the Attorney General's Chambers and one Jolly Sabune, the Managing Director of the first relator.

The Respondent has also filed an affidavit through Edmund Wakida, Company Secretary of the Respondent.

The main suit is a relator action by the Attorney General at the instance and request of COTTON DEVELOPMENT ORGANISATION [CDO] and UGANDA GINNERS & COTTON EXPORTERS ASSOCIATION LTD.

The substance of the Applicants' claim in the main suit is that CDO is the Regulator of the Cotton industry in Uganda. That the Respondent is in breach of the regulatory provisions of the Cotton Development Act and the entire provisions of the Cotton (Amendment) Regulations, S.1. No. 39 of 2005 and the Establishment of Zones and Isolated and Segregated Areas Regulations, S.1. No. 40/2005. As I will show presently, the Respondent's argument is that the Regulations above are unconstitutional in that they are inconsent with the Parent Act.

Counsel:

Mr. Nester Byamugisha for Applicants.

Mr. Andrew Bashaija and Precious Ngabirano for the Respondents.

In as far as this application is concerned, the grounds in support of it are not any different from those stated in the main suit. They are that:

1. The Applicant has filed the main suit at the instance and relation of Uganda Cotton Organisation (CDO) and Uganda Ginners and Cotton Exporters Association Ltd (UGCEA) who are the regulator and dealers in the cotton industry vide the Cotton Development Act; No 30 of 2000, the Cotton (Amendment) Regulations S.1. No. 39 of 2005 and the Cotton Establishment of Zones and Isolated and Segregated Areas, Regulations (S.1 No. 40 of 2005), the Respondent has deliberately carried out and continues to carry out activities in the industry with impunity, fragrantly and blatantly in breach of the law and regulations implemented by CDO and arrangements between the individual ginners and UGCEA, Government and CDO.

2. Although CDO is the statutory regulator of the Cotton industry, the law does not confer on it sanctions effective to restrain the Respondent from continuing to breach the law and regulations.

3. The continued breach of the law by the Respondent will suffer greatly the activities of the dealers in cotton industry individually and collectively

through the UGCEA and hamper the regulatory role of CDO thereby drastically affecting the cotton industry.

4. That CDO or UGCEA do in law lack the capacity to sue the Respondent seeking an injunction as their cause or action can only be based on breach of the law of which at common law, the Applicant is the only party competent to complain in a Court of law.

5. The Applicant is satisfied that in the circumstances of this case, it is reasonable to conclude that the Applicants (sic) continued unlawful activities will continue unless and until effectively restrained by the law and nothing short of an injunction prayed for will effectively restrain it.

From the above, one can see that the grounds in support of the application do not spell out acts which the Applicants consider to be unlawful and therefore actionable. However, the affidavit of Joseph Matsiko clearly spells out the objectives and duties of CDO under the relevant law. They are stated in para 5 thereof. In particular, CDO is stated to be enjoined to register in accordance with the regulations any person to undertake the activities laid there under including those complained of in respect of the Respondent to wit, dealing in cotton seed, dealing in seed cotton, establishing and operating a ginnery and dealing in lint cotton and every holder of a registration is required to furnish CDO with all manner of information prescribed by it. It is for instance stated that for any person to gin raw

cotton or bale lint cotton he/she has to have been registered by CDO in accordance with the law.

It is averred by the A.G that there are existing ginners in Bukedi Zone who have over time invested heavily in cotton production in that zone and increased production there.

From the pleadings, while construction of a ginnery in Pallisa has been singled out, the Chamber Summons does not clearly bring out the activities on the part of the Respondent which are the cause of bad blood between the parties to this suit. But if one goes beyond the Chamber Summons itself and studies the summary of Evidence accompanying the plaint in the main suit, one is treated to a multitude of them. At this stage, these are just allegations.

For purposes of this application, what the affidavit of Mr. Matsiko brings out clearly is the fact that there have been high level consultations between the parties regarding grey areas in the cotton industry which consultations have yielded no results to the extent that the A.G. feels that nothing short of a permanent injunction will effectively restrain the Respondents. Hence the suit.

0.37 r 2 (1) under which the application is brought provides:

"2 (1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the main suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after Judgment, apply to Court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of or any injury of a like kind arising out of the same contract or relating to the same property or right" (emphasis mine).

While in an application under 0.37 r 1 it must essentially be shown that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, it appears to me that all that is required under 0.37 r 2 (1) where the instant application falls is essentially that there exists a suit for restraining the Defendant from committing a breach of contract or other injury of any kind. While such suit is pending determination, the Plaintiff is at liberty to apply to Court for a temporary injunction to restrain the repetition or continuance of the breach or injury.

In my view, to argue that the application should fail because the Applicant has not disclosed what kind of injury has been suffered is to trivialise the issues in the main suit. I don't consider that to be fair given that the plaint

can be amended at any stage of the proceedings to provide for what may have been omitted, advertently or otherwise.

Turning now to the application itself, grant of a temporary injunction is a matter within the discretion of Court. The law requires, however, that the discretion be exercised judicially. Thus over the years, the Courts have evolved principles to consider while determining whether or not to grant a temporary injunction. Spry V. P (as he then was) set out the conditions for the grant as being:

> *"First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be granted unless the Applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."*

See: **Giella –Vs- Cassman Brown 1973 EA 358.**

Both counsel have in this case made very well researched arguments for and against the orders sought herein. It is not my intention to reproduce them here.

I have already outlined the facts in relation to this application. What I have found to be disputed are questions of law, and to some extent two particular

questions, namely, the question of the A.G's involvement in a matter that does not appear to concern him and the question of the principles on which I ought to exercise the jurisdiction.

The jurisdiction of Court is itself not in any serious doubt considering the provision of S. 38 (1) of the Judicature Act, Cap 13. Under that law, the H.C. shall have power to grant an injunction to restrain any person from doing any act as may be specified by the H.C.

Arguing the question of the A.G's involvement, no doubt with a mind to the statutory law of this country, Mr. Ngabirano argued that the Applicants have not shown sufficient interest in the outcome of this matter. He argued that the 2nd relator is a private liability company; that both relators have a right to sue and be sued and so it is strange that Government which licensed a private investor who has invested so much in this country is now turning against the same investor in collusion with a private company, the 2nd relator. In effect, counsel doubts the bonafides of the A.G's involvement in this saga.

It would appear to me that Mr. Ngabirano did not properly appreciate the fact that the suit is brought basically under the principles of common law and the fact that it is more of public interest litigation than private litigation. S. 14 of the Judicature Act, supra, mandates this Court, subject to written law, to apply the common law and the doctrines of equity.

I have understood Mr. Ngabirano's argument to be that for the Applicants to succeed in this application and consequently in the main suit, they have to demonstrate a greater personal interest than that of the general public they are seeking to protect.

That argument finds no favour in this Court.

Traditionally, common law confines standing to litigate in protection of public rights to the Attorney-General. It is immaterial that such suits are rare in this country. This was re-affirmed by the House of Lords in **Gouriet –Vs- Union of Post Office Workers [1978] AC 435.** In short, the A.G's discretion in such cases may be exercised at the instance of an individual or by himself. I have not come across any local authority that contradicts or appears to contradict that legal position. The position was in my view well articulated by Lord Diplock in **IRC –Vs- National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93, 107** when he said:

> *"It would, in my view, be grave lacuna in our system of public law if a pressure group, like the federation or even a single spirited tax payer, were prevented by out dated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped."*

I agree.

My view on this point is that the line of argument pursued by the Respondents of personal interest, personal injury or sufficient interest over and above the interest of the general public, has more to do with private law as distinct from public law. In matters of public interest litigation, and I don't hesitate to hold that the cotton industry in Uganda is a matter of public interest, this Court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter. In coming to this conclusion, I have taken into account the fact that public litigation is a sophisticated mechanism which requires professional handling which a private company or individual may not easily achieve. Much as the CDO and UGCEA are legally empowered to espouse their own claims, Court is of the view that it cannot deny the A.G. the platform to champion the public interest inherent in the case against the Respondent as long as the Respondent is doing so in good faith. No bad faith has been shown herein to deny him the platform.

As to whether the Applicants have a prima facie case with a possibility of success, I'm aware that this is one of the requirements in an application of this nature. In my view, however, this need not be so in all cases. I think that any person dissatisfied with the status quo should essentially be

presumed to have a genuine grievance which can be remedied through the Courts.

Any such person hopes to win although he may in the end turn out to be wrong. In my view, the instant case raises very serious questions to be tried in that the Respondents have been alleged to be involved in breaches of the law. Those breaches, if proved, could have serious consequences on the future of the cotton industry in this country.

It has been argued by Mr. Ngabirano that the Regulations are in conflict with the parent Act. This in my view, is not a matter that should be investigated and remedied herein. It's a matter that belongs to the main suit. Equally so is the question of the Applicants' alleged lack of a cause of action in the main suit. Determination thereof must await proper arguments to be advanced in the main suit.

I have considered counsel's argument that to allow this application would be to make the final determination of the main suit in that the Court will be declaring that the Respondents are in breach.

I don't accept that argument. The reasons which would lead the Court to grant an injunction would not in law be the same as would activate it when deciding finally whether or not the Plaintiff in the main suit is entitled to the

reliefs sought therein. That final determination can only properly be made when the case for the defence has been heard.

As to whether the Applicants are likely to suffer irreparable injury, my short answer is that this being a public interest litigation, it is enough if the Applicants show that a person's right has been, is being or is likely to be contravened. These are plain and clear words which should admit no controversy. The A.G need not first see people suffer irreparable injury before he can complain on their behalf. To do so would be to misread the provisions of 0.37 r 2 (1) and to render the concept of public litigation meaningless.

As to where the balance of convenience lies, I notice that both the investor and the Government which the A.G. represents in this litigation need each other. The investor has brought in heavy investments and the Government stands to benefit from the investment if the two can mutually respect each other. The issue as I see it is whether an investor can set terms of an investment and execute them regardless of any Government policy on the sector. That's a matter I will seek to be educated on in the main suit.

A lot of emphasis has been placed on the fact that the Cotton Development Act has penal provisions for persons acting in contravention of it. I appreciate the sentiments expressed by the Respondents on this point. I

however find solace in the words of Eve, J. in **Attorney – General –Vs- Premier Line Ltd [1932] 1 Ch. 303, 313** where he said:

> *"The general rule is that where an Act creates an offence and provides a remedy, the only remedy is that provided by the Statute, and had this action been commenced and prosecuted by the relators it is, I think, pretty clear that the objection of the Defendants to the maintenance of this action would have prevailed. For this conclusion I think the case of* ***Institute of Petent Agents –Vs- Lockwood 1894 AC 347*** *would have furnished sufficient authority. But that is not the nature of this action. The Attorney General has been involved, and he has intervened in order to assert, not only the rights of the three relators joined with him as Co-Plaintiffs, but of the public at large. The public is concerned in seeing that Acts of Parliament are obeyed, and if those who are acting in breach of them persist in doing so, notwithstanding the infliction of the punishment prescribed by the Act, the public at large is sufficiently interested in the dispute to warrant the A.G. intervening for the purpose of asserting public rights, and if he does so the general rule no longer operates: the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land ……."*.

I accept that position without any reservations.

True CDO and UGCEA can sue the Respondents on their own or even seek convictions in Courts of law. Even if they did, the results would benefit them as individuals, not the poor lot of this country whose livelihood depends on cotton whether on small or large scale.

Upon filing of this suit, the Applicants applied for and obtained an interim order restraining the Respondents from carrying out any activities pending determination of this application. That order appears to have brought relative peace to the parties. In my view, the greater interests of justice and of the cotton industry as a whole warrant that this status quo be preserved until Court decides otherwise.

Upon carefully listening to the able arguments of counsel; perusing the affidavits on record; and reviewing of the law on the point, I have come to the conclusion that this application should be allowed. The only appropriate remedy is to restrain the Respondents by an order of injunction at the instance of the Attorney – General in the terms of the existing interim order. I grant it.

In view of the heated nature of this case, Court is of the view that if the parties made a commitment to have the main suit disposed of expeditiously, and in any event within four months, the hullabaloo about the alleged

deliberate attempt by officials in government to frustrate the investor would cease.

I would therefore direct that circumstances allowing, the main suit be disposed of within four (4) months from the date of this order or else the order be reviewed. For its part, Court commits itself towards that end.

Finally, each party prayed for costs. I have not found my way to award any given the public interest involved and the fact that this is a fairly balanced case where the decision will not only benefit the parties but the public as a whole. Accordingly, parties will bear their respective costs.

I so order.

Yorokamu Bamwine
J U D G E
21/04/2006