THE REPUBLIC OF UGANDA

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

HCT-00-CC-MA-0285-2007
(Arising out of C.S No. 288 of 2007)

PAN AFRICAN CENTRE FOR STRATEGIC
AND INTERNATIONAL STUDIES :::::::::: PLAINTIFF/APPLICANT

VERSUS

MANDELA NATIONAL STADIUM LTD :: DEFENDANT/RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

This application was brought by way of Chamber Summons under S. 98 of the Civil Procedure Act and 0.41 r. 1 and 2 (1) of the Civil Procedure Rules. It seeks an order of a temporary injunction to restrain the respondent and its servants or agents or any one claiming to derive authority from it, from breaching/denying the applicants rights provided under the Tenancy Agreement and/or evicting the applicant from suit premises.

It is also prayed that the costs of the application be provided for.

The application is supported by the affidavit of Dr. Nkamuhayo Rwacumika, the Managing Director of the applicant company, dated 27th April, 2007. The respondents also filed affidavits through one William Kibuuka Musoke, the General Manager of the respondent/defendant company.

Representations:

Mr. Byamugisha-Kamugisha for the applicant.

Mr. Sebugenyi Mukasa, Mr. Mutyaba Bernard and Mr. Nicholas Ecimu for the respondent.

The grounds on which the application is based, according to the affidavit of Dr. Nkamuhayo, are that:

1. The parties entered into a Tenancy Agreement that, inter alia, provided that the plaintiff company has exclusive rights to provide catering services at the Mandela National Stadium apart from wedding parties.
2. The plaintiff has performed its obligations under the tenancy agreement, however, the respondent/defendant is in outright breach and is threatening to further breach the agreement by denying the applicant several rights provided under the tenancy agreement.
3. The respondent has repeatedly breached the terms of the agreement and in particular on 5/10/2006 and on 9/12/2006 prompting the applicant to commence HCCS No. 40 of 2007, which the plaintiff withdrew as a result of an understanding reached with the defendant which the defendant has again breached by attempting to evict the applicant/plaintiff.
4. In further breach of the tenancy agreement the respondent has threatened and attempted to evict the applicant from the premises without any cause or notice.
5. The respondent is threatening to disconnect water and electricity supplies claiming non-payment of bills yet the applicant has duly and regularly paid all the utility bills.
6. The applicant has filed HCCS No. 0288 of 2007 which is pending determination by this Honourable Court and there are high chances of success which will be rendered nugatory unless this Court issues an interlocutory order prayed for.
7. It is in the interest of justice that the order is granted.

Before I delve into the merits of this application, I consider it necessary to comment on a matter that has been talked about a lot herein: the issue of filing the suit out of which the instant application arises when there was another suit on the same matter. The Court is aware that HCCS No. 288 of 2007 was filed during the pendency of HCCS No. 40/2007. Court is also aware that this was done after the applicant had indicated to Court, in writing, that it had withdrawn the earlier suit. Court was reluctant to sanction an instant withdrawal because the issue of costs had not been addressed. The parties appeared before me on 3/5/2007 and the issue of costs was sorted out. While I agree that the interim order obtained in the fresh suit had the effect of stopping the respondent from exercising its rights under the tenancy agreement,

I'm reluctant to accept the argument that the manner in which the order was obtained and how it was used was tainted with illegalities. There could have been lapse in judgment on the part of the Registrar. However, I would hesitate to attribute it to any ill-motive. I would therefore find that the order occasioned no miscarriage of justice and I do so.

Now back to the application.

0.41 r. 1 under which the application is brought provides:

> "***1. Cases in which temporary injunction may be granted.***
> ***Where in any suit it is proved by affidavit or otherwise –***
> ***(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***
> ***……."***

In the instant suit, no property has been shown or alleged to be in danger of being wasted, damaged or alienated. Accordingly, 0.41 r. 1 is inapplicable to the issues herein.

0.41 r. 2 (1) governs injunctions to restrain breach of contract or other injury. It provides:

> ***"(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 ***suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach 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."***

While in an application under 0.41 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, all that is required under 0.41 r. 2 (1) is 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 can apply to Court for a temporary injunction to restrain the repetition or continuance of the breach or injury.

In the instant case, the plaintiff's claim against the defendant is for breach of contract and for recovery of Shs.397, 000,000=, being specific damages, general damages and costs of the suit. Paragraph 3 of the plaint is very clear on this. It is not a suit for restraining the defendant from committing a breach of contract. It is trite that the relief sought in the main suit must be for an injunction in order for an applicant to seek a temporary one before the case is heard.

See: **Frank Nkuyahanga –Vs- Esso (U) Ltd HCCS No. 377/92** reproduced in **[1992] 1 KARL 182.**

For this reason alone, this application would fail.

Be that as it may, grant of a temporary injunction is a matter within the discretion of Court. The discretion must of course be exercised judicially. Over the years, the Courts have evolved principles to consider while determining whether or not to grant a temporary injunction. Those principles were ably highlighted by learned counsel for the applicant. For records purposes, the applicant must show:

1. that the applicant has a prima facie case with a probability of success; and
2. that the applicant might otherwise suffer irreparable damage which would not be adequately compensated in damages.

If the Court is in doubt on any of the above two issues, the Court will decide the application on a balance of convenience.

See: **Robert Kavuma –Vs- M/S Hotel International SCCA No. 8 of 1990.**

Firstly, whether the applicant has a prima facie case with a probability of success.

I'm cutely aware that at this stage, the Court is not concerned with whether or not the claim is frivolous or vexatious. That, I think, can await the hearing of the suit. Court's concern at this stage is whether or not there is a serious question to be tried.

From the pleadings, on the 10th day of October 2005, the parties entered into a tenancy agreement in which the respondent let to the applicant the suit premises for a period of six years effective 1/1/2006 at a monthly rent of Shs.4,200,000= payable three months in advance. Not long after that, the respondent started complaining to the applicant about rent defaults. The applicant denied it. When HCCS No. 40/2007, since withdrawn, was filed, the respondent filed therein a counterclaim in respect of the said rent arrears. The applicant filed no defence or reply to the counterclaim. Accordingly, the respondent applied for judgment on the counter

claim and it was by consent of the parties granted on 3/5/2007. The parties agreed to reconcile the figures in relation to the counter claim so that any balance due would be subject of execution. In view of that consent judgment, it cannot seriously be asserted that there were no outstanding rent arrears by the time the applicant filed this suit. The only serious question as I see it, though not pleaded, is whether there still exists a tenancy relationship between the applicant and the respondent.

Despite the clear evidence of the tenancy being terminated by the defendant in the purported exercise of its rights under the tenancy agreement, the plaint is silent on the fate of the landlord/tenant relationship. However, the defendant is categorical that the relationship is over. The impugned tenancy agreement provided that either party had to give the other three months notice for the termination of the agreement. The respondent has exhibited a notice of termination of tenancy agreement dated 24/1/2007. The notice expired on 26/4/2007, a day before the instant suit was filed. The law is of course that whoever alleges must prove. However, for the applicant to succeed in this application and the main suit, it must have come to Court with clean hands. Given that the respondent is already in possession of judgment against the applicant for non-payment of rent, vide HCCS No. 40/2007, and given either party's contractual right to terminate the tenancy on notice, which right the respondent has already exercised, Court doubts that there is any serious question to be tried in the main suit save on the quantum of damages.

Secondly, whether the applicant might suffer irreparable damage which would not be adequately compensated in damages.

In paragraph 11 of Dr. Nkamuhayo's belated affidavit in rejoinder, he avers that the applicant's hotel business is an investment of over Shs.800m including furniture, accommodation etc. He also avers that the applicant has running contracts to supply facilities to guests and tourists as well other functions including a scheduled one month hosting of 30 universities from USA on Nile Civilization led by Prof James Allen. He further talks of a Hollywood movie filming project to be shot in Uganda from August for about 5 months whereby the entourage is scheduled to be hosted at the Hotel. He has not exhibited evidence of such engagements. Even if he did, it is most unlikely that his Hotel would be the only one capable of meeting such accommodation demands in the City. In my view, any other company would offer those facilities. From the applicant's averments, the worst injury it may suffer if this application is

not granted is simply loss of the tenancy which loss is atonable by ordinary damages. I entirely agree with the submissions of learned counsel for the respondent that the applicant has failed to show that he would suffer irreparable injury if this application was not granted. Damages would in my view atone any injury the plaintiff might suffer if this application is not granted by Court.

I should add that the purpose of a temporary injunction is to maintain the status quo until determination of the whole dispute. It cannot be for purposes of restraining a party from exercising its contractual right of termination solely on the ground that there is a dispute as to the execution of the impugned contract. I note that for now, the applicant is in possession of the suit premises. It is in possession by virtue of an interim order issued by the Registrar of this Court on 27/4/2007. It is noteworthy that the termination notice period expired on 26/4/2007, a day before the said interim order was issued. The effect of the order was therefore to keep the applicant in the premises after the tenancy had already been terminated, wrongfully or otherwise. Believing as I do that the status quo is not about who is in possession of the suit premises as of now but the actual state of affairs at the time the challenge in the main suit was taken out, the status quo is certainly in favour of the respondent who should have been in the premises on 27/4/2007 if the interim order had not been made. For as long as the tenancy was terminated in accordance with the tenancy agreement at a time when there was no Court order to enforce its restoration, my view is that the aim of the applicant's application can only be to disturb the status quo rather than to maintain it.

I have already indicated that the Court may decide the application on a balance of convenience if it is in doubt on any of the above two issues. There is no such doubt herein. Upon listening to the able arguments of all counsel and perusing the affidavit on record; and, upon review of the law on the point, I have come to the conclusion that the applicant has not brought itself within the scope of the law under which applications for temporary injunctions are granted. I would disallow the application, vacate the interim order and direct that the main suit be set down for a scheduling conference on a date convenient to the parties and Court. Costs herein shall abide the outcome of the main suit.

It is ordered accordingly.

Yorokamu Bamwine

J U D G E

18/05/2007

Order: This ruling shall be delivered on my behalf by the Registrar of the Court on the due date.

Yorokamu Bamwine

J U D G E

18/05/2007