

Last Updated: 19 March 2007

Alley Route Ltd-V-Uganda Development Bank Ltd- HCT-00-CC-MA- 634-2006 [2007]
UGCommC 9 (1st February 2007)

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA- 634-2006
(Arising from HCT-00-CC-CS-0553-2006)

ALLEY ROUTE LTD.....PLAINTIFF

VERSUS

UGANDA DEVELOPMENT BANK LTD.....DEFENDANT

1st February 2007

BEFORE: HON. JUSTICE LAMECK. N. MUKASA

RULING:

This is an application by the Plaintiff in Civil Suit No. 553 of 2006, Alley Route Ltd, brought by Chamber Summons under order 41 rules 1,2 and 9 of the Civil Procedure Rules. The Applicant is seeking an order for a temporary injunction restraining the Defendant/Respondent, M/S Uganda Development Bank Limited, from disposing or selling or in any other way interrupting the Applicant's use and enjoyment of premises comprised in Plot No. 612 Block 17 Rubaga and Plot 307 a Block 148 Singo until further Orders of the Court. The brief back ground to this application, as can be gathered from the plaint filed in Civil Suit No. 553 of 2006, is that the Applicant applied for a loan facility from the Respondent to establish a biscuit manufacturing plant in Uganda. The application was considered by the Respondent and thereafter made a loan offer to the Applicant whereby the Respondent was to extend a loan of US\$ 387,221 to finance the following:-

- (i) Machinery and equipment
- (ii) Steel structure
- (iii) Dyna truck
- (iv) Generator set
- (v) Working capital
- (vi) Provision for contingency

A loan agreement was executed dated 27th November, 1995. The Applicant in addition executed a legal mortgage and a debenture in favour of the Respondent. Among the securities for the loan are the two pieces of land which are the subject matters of this application. In its plaint the Applicant alleges several incidents of breach of the Loan Agreement committed by the Respondent. It is as a result of the alleged breach that the Applicant filed Civil Suit No. 553 of 2006 against the Respondent whereby it seeks the following reliefs:-

- (i) An Order for the release of the Plaintiff's securities including the release of mortgages registered on:-

(a) Plot No. 612 Block 17 Rubaga, Nakukologo, Kampala.

(b) Plot 307A Singo Block 148 Mubende District.

(ii) An Order for the discharge of the debenture on the Plaintiffs properties and assets.

(iii) A declaration that the Defendant breached the loan and mortgage agreement plus the debenture entered into with the Plaintiff and made performance by the Plaintiff impossible; thus entitling the Plaintiff to treat the whole transaction as repudiated and or rescinded/discharged.

(iv) An Order that the Plaintiff is not liable to pay any monies to the Defendant.

(v) A permanent injunction restraining the Defendant or its agents from selling the Plaintiff's property that forms part of the present suit.

(vi) General damages for breach of contract.

(vii) Interest and costs of the Suit.

Representation was Mr. Moses Ojakol for the Applicant and Mr. Alex Rexida for the Respondent. The application is supported by an affidavit deponed to by Mr. Sam Mayanja, the Managing Director of the Applicant Company. The Respondent filed an affidavit in reply deponed to by Mrs Priscilla Mugisha, the Bank Secretary of the Respondent Bank. In response the Applicant filed an Affidavit in Rejoinder also deponed to by Mr. Sam Mayanja. I shall review the affidavits in the course of this ruling.

Both Counsel were agreed as to the law relating to grant of a temporary injunction which is that the granting of an interim injunction is exercise of judicial discretion. Court must exercise that discretion judicially. See Sargent vs. Patel [1949] 16 EACA 63. The conditions for the Court to consider whether or not to grant a temporary injunction are that first an Applicant must show that he has a prima facie case with probability of success. Secondly, an interlocutory injunction will not be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly if the Court is in doubt, it will decide an application on the balance of convenience. In this regard counsel for the Applicant referred me to Giella vs. Causman Brown & Co. Ltd [1973] EA 358. See also E.A Industries vs. Trufoods [1972] E.A 420 Robert Kavuma vs. Hotel International Ltd S.C.C.A No 8 of 1990 (unreported). The prime purpose for a temporary injunction is to preserve the status quo pending the disposal of the Main Suit. See Noormohamed Jammohamed vs. Kasamali Virji Madhain [1953] 29 EACA 8, Erisa Rainbow Musoke vs. Ahamada Kezeraka [1987] HCB 81.

Order 41 rule 2 (1) provides:

"In any suit for restraining the Defendant from committing a breach of contract or other injury of any mind, 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 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."

In paragraphs 10, 11 and 12 of the affidavit in support Sam Mayanja avers that at a meeting of 22nd August 2006, the Respondent refused to reschedule the loan and demanded a viable repayment plan by 6th September 2006. That pursuant to the Loan Agreement, the decision of the Respondent is final and according to the Mortgage and Debenture Deeds, the Respondent can appoint a receiver without recourse to Court. He asserts that a refusal to reschedule and a demand for a repayment plan is a precursor to issuance of an event of default notice which is normally immediately followed by appointment of a receiver. In paragraph 8 the deponent avers that the Applicants biscuit plant is situated at Plot No. 612 Block 17 Rubaga, Nalukologo Kampala, which land together with that at Plot 307A Singo Block 14B Mubende District are the subject of the legal mortgage for the said loan and the subject of this application. If the feared Respondent's right to appoint a receiver is exercised the expected result would affect the Applicants rights and interest in the biscuit plant and its right of redemption of the mortgaged properties. It is the status quo of such rights and interests that the Applicant by this application seeks to preserve pending the determination of the Main Suit.

Regarding the first test, whether the Applicant has a prima facie case with the probability of success, it is now the general trend for Courts in Uganda to consider only whether there are serious questions to be tried. See Napro Industries Ltd. Vs. Five Star Industries Ltd. & Anor H.C Misc. App. No. 773 of 2004 (Comm. Court Division), ELT. Kiyimba – Kaggwa vs. Hajji Abdu Nasser Katende [1985] HCB 43. So my investigation will be limited to whether the Applicant raises prima facie triable issues in the Main Suit. In paragraphs 5, 7 and 9 of the plaint the Applicant pleads to various acts of breach of the loan agreement allegedly committed by the Respondent which he contends entitled it to general damages for the injury suffered. In paragraph 6 of the affidavit in support of this applicant Sam Mayanja particularly avers that by the said Loan Agreement the Respondent undertook to extend a loan of US\$ 387,221 to apply in financing the following:-

- (i) Machinery and equipment
- (ii) Steel structure
- (iii) Dyna truck
- (iv) Generator set
- (v) Working capital.

And in paragraph 9 he avers that the Respondent failed to supply the following:-

- (i) Full set of machinery and equipment.
- (ii) Dyna truck
- (iii) Generator set
- (iv) Working Capital
- (v) Provision for contingency.

In the Respondent's affidavit in reply, paragraphs 5 and 6, Mrs Priscilla Mugisha admits that the Respondent financed the project but contends that the Respondent never undertook or purported to supply any of the project machinery or equipment. She avers that the Applicant sourced and the equipment and materials itself. In its written statement of defence the Respondent denies any form of breach of the Loan Agreement.

In the Applicants affidavit in rejoinder reference is made to Annexure 'A' to the plaint, which is the Loan Offer letter dated 17th November 1996 and the Addendum thereto. The Applicant states that under that letter the Respondent was under obligation to do the following:-

- (a) Ensure conclusion of the supply contracts with supplies approved by the Respondent.

- (b) Ensure availability of Bank guarantee(s) if payment terms in the supply contract(s) so necessitated.
- (c) Approve proforma invoices for the supplies.
- (d) Pay the supplies through medium of Letters of Credit (L/CS).

The Applicant contends that at all times the Respondent was in charge of approval of supplies, payment and procurement processes.

All the above considered together raise serious issues of interpretation of the Loan Agreement and the other related documents to determine the obligations there under each of the parties. I therefore find that the first condition has been satisfied.

The next issue is whether the Applicant would suffer irreparable injury which an award of damages can not grant and later the applicant turned out to be successful in the Main Suit. The circumstances should be such that if the Court does not issue the injunction the Applicant would suffer irreparable loss even if he subsequently succeeds in the action. See Napro Industries vs. Five Star Industries Ltd (Supra).

While submitting on this condition Mr. Rexida argued that in a case of breach of contract, like this one, the Applicant if successful would be entitled to an award of general damages. He contended that the Applicant had in its pleadings prayed for general damages, which he argued fundamentally negates the grant of an injunction. Counsel submitted that once a damage feared can be atoned for by an award of damages then a temporary injunction should not be granted. General damages are intended to compensate the party for the loss occasional to him as a result of the alleged breach. In paragraphs 11 and 12 of its affidavit in support the Applicant expresses fear that the Respondent might exercise its rights under the Loan Agreement, Mortgage and Debenture Deeds to appoint a receiver without recourse to Court. In its written statement of defence and its counter claim the Respondent contends that it is the Applicant in breach of the Loan Agreement. Therefore there is a triable issue as to who of the two parties is in breach of the Loan Agreement. The Applicant's contention is that if it had defaulted in any payment, that was due to the Respondents failure to execute its obligations under the Loan Agreement, Mortgage and Debenture Deeds and the other Annexed documents and discovered that in the event of default the Respondent, has powers under the Mortgage Deed and the Debenture Deed to appoint a Receiver whose powers including taking possession of the mortgaged or charged properties and to sell the same.

On the issue of irreparable damage the catch word is "*adequately atoned*". Injury which an award of damages can not adequately atone. In Tonny Wasswa vs. Joseph Kakoza [1987] HCB 85 irreparable injury has been held to be injury which is substantial and can not be adequately remedied or atoned by damages. In paragraph 5 of the Applicant's affidavit in support it is averred that the loan was acquired for the proposes of setting up a biscuit manufacturing plant and in paragraph 8 it is averred that the biscuit plant is situate on Plot No. 612 Block 17 Rubaga, which is subject of this application. If the feared appointment of a Receiver is done and sale takes place that would extinguish the Applicants asserts including capital, good will and the anticipated business acknowledgement and development. These are losses which are substantial and can not be adequately atoned by monetary damages. The second condition is therefore satisfied therefore considering the circumstances of this application I find that if the Respondent was to exercise its right of appointment of a Receiver and sale it might cause the Applicant irreparable loss which can not be adequately atoned by the award of monetary damages.

In the Respondents affidavit in reply it is averred that the Applicant has persistently defaulted on its

obligation to repay the loan and the asserts which from the security for the loan stand a risk of alienation/cannibalisation or being hidden under cover of an injunction thereby leading the Respondent to irreparable loss.

I have already stated hereinabove that the prime propose of a temporary injunction is to preserve the status quo pending the disposal of the Main Suit. Where an order of injunction issues it equally binds both parties to the suit. The Applicant will be equally bound by the order.

The last test is that in the case of doubt the Court should decide whether or not to grant a temporary injunction on the balance of convenience. The Applicant is a limited liability Company and as such with a legal entirely separate from its founders, promoters, shareholders or directors. No evidence has been adduced in this regard on behalf of the Applicant. Mr. Sam Mayanja's averment as to sentimental attachments to the plant at Nalukolongo are personal to him and his family. Thus irrelevant for the purposes of the Applicant's application. However the test of convenience is resorted to when Court is in doubt with regard to any of the first two issues or both. My finding on the first two issues have been in the affirmative. Therefore I need not consider the issue of convenience.

In the final result this application is allowed and I make the following orders:-

1- A temporary injunction do hereby issue restraining the Respondent for disposing or selling or in any other way interrupting, the Applicants use and enjoyment of the premises comprised in Plot No. 612 Block 17 Rubaga and Plot 307A Block 148 Singo until further orders of this Court.

2- An inventory of all the asserts, machinery and equipment at the plant at Plot 612 Block 17 Rubaga be jointly taken by the officials of the Applicant and of the Respondent and a copy thereof, signed by the respective parties officials and lawyers be filed in Court within 7 days for the date hereof.

3- The order as to costs in the Main Suit shall bind the costs of this application.

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Lameck N. Mukasa
JUDGE
1/02/07