THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CC-MA-168 -2005
(Arising from HCT-00-CC-CS-0127-2012)

SAFERIDE SAFARIS & CAR RENTALS LTD::::::::::::::::::APPLICANT

VERSUS

MTN (U) LTD::RESPONDENT

BEFORE: LADY JUSTICE HELLEN OBURA

RULING

The applicant company brought this application under Order 41 rules 1, 2, 3 and 9 of the Civil Procedure Rules (CPR) seeking for orders that:

1. A temporary Injunction doth issue to restrain the respondents, their servants, workmen, representative and/or agents from trespassing on the person of the applicant's Managing Director and/or arresting and causing his imprisonment, interfering with the applicant's rights and or forcefully attach and sale the applicant's properties on account of an alleged debt and accruing interest the subject of this suit or tampering with the applicant's property in whatsoever way pending the disposal of the main suit.
2. The costs of the application be provided for.

The application is supported by the affidavit of Mr. Nelson Guard Murinzi, the applicant's Managing Director.

The gists of the grounds of this application as stated in the affidavit in support are that:

- the applicant entered into an agreement, **annexture G1 (**the agreement appears to be Annexture G5 rather than annexture G1) with the respondent for the provision of subscriber services on the Talktime Post Paid Account**.**
- the terms included special tariff packages applicable to the specific contract which the applicant did apply for but the respondent never complied.
- the respondent complained continuously about the unilateral and indiscriminate manner in which the respondent maintained the account without any regard to its contractual obligations but the same was ignored.
- the respondent unilaterally disconnected the services without any notification to the applicant but subsequently credited the plaintiff's account.
- the applicant's Managing Director had on several occasions been harassed by the respondent, its official and debt collectors with threats of illegal arrest and detention unless he paid the monies allegedly owed to the respondent.
- the respondent's arbitrary, highhanded and oppressive actions had denied the applicant the opportunity to effectively conduct its business and yet the applicant does not owe the respondent any money.
- unless the respondent is restrained from forcefully attaching the applicant's property and implementing its threats, the applicant would suffer loss that could not be financially atoned to by way of damages.

This application was opposed by the respondent based on two affidavits sworn by Mr. Ronald Zakumumpa, the respondent's Senior Manager Legal and Regulatory Affairs and another sworn by Mr. John Paul Othieno, the Managing Director of a debt collection company.

In his affidavit, Mr. Zakumumpa stated that the applicant requested for and duly subscribed to the respondent's Talktime Post Paid Tariff plan and entered a Talk Time Service Agreement **annexture A** under which the applicant was obliged to pay the respondent at the end of every month for the telephone charges. The respondent duly invoiced the applicant for the services rendered but the applicant deliberately refused, failed and/or neglected to pay its bills totalling to UShs. 2,488,163/=. He stated further that due to breach of the service agreement, the respondent

suspended provision of the services and instructed JIL Auction Trust Limited to recover the outstanding debt. According to him there was no threat of arrest or execution of a warrant of attachment which would result into irreparable loss of property of the applicant.

In his affidavit, Mr. John Paul Othieno denied approaching the applicant's Managing Director or any of its officers with threats of arrest or attachment of property. He stated that in a bid to recover the debt, his company wrote a demand letter to the applicant demanding payment within 7 days or seek court action to recover the money. This letter is annexture A to his affidavit. Having failed to recover the money or receive any communication from the applicant, Mr. Othieno stated that he notified the respondent to use other means to recover the outstanding bill from the applicant.

When this application came up for hearing on the 11th June 2012, the applicant was represented by Dr. James Akampumuza while the respondent was represented by Mr. Paul Kuteesa. Both counsel agreed to file written submissions which was done and hence this ruling.

In his written submissions, Dr. James Akampumuza argued that Order 41 r 2 (1) of the CPR is the legal test to be applied to this application under which all that is required is essentially to show that there exists a suit for restraining the defendant from committing a breach of contract or injury of any kind. He pointed out that the applicant is the plaintiff in High Court Civil Suit No. 127 of 2012 under which the application arose.

Dr. Akampumuza submitted that this application satisfied the criteria for grant of a temporary injunction. He contended that there was a status quo to be preserved because the applicant's property had not been attached and no arrest of the applicant's officials had been carried out.

He alluded to the conditions for grant of an interlocutory injunction as set out by Spry VP in the leading case of ***Geilla v Cassman Brown and Co. Ltd [1973] EA 358*** namely that;

(1) An applicant must show a prima facie case with a probability of success;

(2) An interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated for by damages;

(3) If the court is in doubt, it will decide the application on a balance of convenience.

On the first condition, Dr. Akampumuza submitted that the applicant has a prima facie case with a probability of success in so far as the respondent had turned a civil contract into an avenue for arbitrary persecution of the applicant and its officials. He submitted further that the respondent committed acts that are a breach of contract as shown from paragraphs 2-14 of the applicant's affidavit in support. According to him the applicant had a genuine grievance that merits remedy through this court. He contended that the respondent did not deny that there was serious threat by the respondent which was specifically pleaded in the applicant's affidavit. He relied on the case of ***Samwiri Mussa v Rose Achen (1978) HCB 297*** for the position that where facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted.

On the second condition of irreparable damage, Dr. Akampumuza relied on paragraphs 14 & 16-19 of the affidavit in support and submitted that the applicant was likely to suffer irreparable damage. He explained that the irreparable damage would be in the form of violation of the applicant's rights to a fair hearing and the right to own property once the applicant's officials are arrested. He cited the case of ***RO/133 Maj. Gen. James Kazini v Attorney General Constitutional Application No. 4 of 2009*** where Kavuma, S (J.A) held that court has to issue an Interim Order to preserve the status quo where there are threats to violation of rights. He then submitted that this was a proper case for the issuance of a temporary injunction to preserve the applicant's property and liberty of the applicant's official until the main suit is determined.

As regards balance of convenience, Dr. Akampumuza relying on paragraphs 22 and 23 of the affidavit in support submitted that this should be in favour of the applicant to protect its rights from infringement by the respondent.

Counsel for the respondent in response submitted that there was no status quo to preserve since the respondent had not threatened to arrest the applicant nor attach its property. He relied on the case of ***Ssemakula Augustine v Commissioner General URA HCMA No. 321 OF 2011*** where this court observed that the court needs to know the status quo intended to be preserved before

applying the three conditions laid down. His view was that annexture G9 to the applicant's affidavit was only a demand letter which constituted no threat in its ordinary and natural meaning.

In addition, he submitted that the orders sought in the instant application had no relationship with the dispute the court would determine in the main suit. His view was that the status quo referred to in order 41 rules 1 and 2 of the CPR must be related directly to the dispute in the main suit. He explained that the purpose of the temporary injunction must be to preserve the status of the property or contract in dispute until the disposal of the suit. The cause of action in the main suit is breach of contract between the applicant and respondent while this application sought orders to prevent the respondent's alleged intention to attach the applicant's property and/or arrest its officials.

Mr. Kuteesa submitted further that the contract between the parties which was subject of the main suit had already been terminated and therefore there was no status quo to maintain.

With regard to a prima facie case, Mr. Kuteesa submitted that the applicant had failed to demonstrate the presence of a prima facie case in the application as he did not show that there was an eminent danger that its property would be attached by the respondent or that the applicant's officials would be arrested by the respondent if the injunction was not granted. He argued that there was no threat alluded to on the basis of the demand letter. He also pointed out that attachment of a debtor's property is a preserve of the court and no order or warrant for attachment of the applicant's property had been issued by any court.

He submitted further that the debt which was the subject matter in the demand note was being pursued by way of instituting a counter claim against the applicant in the main suit and as such the applicant's fears were unfounded.

Mr. Kuteesa submitted that the applicant had totally failed to prove that it would suffer irreparable injury based on four reasons. He explained that firstly, the applicant had no locus

standi to complain or institute a suit for unlawful arrest since the applicant and its Managing Director are separate and distinct entities. See ***Fredrick Sentamu v UCB [1983] HCB 59.***

He contended that there was no threat to arrest the applicant's Managing Director and even if it happened, there are adequate remedies under the law to prevent the arrest and not by way of a temporary injunction.

Secondly, that the applicant being separate and independent of its shareholders, directors and any of its officials had not shown in what way the arrest of its officials would occasion irreparable injury to the applicant. According to counsel for the respondent even if one of the applicant's officials were arrested this would not occasion irreparable injury to the company.

Thirdly, that the applicant had no property of any kind that could be attached since the same was not disclosed by the applicant.

Lastly counsel for the respondent argued that the injury, if any, which would be occasioned to the applicant could be compensated for by way of damages which the applicant was already pursuing in the main suit for breach of contract.

As far as the balance of convenience is concerned, counsel for the respondent submitted that it was tilted in favour of dismissing this application. He argued that no inconvenience would flow to the applicant if this application is dismissed since there are already adequate legal remedies to remedy illegal arrests and detention. He added that the dispute is already before court and it has sufficient powers to make any orders at any stage in the event of such occurrence. He summed up the applicant's fears as a fertile and speculative imagination.

Counsel for the applicant in rejoinder reiterated his earlier submissions and asserted that the respondent's denial of the threats does not prejudice the granting of this application. He referred this court to the case of ***Ayebazibwe Raymond v Barclays Bank Uganda Ltd Ma No. 211 of 2012*** where a similar application was allowed there having been no prejudice that the respondent

would suffer. He insisted that there was a status quo to maintain since the cause of action in the main suit was related to the prayers in this application.

On the argument that the applicant lacked locus standi, counsel for the applicant submitted that the applicant had locus to bring this application to prevent the arrest of its officers through whom it operates. He also submitted that the applicant had adduced evidence of the threats by showing the telephone numbers that were used to call him.

Before I consider the merits of this application, I will first deal with the contention by counsel for the applicant that the affidavits in reply contain falsehoods and therefore should be struck out with costs. He contended that Mr. Zakumumpa Ronald was not possessed with sufficient knowledge to depose the affidavit as he was not involved in entering the agreement between the parties. He also faulted Mr. John Paul Othieno's affidavit as having falsehoods. He prayed that this court should reject those affidavits as being offensive. Counsel for the respondent argued that Mr. Zakumumpa's affidavit should not be rejected because it was based on matters within his knowledge by virtue of his work.

As regards Mr. Zakumumpa's affidavit, I do not agree with the applicant's contention because the deponent stated the nature of his work and his familiarity with the agreement that was signed between the parties. For Mr. Othieno's affidavit, I find no evidence of falsehoods as alleged. Even if there was proof of some falsehood, courts have now adopted a more liberal approach to dealing with defective affidavits. The Supreme Court of Uganda has held that the offending paragraphs could be safely severed and the rest admitted. See ***Col. (Rtd) Besigye Kizza v Museveni Yoweri Kaguta & Electoral Commission (Election Petition No. 1 of 2001) [2001] UGSC 3***. In the premises, I find no basis for striking out the affidavits and I decline to do so.

I now proceed to determine whether this is a proper application for grant of a temporary injunction. It is now a settled principle of law that the purpose of a temporary injunction is to preserve matters in status quo until questions to be investigated in the suit can be finally disposed of. See ***Kiyimba Kaggwa v ABDU Nasser Katende [1985] HCB 43.***

I have found a lot of difficulty in appreciating the status quo sought to be preserved by this application. To my mind the applicant seeks to prevent an arrest or attachment which is not at all threatened. From the evidence before me, I do not see any eminent threat to arrest the applicant's Managing Director or even attach its property as alleged. Annexture G9 that is heavily relied upon to support this application in my view is a routine demand note that creditors normally send to their debtors either directly or through their designated debt collectors.

I have carefully and critically read the said letter but I do not seem to see the alleged threat of arrest and attachment. If indeed the respondent's debt collector wanted to arrest the applicant's Managing Director or attach its property, my view is that it could have been expressly stated in the last paragraph of that letter which showed the implication of failure to comply within the seven days given. It is instead stated in the last paragraph that; *"failure to comply shall leave us with no option other than* ***to unleash the legal machinery to recover the same*** *at your further expense and great displeasure"* (emphasis added).

The applicant's Managing Director in paragraphs 16 and 17 of his affidavit in support of this application referred to the respondent's threat to arrest him as being arbitrary, highhanded, oppressive and illegal. My view is that if the respondent and its agent had intended to use arbitrary, highhanded, oppressive and illegal means to recover the money then the last paragraph of the demand note quoted above would not have alluded to unleashing the legal machinery that in my view include seeking redress from court.

The applicant's Managing Director also alleged that the threats were issued on phone but he failed to produce a telephone call print out to show the number of calls he received. Counsel for the applicant argued that it should have been the respondent to produce the print out. With due respect to counsel, the cardinal principle of law that "*he who alleges must prove*" has never been changed in our jurisdiction. The burden of proving that the applicant's Managing Director received numerous phone calls by which he was threatened with arrest squarely laid on him. It is only after he has discharged it that the burden would then shift to the respondent to rebut it.

In any event, even if for argument's sake one were to believe that there was such a threat, I do not see why it would have taken the respondent such a long time to execute the same. I know it could be argued that the respondent was prevented by the interim order issued by this court on 18th April 2012 but this was almost six months after the demand note was issued.

It is not in dispute that the respondent has now brought its claim to court by way of a counterclaim in the main suit. I believe even if the respondent had originally intended to recover its debts using other means, it is now bound to wait for the outcome of its case.

Furthermore, the precondition for bringing an application under Order 41 rule 2 (1) of the CPR is that there must be a threat of committing breach of contract or other injury of any kind which court can be called upon to restrain. In the circumstances of this case, I do not see what this court is being invited to restrain because the alleged threat has not been proved. For that reason, I would be inclined not to consider conditions for grant of application for a temporary injunction and dismiss this application because it is merely speculative.

Be that as it may, just in case I have misdirected myself on this point which I doubt, I will go ahead and briefly consider the arguments of counsel based on the three conditions for grant of an application like this one. With regard to the first condition on a prima facie case with a likelihood of success, I first of all wish to disagree with the view held by counsel for the respondent that the question as to whether there is a prima facie case in the main suit is irrelevant for determination of this application. His contention that the applicant must demonstrate the presence of a prima facie case in the application itself is completely misconceived as it is contrary to the well settled principle of law.

Having put that record straight, I now turn to consider the issue as to whether the main suit discloses a prima facie case. I find very instructive the dictum of Lord Diplock in the case of ***American Cynamide Co. v Ethicon [1975] 1 ALL E.R. 504*** to the effect that for purposes of grant of a temporary injunction it is sufficient for the applicant to prove that triable issues have arisen that merit judicial consideration. There is no requirement for the plaintiff to establish a strong prima facie case. All the Plaintiff needs to show by his action is that there are serious

questions to be tried and the action is not frivolous or vexatious.

I have had the opportunity of reading the pleadings in the main suit with the relevant documents attached. That suit was instituted for breach of a service agreement between the parties for which the plaintiff/applicant prayed for several declarations, orders, special damages, general damages, and permanent injunction among other prayers. I do agree with counsel for the applicant that there are some triable issues raised in the main suit that merit judicial consideration. For that reason the applicant has met the first condition.

On the second condition, it was contended for the applicant that it would suffer irreparable injury if a temporary injunction is not granted to restrain the respondent from arresting its Managing Director and/or attaching its property. On the other hand, it was contended for the respondent that the applicant would not suffer irreparable damage that could not be compensated by damages.

I have already made a finding herein above that there is no threat of arrest or attachment. For that reason, I do not see any loss that the applicant would suffer. But even if there was to be an arrest or attachment, which I think is farfetched, my view is that the loss that would be suffered by the applicant could not be categorised as one that cannot be adequately compensated for in damages. It appears to me that it would be possible to quantify the loss the applicant would suffer and put a monetary value to it. For that reason, I find that the second condition has not been met by the applicant.

In view of the above findings on the two conditions, this court will proceed to consider the third condition on the balance of convenience. It was contended for the applicant that the balance of convenience is in its favour because it stands to lose more when the injunction is denied. On the other hand, it was argued for the respondent that no inconvenience would flow to the applicant if the application is dismissed since there are already adequate legal remedies for illegal arrests and detention.

I agree with the view that the applicant will stand to lose nothing if the temporary injunction is not granted since there is no threat of arrest or attachment. For that reason, this court is of the considered view that the balance of convenience favours refusal to grant the temporary injunction. In the result, this application must fail and it is accordingly dismissed. Costs shall be in the main cause.

The interim order of injunction granted by this court on 18th April 2012 is accordingly vacated.

I so order.

Dated this 21st day of November, 2012

Hellen Obura
JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Mr. Paul Kuteesa for the respondent and Mr. Nelson Guard Murinzi, the Managing Director of the Applicant Company whose counsel was absent.

JUDGE
21/11/12