THE REPUBLIC OF UGANDA
THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HCT - 00 - CC - MA - 487 - 2011
(ARISING FROM CIVIL SUIT NO. 276 OF 2010)

ANGUYO SAM .....APPLICANT/PLAINTIFF

VERSUS

1. **CENTENARY RURAL DEVELOPMENT BANK**
2. **TROPICAL BANK LTD**
3. **ECO BANK LTD**
4. **DFCU BANK LTD**
5. **ORIENT BANK** **.....RESPONDENTS/DEFENDANTS**
6. **STANBIC BANK (U) LTD**
7. **DIAMOND TRUST BANK LTD**
8. **BANK OF AFRICA LTD**
9. **EQUITY BANK LTD**

BEFORE: **THE HON. JUSTICE GEOFFREY KIRYABWIRE**

R U L I N G

This application is brought by Notice of Motion under S. 38 of the judicature Act, S. 98 of the Civil procedure rules and O. 52 r 1, 2 and 3 of the Civil Procedure Rules for orders that a temporary injunction doth issue to restrain the respondents, their agents, servants, employees or any person acting on their behalf from collecting the impugned bank charges until the main suit is determined and costs.

The application is supported by the affidavit of Balondemu David an Advocate with M/s Web Advocates and Solicitors who represent the applicants.

The brief background to this application is that the applicant filed HCCS 276 of 2011 against the respondents on his behalf and on behalf of members of the general public for a declaration that the sums ranging between Ushs 2000/= and 2500/= charged by the respondents as bank charges on persons making various kinds of payments are wrongful or unlawful, a permanent injunction restraining the respondents from levying bank charges, general damages, interest and costs.

The case for the applicant in the main suit is that the respondents/defendants merely act as collection agents of their customers for payments made by third parties and therefore, there is no privity of contract between the third party making the payment and the respondent/defendant who is a collection

agent. The applicant brought this application for a temporary injunction restraining the respondents/defendants from collecting the said bank charges until the determination of the main suit.

The case for the applicant as stated in the affidavit of Balondemu David is that the respondents collect payments on behalf of various categories of customers. Furthermore, that in the course of collecting these monies, the respondents levy bank charges on the deposits made, to be paid by the persons making the deposits. Mr. Balondemu deponed that the respondents and their respective customers have a contractual relationship by virtue of which the respondents are entitled to levy bank charges on their customers. Furthermore, that any member of the public including the applicant is not liable to pay the bank charges for want of privity of contract between that person and the respondent. Mr. Balondemu further deponed that according to the normal banking practises; the respondents should levy the said bank charges on their customers by directly debiting their customers accounts. Furthermore, that there is no basis in law for the respondents to levy bank charges on a third party who is not their customer since the respondents have not provided any consideration for the same.

Mr. Balondemu deponed that if the respondents are not restrained from collecting the said bank charges, they will continue collecting the same, yet their action is being challenged in court for being illegal, thereby rendering the suit nugatory and in effect, the court would be justifying the respondents acts, which are being challenged in the main suit. Mr. Balondemu further deponed that where the person making a deposit does not pay the bank charge, the respondents will not accept the deposit and this will cause inconvenience constituting irreparable harm to the applicant. Furthermore, that the nature of the reliefs sought in the main suit cannot be sufficiently quantified in monetary terms and therefore, compensation by way of damages is insufficient. Mr. Balondemu also deponed that the respondents will not suffer any inconvenience if the injunction is granted because they will simply resort to debiting their customers accounts directly without incurring any loss.

In reply, Ms. Brendah Nabatanzi Mpanga on behalf of the 2nd, 3rd, 4th, 6th and 7th respondents deponed that the suit by the applicant is not a representative suit, on behalf of the general public as stated by the applicant because there is no representative order granted by this court and therefore, this application is by the applicant himself and no order can be made other than one relating to the applicant.

Furthermore, Ms. Nabatanzi Mpanga and Ms. Rehema Nabunya (who deponed an affidavit on behalf of the 8th respondent), agreed that the respondent banks hold various collection accounts for various institutions and persons, in relation to which they require depositors thereon to pay bank charges ranging from Ushs 2000/= to Ushs 2500/= as a charge for the respondents expenses and time in managing the collection accounts. Furthermore, that Bank of Uganda as the supervisor of financial institutions is aware of the bank charges levied by the respondents.

It is the case for the respondent banks that any depositor is informed that he/she has to pay a bank charge which is not levied under the contract between the bank and the customer, but under an independent contract between the bank and the depositor, under which the bank charge is the consideration for which the bank agrees to offer the deposit service to the depositor. In contractual terms the deposit can only be accepted by the bank on the payment of the collection fee (the contractual offer) and the depositor agreeing to pay the collection fee and then making the deposit (contractual acceptance).

The depositor may still refuse to enter into this independent contract with the respondent banks by not making the deposits hence not paying the collection fee.

Ms. Nabatanzi deponed that the status quo is that all depositors are required to pay bank charges in order to make deposits and therefore, this should be maintained. Furthermore, that in any event, the applicant will not suffer any irreparable harm by continuing to pay the bank charges until the final disposal of the main suit as the applicant's loss is purely monetary and the respondents are in position to refund the bank charges in the event that the suit is successful. Ms. Nabatanzi deponed that the main suit will not be rendered nugatory if the status quo is maintained pending the determination of the main suit.

At the hearing of this application, the applicant was represented by Mr. Alex Chandia, Mr. D. Wandera and Mr. D. Balondemu while the 1st, 2nd, 4th, 5th, 6th 7th and 9th respondents were represented by Mr. Masembe Kanyerezi and Mr. Barnabas Tumusinguzi. Mr. Didas Nkurunziza represented the 8th respondent and Mr. Noah Mwesigwa represented the 5th respondents.

Counsel for the applicant submitted that the grant of a temporary injunction is a matter within the discretion of the court and that for the court to exercise its discretion to grant a temporary injunction, the applicant must satisfy three conditions;

(a) The applicant must establish a prima facie case

(b) The applicant must establish that he/she will suffer irreparable harm which can not be atoned for by an award in damages and

(c) Where the court is in doubt it will consider the balance of convenience.

With regard to the condition that the applicant must establish a prima facie case, counsel for the applicant submitted that the applicant filed HCCS No. 26 of 2011 challenging the legality of bank charges on the grounds that the respondents and their respective customers have a contractual relationship by virtue of which the respondents are entitled to levy bank charges on their customers.

Furthermore, that any member of the public including the applicant is not liable to pay bank charges for want of privity of contract between that person and the respondent. Counsel for the applicant submitted that the respondents in their affidavits in reply accepted that they do levy bank charges on depositors and although they gave various reasons to justify the charges, the court is not required to examine the reasons at this stage in order to determine the legality of the charges. Counsel for the applicant submitted that the applicant has raised serious questions of the legality of these charges, which require investigation by the court.

With regard to the condition that the applicant must establish that he/she will suffer irreparable harm which can not be atoned for by an award in damages, counsel for the applicant submitted that the nature of the reliefs sought in the main suit such as the permanent injunction and the order restraining the respondents from levying bank charges can not be sufficiently quantified in monetary terms and therefore, the applicant cannot be compensated by an award of damages. Counsel for the applicant submitted that in determining whether an award of damages is sufficient compensation, the court must look at the remedies, which in this case, cannot be sufficiently quantified in monetary terms. Counsel

referred to the case of **PAUL MAKUMBI & ORS V LUCY NANTALE & ORS** (HCMA No. 104 of 2009) for this proposition of law.

Counsel for the applicant submitted that if court is in doubt as to the above two conditions, the balance of convenience is in favour of the applicant who could suffer hardship if the order is not granted because the respondents may refuse to accept deposits if bank charges are not paid, while if the order is granted, the respondents will simply resort to debiting their customers accounts with the charges. Counsel for the applicant submitted that the applicant has met the tests for the grant of a temporary injunction.

On the other hand, Mr. Masembe who submitted on behalf of the respondents argued that a temporary injunction is intended to preserve the status quo. Counsel relied on the case of **KIYEMBA KAGGWA V NASSER KATENDE** [1985] HCB 43, and submitted that the present practise is that banks levy bank charges and this should be maintained.

With regard to the condition that the applicant will suffer irreparable harm which can not be atoned for in damages, counsel for the respondents submitted that the refund of all bank charges that had been collected severally from the public from 9th August 2006 to date as claimed in the plaint is a monetarised claim that can be atoned for in damages and therefore, the temporary injunction would not be necessary.

Counsel for the respondent submitted that the plaintiff brings this action on his own behalf of the members of the general public, but this is not a representative suit as contended by the applicant because the court has issued no representative order. With regard to the condition that the applicant must show a likelihood of success of the case, counsel for the respondent submitted that there is a separate contract between the bank and the customer to which the depositor is not party, and another independent contract between the depositor and the bank, for which bank charges must be levied and therefore, the main suit has no likelihood of success.

I have considered the evidence and the submissions of the parties for which I am grateful.

The grounds for granting a temporary injunction are well settled. The test for the grant of a temporary injunction is clearly set out by Spry V.P in the case of **GIELLA V CASSMAN BROWN** [1973] EA 358 as follows;

> ***"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".***

These tests have been ably pointed by all counsel who addressed court.

With regard to the first ground; whether there is a prima facie case with a probability of success, Lord Diplock in the case of **AMERICAN CYANAMID CO. V ETHICON LTD** [1975]1 ALL ER 504 at 510, held that it is no part of the court's function at this stage of the litigation to try to resolve conflicts

of evidence on affidavit as to the facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. Furthermore, Odoki J (as he then was) in the case of **KIYIMBA KAGGWA V KATENDE** [1985] HCB 43 found that at this stage of the case, it is difficult to determine whether the case has a probability of success. Evidence at this stage has been given by affidavit and has not been tested by oral examination. A more realistic approach is to determine whether there is a serious question to be tried.

In the main suit the applicant is challenging the legality of bank charged levied (some time referred to as collection fees) by the respondent for want of privity of contract between the depositor and the respondent. This is denied by the respondents who contend that there is a separate contract between the depositor and the respondent, for which bank charges should be levied. I agree that it is difficult at this stage to determine whether the case has a possibility of success, however I find that these can be considered serious issues which merit consideration by the court and therefore, do constitute a prima facie case.

The second question for determination by the court is whether the applicant is likely to suffer irreparable harm, which cannot be compensated for in damages.

Irreparable harm is defined in the case of **KIYIMBA KAGGWA V HAJI KATENDE** [1985] HCB 43, to mean that, there must not be physical possibility of repairing injury, but that the injury must be substantial or material which cannot be adequately compensated for in damages.

The applicant in the main suit is seeking a refund of bank charges levied by the respondent from 9th August 2006 to date, a declaration that bank charges levied by the respondents are illegal and a permanent injunction restraining the respondents from levying bank charges.

In the case of **PAN AFRIC IMPEX (U) LTD**. **V BARCLAYS BANK PLC AND ANOTHER** (HCT-00-CC-MA-0804-2007), Justice Egonda Ntende (as he then was), considers what should be considered in determining what amounts to irreparable harm, which can not be compensated by an award of damages. Justice Egonda refers to Lord Diplock, in the case of **AMERICAN CYANAMID CO. V ETHICON LTD**. (above) at 510, where it was found as follows;

> ***"The governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by***

being prevented from doing so between the time of the application and the time of the trial. If the damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in such a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction."

The remedies sought in the head suit are orders in relation to the bank charges and a refund of the said bank charges. The injury suffered by the applicant therefore to my mind if at all is monetary

Although the applicant states that they are likely to suffer inconvenience due to the levying of bank charges by the respondents, the applicant has not shown that if the interlocutory injunction applied for is not granted and the applicant succeeds at the trial, the loss they will suffer is incapable of compensation by an award of damages.

Furthermore, the respondents are financial institutions and the applicant has not shown that they would not be able to compensate the applicant if such compensation is ordered by the court should the applicant succeed in the main suit. I therefore find that the applicant has failed to prove that he will suffer irreparable harm which can not be adequately compensated for in damages.

The primary purpose of a temporary injunction is to preserve the status quo. In the case of **NOORMOHAMED JAN MOHAMED V KASSAMALI VIRJI MADHANI** (1953) 20 EACA 8, Sir Newman Worley VP, referring to Halsbury's Laws of England Hailsham Edition Vol. XVIII par 41 to 44 found that,

"I have always understood that the whole purpose of an injunction is that matters ought to be preserved in status quo until the question to be investigated in the suit can finally be disposed of."

This position of the law is also stated in the case of **GOLKALDAS LAXIMIDAS TANNA V SHELL & BP UGANDA LTD** [1971] HCB 225.

I agree with counsel for the respondents that the status quo is that the respondents are levying bank charges and therefore should continue in order to preserve the status quo. In any event the balance of convenience lies with respondents as a lot of economic activity is currently being done by direct payments through banks.

All in all the applicant has not satisfied the tests for the grant of a temporary injunction and this application therefore fails.

Costs however shall be in the cause.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 28/06/2012

28/06/12

9: 47

Ruling read and signed in open court in the presence of;

- P. Nkurunziza for 8th Respondents h/b for 1, 2, 4, 5 & 7 Respondents

In Court

- None of the parties
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 28/06/2012