

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

HCT-00-CC-MA-0030-2013

(Arising out of Civil Appeal 0154 of 2012)

NEW VISION PRINTING & PUBLISHING COMPANY LTD ...APPLICANT/
PLAINTIFF ON COUNTER CLAIM

VERSUS

WANAINCH GROUP LIMITED RESPONDENT

BEFORE HON. MR. JUSTICE MASALU W. MUSENE

RULING:

This was an application for a temporary injunction by New Vision Printing and Publishing company Limited against Wanainch Group (U) Limited under O.41 rules 2, 7 (a) and (90 of the Civil Procedure rules, section 98 of the Civil Procedure rules, Section 98 of the Civil Procedure Act and S. 45 (I) of the Copyright and Neighbouring Rights Act.

The temporary injunction sought is to restrain the Respondent (Wanainch Group (U) Limited, its servants or agents from further infringing the Applicants Copyright in the Production, air transmission and/or broadcast of the “**Bukedde Television**” through the respondents Zuku Television by retransmitting and/or rebroadcasting for economic gain and / or Commercial purposes or for any other

purpose whatsoever, the works created for Applicants “**Bukedde Television**” without the applications consent.

Mr. Peter Kauma represented the Applicant, while Mr. Fred Muwema appeared for the Respondent. Both Advocates submitted at length, but I must state that most of those submissions will be considered in the main case. For purposes of this Application, this court will not go into those lengthy and detailed submissions.

Mr. Peter Kauma’s submissions were to the effect that a copy right of the Applicant is being infringed by the Respondent, who without authorization is retransmitting through its Zuku Television and for commercial purposes the works of the Applicant’s “Bukedde television.” He added that under paragraph (18) of the affidavit in support sworn by Robert Kabushenga, the Respondent has continued to infringe on the copy right by retransmitting the Applicants work for private benefit and for personal economic gain without the consent or licence of the owner despite express warning. Mr. Peter Kauma’s further submissions were that even when the Applicant switched off respondents’ signal to Bukedde Television and communicated to the Respondent, the Respondent went ahead and procured equipment and continued to air and rebroadcast Applicants Bukedde T.V without consent. He quoted the case of **Supra Studios Vs TIP-To Clothing Co. (1971) IEA 489**, where the court held that an injunction would be the normal remedy in breach of copyright cases.

Mr. Kauma added that since it was not in contention that the Applicant is the proprietor of the copyright in the productions, air transmission and broadcast of Bukede T.V. Applicant has a prima facie case with high probability of success, hence the need for Temporary Injunction. He also referred to paragraph (7) of the affidavit in support. Mr. Kauma also stated that when the Respondent was

switched off, he stubbornly commenced re-transmitting Bukedde T.V. on a poor and inferior signal which affected Bukedde Brand on the Market, and that is such, the applicant has suffered substantial loss in its trade.

Mr Kauma concluded that on the balance of convenience, the Application be granted as the Applicant continue to spend money in promoting its brand while the Respondent is simply riding on that good will and created a market to its own selfish gain.

In reply, Mr. Muwema for the Respondent opposed the application. He urged that the main suit is based on the Uganda Communication Act which is not applicable to broadcasting. And that the provisions of the repealed Uganda Communications Act to determine the manner in which T.V. Operators behave were applicable before 2013. Mr. Muwema also submitted that the operation is not governed by or regulated by the Copy Right Act, but by the Uganda Communications Commission. He also urged that a copy right is deferent from a trade mark and that whereas a T. V. broadcast carried a lot of programmes, it does not mean that all those programmes are owned by the T.V. owners. He quoted S. 7 (d) of the Copy right Act which states that the right to protection of a copyright shall not extend to the news of the day. He concluded that the Applicant was seeking for a blanket injunction which offends the law and that the Respondent under paragraph (8) of eh affidavit in reply was ready and willing to pay in eh event the Applicant was successful. He also dismissed the assertion that Applicant has suffered damages, but the instead, the Applicant benefited from a wider platform by Bukedde T.V. showing on Zuku Platform.

The law and practice on Temporary injunctions is now settled. The gist or essence of a temporary injunction is to preserve the status quo pending the disposal of the

substantive suit. The conditions to be fulfilled as rightly or correctly submitted by both counsels are that the Applicant must show that there is Prima Facie case with probability of success. Secondly, the circumstances must be such that if the court does not issue the Order, the applicant would suffer irreparable injury which would not adequately be compensated by an award of damages, even if he subsequently success in the action. Thirdly, if the court is in doubt, the Applicant be decided on the balance of convenience. The relevant authorities include:

- 1. Geilla Vs Casman Brown (1973) E.A. 358**
- 2. Kiymba Kagula Vs Haji Abdu Nasser Katende, (1985) HCB 43**
- 3. American Cyanamid Co. Vs Ethicon Ltd (1975) A.C. 396**
- 4. Robert Kauma Vs Hotel International C. A. No 8 of 1990 (Supreme Court) Per Wambuzi C.J. as he then was**
- 5. Uganda Muslim Supreme Council Vs Sheikh Mulumba (1980) H.C.B. 110**

In the circumstances of this case of Applicant, several issues are raised. They include the matters of whether the broadcast by the Respondent is an infringement of the copyright Act or any other law which this court may in the course of the trial find applicable.

This is particularly in view of the holding of my brother **Judge G. Kiryabiwire in Uganda Performing Rights Society Limited Vs Fred Mukubira. HC Misc. Application No 818 of 2003.** (Arising from HCCS No 842 of 2003). That view was also expressed in another case cited by counsel for the Applicant, **Supra Studio Vs TIP Top Clothing Co. (1971) I.E.A. 489**, where it was held:-

“The General Principles upon which the injunctions are granted for the protection of Copy Right do not differ from those upon which they are granted for the protection of other property. The Nature of Copy Right Property, however, makes an injunction a peculiar suitable and indeed the normal remedy.”

The above triable issue is amplified in the supporting affidavit by Robert Kobushenga, particularly para 13:

“13. That applicant/plaintiff on counter claim has the exclusive right to authorise or prohibit the broadcasting of its product and the respondent/defendant has not right to restaurant its free on air Television service for private benefit and personal economic gain without seeking its consent and approval.”

In the affidavit in reply Mr. Sam Kimathi, paragraph 5(e) states:

“5. That in response to paragraphs 9, 11, 12, 13, 14, 17, 18, 19, 20 and 21 of the said affidavit in support, the Respondent maintains that;

(e) That Bukedde Televisions Act of allowing other stakeholders including other pay TV services providers like DSTV and Star Times TV access to its free to air channel whilst purporting to bar the plaintiff is discriminatory, unfair, against public interest and contrary to media and communication laws of Uganda.”

Also in the same affidavit in reply, paragraph 7 states:-

“7. That in specific response to paragraph 16 and 20 of the affidavit in support of the application and in the alternative but

entirely without prejudice, he respondents access to Bukede Television signed was/ is authorized by the counter claimant.”

The outgoing, passages from the affidavits in support and reply raise triable issues, thereby creating a prima facie case, warranting the grant of a temporary injunction. As was held on the **American Cynmide Co Vs Ethicom (1975) AU E.R.** there is no requirement for the plaintiff/Applicant to establish a strong Prima Facie case. The court at this stage is not to go into the merits of the main case.

The other services triable issue raised by paragraph 22 of the supporting affidavit of Robert Kabusenga also touches on the second requirement of irreparable damage it states:-

“22. THAT unless restrained by this Honourable Court, the Respondents deliberate and / or wanton infringement despite warning and disconnection has caused and continues to cause substantial loss and damage to Applicant/Plaintiffs by counter claim’s reputation and market share and the Applicant/Plaintiff by counterclaim stands to suffer great injury in its trade and this damage cannot be compensated by way of damages,”

And in his submissions, Mr. Kauma for the Applicant amplified that the type of injury will be attended to a third party, multi-choice with which they have an exclusive contract and who is a third party to the present suit. The Respondent on the other hand, under paragraph 8 (e) of the affidavit in reply by Sam Kimathi contents:-

“8(e) That in the alternative and entirely without prejudice to the foregoing the respondent has always been able and willing to pay reasonable

remuneration to the Applicant in order to carry the Bukedde Signal which the Applicant has neglected and /or refused. “

The issue of whether or not the applicant has refused reasonable remuneration has to be borne out in evidence at trial. But even then, this position under paragraph 8 (e) of the affidavit in reply contradicts paragraph 7 of the same affidavit in reply which states that the Respondents access to Bukedde Television signal was authorized by the Applicant.

Those are serious issues to be proved at trial as to whether authority was granted for not, and whether reasonable remuneration has been refused and/ or neglected by the Applicant. And that touches on the other issue of unfair competition raised by the Respondent and which is covered under section 52 and 53 of the Uganda Communications Act, 2013. Evidence must come out during the trial to verify and support the assertions by either side before a final verdict is taken by this court. Otherwise the circumstances and law as outlined warrant a halt of the alleged infringement of the Applicants rights pending the outcome of the trial in the main suit. I accordingly, allow the application and grant the temporary injunction as prayed. Since this court processes a speedy trial of the case in view of its uniqueness and the urgent need for the interpretation of the Uganda Communications Act of 20 13, to the circumstances, I order that each party meets its own costs of this application.

W. M. Musene

JUDGE

22/02/2013