

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

MISCELLANEOUS CAUSE NO 41 OF 2015

SWABRI ALI ABUBAKER MUKUNGU}.....APPLICANT

VS

KOBIL UGANDA LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant commenced this action by Originating Motion under the provisions of section 6 of the Arbitration and Conciliation Act Cap 4 laws of Uganda, section 98 of the Civil Procedure Act cap 71 and Order 52 rules 1 and two as well as Order 9 Rule 23 (1) Of The Civil Procedure Rules. It is for an order of an interim measure of protection pending arbitration by way of an injunction to issue against the Respondent and his agents, servants, employees, assignees or anyone else claiming or deriving authority from them, from interfering with the Applicant's rights under the agreement entered between the Applicant and the Respondent, and evicting him from K - Mart station situated at Kagoma. Secondly for costs of the application be provided for.

At the hearing, the Applicant was represented by Counsel Oscar Kihika but the Respondent was not represented. The Respondent was however served on 9 September 2015. This was proved by the affidavit of service of one Ogola Abdallah. The Respondent was served at the address of Kobil Uganda Limited Plot 4 Wankulukuku road and service acknowledged by a Principal office with the company seal. The application to proceed ex parte was allowed under Order 9 rule 20 (1) of the Civil Procedure Rules and the matter proceed ex parte.

The Applicant's Counsel briefly addressed the court on the import of section 6 of the Arbitration and Conciliation Act. The provision enables a party to an arbitration agreement to apply before or during arbitral proceedings to a court for an interim measure of protection pending arbitration. The grounds of the application are as stated in the notice of motion and affidavit in support and are summarised below.

The facts in support of the application are that the Applicant has an agreement with the Respondent executed on 1st of April 2014 and 24th of July 2014 to manage K - Mart at Kagoma according to copies of the agreement annexure "A" and "B" respectively. Annexure "A" clause 16 has a dispute resolution and arbitration clause and annexure "B" is the licence agreement with the same dispute resolution mechanism.

The crux of the matter is that the Applicant applied to modify K - Mart structure and design without breaking existing walls and sent the modification application by way of email according to annexure "C" to the Respondent. It was approved by the Respondent but a written approval was to be sent later. The Applicant accordingly commenced making the modification but surprisingly on the 17 of August 2015 the Applicant received a letter from the Respondent alleging his unauthorised modifications on K - Mart in breach of the agreement. The Respondent also notified the Applicant of their intention to terminate the agreement and the letter thereof is annexure "D". The Applicant's Counsel submitted that from the above events a dispute has arisen which the Applicant intends to refer to arbitration. The Applicant believes that he has been unjustly disadvantaged by his treatment by the Respondent and is of the strong view

that unless an interim order is granted, the arbitral proceedings intended will be rendered nugatory. He seeks intervention of court for protection of his right under the agreement by an injunction pending arbitration proceedings with costs of the application to be provided.

Ruling

I have carefully considered the application and the grounds thereof. The grounds of the application are that the Applicant entered into an agreement for operation of the K - Mart and fuel service station at Kagoma with the Respondent company on 1 April 2014 and 24 July 2014 respectively. The licence agreement has an arbitration clause. The Applicant had applied to modify the K - Mart and contends that the application was approved by the Respondent. On 17 August 2015, the Applicant received a letter from the Respondent alleging that he had made unauthorised modifications in breach of the licence agreement and notified the Applicant of its intention to terminate the tenancy agreement within 14 days from the date of receipt of the letter.

The licence agreement contains an arbitration clause. A dispute has arisen from the agreement and the Applicant intends to refer the dispute to arbitration. Furthermore he averred that unless an interim protection order is issued the intended arbitration will be rendered nugatory. The Applicant will be unjustly and unfairly disadvantaged by the termination which is to take effect before arbitration. Finally that it is in the interest of justice that the application is granted.

The application is supported by the affidavit of the Applicant wherein the two copies of the agreement are attached. Secondly attached is the application to modify the K - Mart in line with the provision of the agreement and also the email of proposed modifications. The Applicant deposed that he discussed the modifications in detail with Mr Yoav Erenberg the Country Manager and Mr Anthony Gatandi the Operations and Marketing Manager of the Respondent. The Respondent's engineer inspected the premises and the modifications. Furthermore the Respondent Company approved the modifications pending a written approval.

On 17 August 2015 he received a letter from the Respondent alleging that he had made unauthorised modifications in breach of the licence agreement. The Respondent also notified him of an intention to terminate the agreement within 14 days from the date of receipt of the letter and to evict him from the premises according to a copy of the letter annexure "D". He deposes that he is not in breach of the agreement as alleged and therefore should be heard before any action by the Respondent can be taken. Furthermore that he would be unjustly and unfairly disadvantaged by the intended action of the Respondent unless an interim measure of protection is granted or the arbitration process will be rendered nugatory. He further deposes that is in the interest of justice and equity that the orders sought should be granted.

I agree with the Applicant's Counsel that section 6 (1) of the Arbitration and Conciliation Act enables a party to an arbitration agreement to apply to a court of law either before or during arbitral proceedings for an interim measure of protection. Secondly it gives the court discretionary powers whether to issue an order of interim measure of protection or not. Section 6 (1) provides as follows:

"6. Interim measures by the court.

(1) a party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure."

In considering whether there is a prima facie case that merits the grant of an interim measure of protection, the question to be considered is whether there is an agreement to submit a dispute to arbitration which is valid and whether a dispute has arisen between the parties. Secondly the question is what scope the expression "an interim measure of protection" has? It is my humble ruling that the court should have minimum interference with arbitration proceedings. Section 9 of the Arbitration and Conciliation Act limits inference by the court in matters governed by the Act except as enabled by the Arbitration and Conciliation Act. It provides that:

"9. Extent of court intervention.

Except as provided in this Act, no court shall intervene in matters governed by this Act."

Section 1 of the Arbitration and Conciliation Act provides that the Act shall apply to domestic arbitration. For that reason the principles applied by the courts in the grant of a temporary injunction should be sparingly applied in order to enable the arbitral tribunal exercise its jurisdiction without being restricted by a court order. Because the interim measure of protection is a remedy granted pending arbitral proceedings it should as far as possible be an order that is interim in nature to the extent that it enables the arbitral tribunal to further deal with the matter inclusive of matters of an interlocutory nature pending the final award. Particularly section 17 (1) of the Arbitration and Conciliation Act enables the appointing authority to order a party to take an interim measure of protection the tribunal may consider necessary in respect of the subject matter of the dispute.

Apart from the fact that the Act confers jurisdiction on the appointing authority namely the Center for Alternative Dispute Resolution to make necessary orders of interim measure of protection, the court in such an application as this one should consider the words in the enactment. What is a necessary order? In terms of the judicial precedents for the grant of a temporary injunction can those precedents be used to grant an interim measure of protection? The principles for the grant of a temporary injunction are derived from section 38 (1) of the Judicature Act cap 13 Laws of Uganda and Order 41 rules 1, 2 and 3 of the Civil Procedure Rules. Section 38 (1) of the Judicature Act provides that:

The High Court shall have power to grant an injunction to restrain any person from doing any act as may be specified by the High Court."

The section is about the jurisdiction of the High Court to grant an injunction. However what principles are applied? Order 41 rules 1 of the Civil Procedure Rules is restricted unlike section 6 (1) of the Arbitration and Conciliation Act which enables any order interim order other than temporary injunction such as deposit of security, attachment before award etc.

Order 41 rule 1 of the Civil Procedure Rules Provides that:

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

(b) that the defendant threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the

property as the court thinks fit until the disposal of the suit or until further orders."

Order 41 rule 2 deals with injunctions to restrain breach of contract or other injury.

On the other hand the expression "interim measure of protection the tribunal may deem necessary in respect of the subject matter of the dispute" under section 17 (1) as well as the wording of section 6 (1) of the Arbitration and Conciliation Act should not be interpreted restrictively to mean interim injunctions only and under principles applied for grant of injunctions. Secondly the limitations imposed by section 9 of the Arbitration and Conciliation Act should enable the High Court to limit itself to necessary orders in the interest of justice leaving the rest of the matters including the substance of the interim measure of protection in the hands of the tribunal and the Authority where possible.

Under section 6 (1) of the Arbitration and Conciliation Act, an interim measure of protection should be taken to mean any lawful order that may be made in the interim to protect a party to an arbitration agreement pending arbitration proceedings. Such orders may include interim temporary injunctions, attachment before arbitration, deposit of security etc.

Lastly an order may be made simply to prevent the intended arbitral proceedings from being rendered nugatory. I had occasion to discuss this principle from the authorities in the case of **Souna Cosmetics Ltd vs The Commissioner Customs URA and The Commissioner General URA HCMA No. 424 of 2011 (Arising from HCCS No. 257 of 2011)**. In that application the Applicant's application was for an interim order of injunction to restrain the respondent, its servants and agents, or assigns from auctioning as threatened, disposing off, alienating or in any way dealing with the Applicant's assorted cosmetics seized by the 1st Respondent till the hearing and final disposal of the main application. Upon consideration of the precedents I held that:

"The law concerning an interim stay of execution or injunction is that the court preserves the right of the applicant/appellant to be heard on the merits. This is a very limited jurisdiction which does not deal with the merits of the suit. Hence it is normally handled by the Registrar. The same time used to argue points on the merits if taken before the trial judge can be used to hear the main application. The principles for preserving the right of appeal or the rights of hearing were stated in the case of **Wilson V. Church (1879) vol. 12 Ch D 454** where it was held that:

As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the Judgment appealed from as will prevent the appeal if successful from being rendered nugatory."

This holding was approved and followed in the Supreme Court case of **Somali Democratic Republic V. Anoop Sunderial Trean C.A.C.A No 11 of 1988** before Manyindo DCJ Odoki J.S.C and Oder J.S.C. The Supreme Court held that where an unsuccessful party is exercising a right of appeal, it is the duty of the appellate court to prevent the appeal from being rendered nugatory. The Supreme Court quoted Cotton Lord Justice at page 458 of the case of **Wilson vs. Church** (Supra) where he held that the court would order a stay of execution in order to preserve the applicants right of appeal so that it is not rendered nugatory. At page 459 of the same case Bret Lord Justice held that the law is that court will exercise its discretion so as to stop an appeal from being rendered nugatory."

In this application what the applicant seeks is a right to be heard by the arbitral tribunal which has not yet been appointed before he is evicted or his tenancy terminated as threatened by the Respondent.

The license in respect of the operation of the K - Mart at Kobil Kagoma was executed between the parties on 24 July 2014. It is for the operation of a K - Mart at the premises of the licensor and is for the period commencing 1st of May 2014 to the 31st of April 2015 according to annexure "A". Apparently the license was extended after the 31st of May 2015 because this dispute matter arose in August 2015 when the Respondent wrote a letter annexure "D" dated 10 of August 2015 threatening to terminate the tenancy agreement. Secondly annexure "C" is an e-mail giving the drawings for the proposed modifications. Finally annexure "D" is a letter written to the Applicant by the Marketing and Operations Manager dated 10th of August 2015 on the subject of unauthorized modifications. In that letter he wrote that all modifications must be approved by Kobil Uganda in writing as stipulated in section 8 clause (e) of the license agreement after successful application. The second paragraph of the letter reads as follows:

"Therefore, you are to reinstate the K - Mart to its original structural design within 14 days on receiving this later, failure to do so will lead to the company reinstating it at your own costs and cancellation of the tenancy agreement."

The letter on the face of it was received on 17 August 2015. It requires the Applicant to reinstate the K - Mart to its original structural design within 14 days. It further states that failure to do so would lead to reinstating the K - Mart at the cost of the Applicant and cancellation of the tenancy agreement. The question therefore is whether that is a valid arbitration agreement. The letter of the Respondents makes reference to clause 8 of the agreement. Clause 8 (e) provides that the licensee shall not in any way alter the external appearance and/or structures of the K - Mart area licensed without the prior written consent of the licensor and shall not allow anyone else to do so.

The crux of the matter is that the Respondent alleges that the modifications which were made were made in breach of the licence agreement. On the other hand the Applicant alleges that he had the consent of the Respondent. However the consent was not in writing but pursuant to the unwritten alleged consent he admits in this application having made the modifications. The demand of the Respondent has got financial implications in that the Applicant is required to restore the K - Mart to its original state. The Applicant had 14 days within which to do this. The 14 days have elapsed but the Applicant dreads the termination of his licence or tenancy.

Clause 16 of the licence agreement provides as follows:

"Dispute Resolution and Arbitration

- a. Any disputed matter referred to arbitration under this license is to be decided by the arbitration under the Arbitration and Conciliation, 2000 Act Laws of Uganda by a single arbitrator appointed by the parties to the dispute. If the parties do not agree on the arbitrator then at the request of any party an umpire shall be appointed by each of the arbitrators. The umpire's award shall be conclusive and binding upon the parties."

I am satisfied that there is a dispute worthy of reference to an arbitrator. Secondly the Applicant has a right which he is seeking to enforce to have his dispute resolved through the contracted means of arbitral proceedings. However the Applicant has not demonstrated that he has taken the steps in the appointment of an arbitrator. The arbitrator is required

to be appointed by the parties. Secondly at the time of hearing, the 14 days in the Respondent's letter referred to above have already elapsed.

That notwithstanding, the Applicant is likely to be disadvantaged if the matter is not addressed on its merits by an arbitral tribunal. If the Respondent indeed authorised the modifications, can the Respondent insist that the permission to modify ought to have been made in writing? In the premises an interim measure of protection will be issued under the principle enunciated in **Somali Democratic Republic V. Anoop Sunderial Trean** C.A.C.A No 11 of 1988 by Manyindo DCJ Odoki J.S.C and Oder J.S.C. The order shall be issued to prevent the intended arbitration being rendered nugatory before the Applicant can exercise his rights under section 16 of the agreement being annexure "A" to the application. In the premises a conditional interim measure of protection issues as follows:

1. The Applicant shall commence the process of appointing an arbitrator within 10 days from the date of this order failure for which this interim order shall lapse.
2. An interim order issues restraining the Respondent and its agents, servants, employees, assignees or anyone else claiming or deriving authority from the Respondent, from interfering with the Applicant's rights under the agreement pending hearing and any further orders or directions by the arbitral tribunal as enabled by the Arbitration and Conciliation Act.
3. The issue of costs in this application is referred for consideration by the intended arbitral tribunal and shall be part of issues in the arbitration proceedings.

Ruling delivered on the 22 of September 2015 in open court

Christopher Madrama Izama Judge

Ruling delivered in the presence of:

Oscar Kihika for the Applicant Respondent not present in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama
Judge**

Odoki J.S.C and Oder J.S.C. The order shall be issued to prevent the intended arbitration being rendered nugatory before the Applicant can exercise his rights under section 16 of the agreement being annexure "A" to the application. In the premises a conditional interim measure of protection issues as follows:

1. The Applicant shall commence the process of appointing an arbitrator within 10 days from the date of this order failure for which this interim order shall lapse.
2. An interim order issues restraining the Respondent and its agents, servants, employees, assignees or anyone else claiming or deriving authority from the Respondent, from interfering with the Applicant's rights under the agreement pending hearing and any further orders or directions by the arbitral tribunal as enabled by the

Arbitration and Conciliation Act.

3. The issue of costs in this application is referred for consideration by the intended arbitral tribunal and shall be part of issues in the arbitration proceedings.

Ruling delivered on the 22nd of September 2015 in open court

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Oscar Kihika for the Applicant

Respondent not present in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

22/09/2015