

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS APPLICATION NO.135 OF 2015

5

[Arising from Civil Suit No. 56 of 2015]

- 1. KISEKKA K EXPERITO**
2. NAGUDDI ESTHER MAFABI ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

- 10 **1. UGANDA REVENUE AUTHORITY**
2. COMMISSIONER GENERAL, URA
3. COMMISSIONER CUSTOMS, URA } ::::::::::::::::::::::::::::::::::: **RESPONDENTS**

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

15 This is an application by Chamber Summons brought under the provisions of Order 41 rules 1, 3 and 9 of the Civil Procedure Rules. It is for orders that a temporary injunction be issued against the respondents, their agents, officers and employees restraining them from enforcing and collecting the recent import duty tax increment levied against different sects of importers of general merchandise. The applicant was also seeking for costs of this application.

20 The application was supported by an affidavit dated 24th February, 2014, sworn by the 2nd applicant. The grounds as stated in the affidavit are briefly that the respondents have occasionally levied unlawful and selective import duty on the traders of clothes and shoes and general merchandise in order to make cover ups of their shortfalls in tax collection projections. Further, that according to internal audits of the 1st respondent since 2008 to 2014, it was
25 discovered that over UGX 1,248,951,360/= was lost in revenue due to breach of revenue collection procedures by the respondents. In order to make up for the above shortfalls, the respondents imposed unlawful taxes on the 2nd applicant and other importers. The 2nd applicant further deposed that she had been advised by her Advocates that in order to keep her business

from dissolution by her loan financier, the respondents actions mentioned above could be stopped by court until the final determination of the main suit. She stated that the balance of convenience favours the issuance of a temporary injunction against the respondents and that the applicants and other small scale and medium size importers of assorted general merchandise would suffer irreparable damage if the temporary injunction was not granted.

An affidavit in reply dated 23rd March, 2015, was sworn on behalf of the respondents by Baluku Ronald, an Advocate in the department of Legal Services and Board Affairs. It was his deposition that the applicants did not have legal capacity to sue on behalf of other importers and that the application was frivolous and vexatious. Further, that the orders sought by the respondents were an abuse of court process, general in nature and were intended to curtail the 3rd respondent's performance of statutory duties under the East African Community Customs Management Act and EAC Treaty.

She further deposed that the applicants would not suffer irreparable damages but it was the Government of Uganda which would have a shortfall on its budget resulting into reduced services to the people of Uganda. In that regard, he contended that the balance of convenience was in favour of refusal to grant the temporary injunction.

At the hearing of the application, the applicant was represented by Mr. Mularira Faisal and Ms. Cissy Nakazi (Counsel for the applicant), while the respondent was represented by Mr. George Okello (Counsel for the respondents).

In his submissions, Counsel for the applicants cited ***Viola Ajok & Anor Vs Andrew Ojok & Anor Miscellaneous Application No.179 of 2007*** where the conditions for the grant of a temporary injunction were stated to be;

1. The applicant must show that there is a *prima facie* case with probability of success,
2. That the applicant might otherwise suffer irreparable damage which cannot be easily compensated in damages, and
3. That incase court is in doubt, it will decide the application on the balance of convenience.

With regard as to whether there was a *prima facie* case with a probability of success, Counsel for the applicants submitted that the applicants were small scale importers who were grossly affected by the respondent's seasonal import duty tax increments which were being done in contravention of the **East African Community Customs Management (Amendment) Act**. Further, that it was the applicant's case that the respondents engaged in malpractices leading to loss of monies on the part of the Government and then unlawfully started to periodically and selectively increase the applicants import duty taxes. Counsel further contended that in total contravention of **Section 122(2) of the East African Customs Management Act, 2005**, the respondents had never given the applicants or any other small scale or medium size importers a fair hearing to have periodic increments abandoned for fair purposes of keeping them in business.

As to whether the applicants were likely to suffer irreparable damage in case the application was not granted, Counsel submitted that the 2nd applicant was a teacher by profession and a single mother who pulls resources from different sources in order to be in position to meet shipment and the assessed import tax duty. It was his contention that as a result, she had loan obligations with banks and had mortgaged her home to money lenders. In that regard, the periodic tax increments in the import duty tax had led to her falling back on the above obligations. Further, that the tax increments continue to threaten the survival of her school going children, her personal image and the likely loss of her personal property.

In reply, Counsel for the respondents submitted that the applicant had not satisfied the tests for the grant of a temporary injunction.

Counsel submitted that the applicants had not proved that any of their property was in danger of being wasted, damaged or alienated by the respondents, nor had they stated that their properties were in danger of being sold in execution. In that regard, Counsel contended that the provisions of **Order 41 rule 1 of the Civil Procedure Rules**, upon which this application was premised was inapplicable. Counsel prayed that the application be disallowed on this ground.

Counsel further submitted that the current status quo was that that the 1st and 3rd respondents had been collecting and continue to collect tax revenues on behalf of the Government of Uganda in exercise of statutory powers conferred upon the 1st respondent by law. Counsel contended that by

this application, the applicants were seeking to change the status quo by stopping the tax body from collecting import duties.

As to whether there was a *prima face* case with a probability of success, Counsel submitted that the applicants had not attached any evidence to show the tax increments allegedly imposed on them by the respondents, and that there was no instrument to that effect. Further, that the 2nd applicant had failed to demonstrate a strong basis for her claims in the suit and did not know the basis of the documents like audit reports which she seeks to rely upon. Counsel further submitted that the applicants had not attached evidence of the goods they alleged to be importing.

It was the further submission of Counsel that a representative order had not been obtained before the applicants apparently filing a suit on their behalf and on behalf of other importers. In Counsel's view, the suit did not disclose a *prima facie* case with a probability of success.

With regard to whether the applicants shall suffer irreparable damage which cannot be compensated by an award of damages, Counsel for the respondents submitted that the 2nd applicant had conceded to the fact that she was seeking for general damages and that the applicants claim for refund of all monies allegedly collected from them. Counsel contended that the applicants were not seeking for a permanent injunction in their plaint. Counsel cited ***Ssemakula Augustine t/a Ssemakula & Co. Advocates Vs the Commissioner General, URA, HCT Misc Application No. 321 of 2011***, where it was held that considering that the applicant for a temporary injunction had prayed for general damages in the main suit, if he won the case, the court would be in position to evaluate the evidence and reward adequate damages that would atone for any loss whether financial or otherwise. In this regard, Counsel contended that in case of any injury to the applicants, it would be atoned through an award of general damages. Counsel also relied on **Section 144(1) of the EACCMA** where it is stated that a person who is found to have paid any import duty in error is entitled to a refund. In that regard, Counsel submitted that the applicants could not suffer irreparable damage.

With regard to the submission of Counsel for the applicants that the 2nd applicant was a single mother with school going children and that she had outstanding loans with financial institutions, Counsel for the respondents contended that these were extraneous facts which were not

contained in the affidavit in support of the application. He, therefore, prayed that this court disregards the above submissions by Counsel for the applicants.

Counsel further submitted that the balance of convenience was in favour of denying the orders sought by the applicants. First, that the status quo would be altered if the application was granted. Secondly, that the orders sought had the effect of halting the collection of tax which would irretrievably lead to the loss of monies to Government and that this would lead to shortfall in government services to the people of Uganda.

In rejoinder, Counsel for the applicants submitted that the main suit was not of a representative nature and that it was seeking for enforcement of rights under **Article 50 of the Constitution**.

Counsel further submitted that the *status quo* intended to be maintained was to stop the 1st and 3rd applicants from making any new increments of the tax until final determination of the main suit.

I have carefully considered the submissions of Counsel, the evidence and the law relating to grant of temporary injunctions.

Before I consider the substance of the application, I note that although the 1st applicant is indicated as being an applicant in this application, there was no affidavit in support of the application filed by him or on his behalf. The 2nd applicant in her affidavit does not indicate that she swears the affidavit on her behalf and on behalf of the 1st applicant. In that regard, I find that this application is defective in regard to the 1st applicant for having no supporting affidavit. I dismiss the same as regards the 1st applicant.

The grant of temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in status quo until the question to be investigated in the suit can finally be disposed of. (*See Noormohamed Janmohamed Vs Kassamali Virji Madhani, CA Civil Appeal No.42 of 1951, E.L.T Kiyimba Kaggwa Vs Haji Abdu Nasser Katende, HC Civil Suit No.2109 of 1984*).

The conditions for the grant of temporary injunction were stated in *Nasser Kiingi and Anor Vs Attorney General & ors, Constitutional Application No. 29 of 2012*, as follows:

1. The applicant must show a *prima facie* case with a probability of success,

2. The applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages,
3. If the court is in doubt, the application would be considered on a balance of convenience.

5 From the reading of submissions of Counsel for the respondents, a crucial point was raised that the grant of this application would have the effect of changing the status quo and not maintaining the same. I shall first address this issue before determining whether the applicant has satisfied the conditions for the grant of a temporary injunction.

In *Clovergem Fish & Foods Ltd Vs International Finance Corp & 7 Ors [2002-2004] UCLR*

10 **132**, court stated as follows:

“Indeed the court needs to know the status quo intended to be preserved by the application before applying the three conditions laid down...if the status quo has changed before the application, then the application would be rendered useless since there will be no status quo to preserve”.

15 Paragraph a of the Chamber Summons filed by the applicants seeks for an order that;

“A Temporary injunction be issued restraining the respondents, their agents, officers and / or employees and any other persons rightfully acting under them from enforcing and collecting the recent import duty tax increment levied against different sects of importers of general merchandise be it o medium or small scale”.

20 The affidavit in support of the application does not specifically state what the applicant seeks the court to restrain the respondents from doing. However, under paragraph 12 of the affidavit, the above order sought in the Chamber Summons is restated. I have not found any prayer or statement indicating that the applicant seeks to restrain the respondents from making any new tax increments until final determination of the main suit. I find that the above averment by Counsel
25 for the applicant in rejoinder was a submission from the bar, and I cannot, therefore, consider it as the order sought by the applicant. I find that the orders sought by the applicant were that the respondents be restrained from enforcing and collecting the then import tax increment allegedly levied against importers of general merchandise, including the applicant.

From the reading of the applicant's affidavit in reply, it appears to me that the import tax duty increments complained of have already been enforced by the respondents. I accept the submission of Counsel for the respondents that the grant of the temporary injunction sought by the applicant has the effect of changing the status quo by stopping the respondents from
5 collecting import duties, which is ongoing. In essence, I find that the orders sought by the applicants have been overtaken by events.

Accordingly, the above should be able to dispose of this application.

In addition to the above, I find that the applicant has not satisfied the conditions for the grant of temporary injunction.

10 With regard to the first principle whether there has been a prima facie case with a probability of success, the court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried. (*See American Cynamide Vs Ethican [1975] ALL ER 504*). In order to determine the above, court only looks at the face of the pleadings and is not required to inquire any further into the evidence at this stage. Otherwise, there would be a risk of delving
15 into the merits of the suit.

I have perused the plaint and the annextures thereto and I am not convinced that the applicant's claim raises triable issues with a probability of success. While Counsel for the applicant contends that the suit is for enforcement of rights, I have not found any statement in the pleadings to that effect and the suit seeks for declarations which do not include an indication that the suit is for
20 enforcement of rights brought under **Article 50 of the Constitution**. On the face of it, it appears to me that the suit is an ordinary one, brought on the applicant's own behalf and on behalf of another class of people (Small scale and medium size importers of general merchandise). There is no proof that a representative order was obtained before filing the suit. In this regard, it appears to me that the suit has no likelihood of success.

25 As to whether the applicant is likely to suffer irreparable injury that cannot be atoned for by an award of damages, I find the decision of court in *Kiyimba Kaggwa Vs Hajji Nasser Katende (Supra)* instructive. It was stated that irreparable injury does not mean that there must not be physical possibility of repairing the injury but means that the injury must be substantial or material that cannot be adequately compensated for in damages.

I have taken into consideration the submission of Counsel for the applicants that the 2nd applicant has loan obligations and that she has school going children who may be affected by the respondents actions making tax increments. First, I find that the allegations that the 2nd applicant has school going children who may be affected if the injunction is not granted are submissions
5 by Counsel from the bar and were not contained in the affidavit evidence by the 2nd applicant. Secondly, i find that the injury, apparently, likely to be suffered by the applicant is monetary and can be atoned for in damages by the respondent(s) who is the revenue collecting organ of Government.

In view of the above, I find that the applicants have failed to fulfill the conditions for the grant of
10 a temporary injunction. I, accordingly dismiss this application for the above reasons.

No order as to costs.

I so order.

15 **B. Kainamura**

Judge

28.09.2016