

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS APPLICATION No. 630 OF 2015

[Arising from Civil Suit No. 689 OF 2014]

1. INFINITY TELECOM UGANDA LIMITED
2. DISTRIBUTION MAESTROS LIMITED ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

ORANGE UGANDA LIMITED ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE JUSTICE B. KAINAMURA

RULING

This is an application brought under Order 41 rule 7 (i) & (2) Order 8 rule 22 and 3 CPR, Section 64(c) and Section 98 of the CPA. The application is seeking for orders that the dealership agreements subsisting between the applicants and the respondent and the terms agreed upon therein including specifically geographical territories, commissions and final obligations therein be preserved pending disposal of the main suit.

The applicant further seeks costs of the application.

The grounds of the application are stated in the affidavit in support sworn by Basil Bataringaya a director of the 1st applicant who deposed that;

The applicants filed Civil Suit No. 689 of 2014 and the same has high chances of success.

The respondent is threatening to terminate the applicant's contract by creating new territories of other dealers and a super dealer which in effect wholly breaches the terms of our dealer contracts.

The respondent has sent out scouts who talked to the applicant and told him they were requested by the respondent to create another dealership between Orange and Africel and 3rd parties making the applicants new sub dealers which will reduce the commission agreed upon in the dealer contracts and creates a new contractual obligation which terminates the original contract terms without negotiations or consideration due to existing huge Bank loans and credit facilities being serviced.

It is unfair and unjust to carve out the dealer territories of the applicants as this reduces on the output of the product sold and thus less profit rendering the business to crumble.

The respondent is also threatening to recall their financial obligation yet the applicants secured loans by mortgaging their properties, bank guarantees and corporate credit facilities.

The applicants will suffer irreparable loss and damage if the contracts are not preserved and the respondent is not ordered to maintain its financial obligation till the determination of the main suit.

It is in the interest of justice that this application is granted and the status quo preserved pending the disposal of the main suit.

The main suit has high chances of success and the same shall be rendered nugatory if this application is not granted.

This application if granted will not prejudice the respondent in any way.

The dealership agreements subsisting between the applicants and the respondent and the terms agreed upon therein including specifically geographical territories, commissions and financial obligations therein be preserved by this honorable court pending the final disposal of the main suit.

In the affidavit in reply Ms Phiona Kiwanuka deposed that;

On the 9th of July 2015 the main suit came up for mention before court and the matter was referred to arbitration to be conducted within a period of three months.

Since the reference was made the plaintiff has never commenced the arbitration process despite a prior request by the respondent to arbitrate the matter.

The application is baseless, misconceived and an abuse of the court process by the applicants.

The application has no basis and the matter now rests with an arbitrator by virtue of the reference and the applicants cannot claim to have a suit with a high likelihood of success before this court.

The respondent has a right conferred by contract to terminate the dealership agreements and the procedure for termination of the agreement is clearly provided for under clause 10 of the agreement.

In the event of termination the applicant can be adequately compensated for in terms of damages in case of any loss occasioned on them by a termination of the dealership agreements.

In any event the orders sought in the application if granted have the effect of curtailing the rights of both the applicants and the respondent enshrined in clause 10 of the dealership agreement.

In any event the balance of convenience favors the respondent as the orders sought in this application have the effect of crippling the respondent's business by restraining them from redemarcating territories where the applicants failed to satisfy the business needs and sale targets in accordance with the dealership agreement.

In any event an injunction stopping the respondent from changing non performing dealers would be unjust as it would lead to irreversible loss of business in the territories to the benefit of the respondent's competitors.

In any event the respondent will be prejudiced if this application is granted since it will be forced to continue with the dealers who do not satisfy its business needs and sale targets thereby causing financial loss to the respondent.

In any event the balance of convenience favors the respondent who would suffer loss of territory to its competitors if the injunction is granted.

The application before court does not pass the test for an application for a temporary injunction under the law.

In rejoinder Mr. Basil Bataringaya stated that;

It is true when the main suit came up for mention on 9th July 2015, the same was referred to arbitration for a period of three months and the 1st applicant and respondent have agreed tentatively on an arbitrator.

The application is not baseless, misconceived or an abuse of the court process but is a consequence of the respondent's threats and eminent actions to alter the status quo by appointing super dealers in the 1st applicant's territories in utter disregard and in breach of the dealership agreements.

The reference of the matter to arbitration does not in law bar the 1st applicant from filing an application for injunction in this court pending the disposal of the main suit.

The 1st applicant will suffer irreparable loss if the application is not granted.

The applicants cannot be adequately compensated in damages as the respondent should not hide under the right to terminate the contract to cripple the 1st applicant's business which is a subject of the main suit.

The balance of convenience is in the 1st applicant's favor as she has not or at all failed to satisfy the business needs and sale targets reason for which the respondent is orchestrating the alleged failure in business by electing to appoint super dealers and other dealers in her dealership and territory.

The 1st applicant will be prejudiced If the application is not granted and it is utterly false that the applicant is a non performing dealer.

The respondent cannot or at all suffer irreparable loss of business as alleged but it is the 1st applicant who will be left at the heart of a business involving super dealers and other dealers to adversely compete with the applicant.

Counsel for the applicants submitted that the situation between the applicants and respondent warrants a grant of a temporary injunction. Counsel argued that the applicant will suffer irreparable injury if the injunction is not granted. Counsel further submitted that the other factor to be considered is the balance of convenience. Counsel argued that the balance of convenience is

in favor of the applicants since they are the ones to lose more as the respondent will not be inconvenienced in any way. Counsel relying on the case of ***Kiyimba Kaggwa Vs Haji N. Katende [1985] HCB 43*** stated that the plaintiff's case is not vexatious or frivolous. Counsel stated that the applicants have proved that they have a *prima facie* case since they are threatened by the respondents to terminate the contracts to their prejudice. Counsel added that the applicants have never breached the terms of the agreement and have never been issued with any notice of termination. Counsel further stated that the purpose of the injunction is to maintain the *status quo* till the determination of the issues in controversy. (***Jan Mohammed Vs Kassamal Virji Madhari [1953] 20 EACA 8***). Counsel finally submitted that it is in the interest of justice that a temporary injunction be granted to the applicants in the terms that, the dealership agreements subsisting between the applicants and the respondent and the terms agreed upon therein including specifically geographical territories, commissions and financial obligations therein be preserved pending the final disposal of the main suit such that the same is not rendered nugatory.

In reply Counsel for the respondent submitted that in the case of ***Geoffrey Kitembo David Vs Standard Chartered Bank Uganda Limited H.C.M.A 344 of 2014*** it was held that an application for a temporary injunction is incompetent where no relief of a permanent injunction is sought in the plaint.

Counsel while addressing the conditions for the grant of an application for an injunction, cited a number of authorities. Relying on the case of ***British American Tobacco Uganda Ltd Vs Lira Tobacco Stores HCMA No.924 of 2013*** Counsel submitted that the application should fail since the dispute was referred to arbitration. Counsel relying on the case of ***Pan Afric Impex Vs Barclays Bank and ABSA Bank Misc Appl No. 804 of 2007*** submitted that the respondent is a reputable firm and is a going concern able to pay any amount in damages if any decided by court. He argued that any loss that will be suffered by the applicants is capable of monetary compensation and for this reason, no injunction should issue. Finally, Counsel submitted that the balance of convenience lies in favors of the respondent who would suffer loss of territory to its competitor if the injunction is granted.

In rejoinder, Counsel for the applicants in reply to the preliminary point raised, submitted that ***Order 41 rule 2 of the CPR*** provides that a plaintiff in a suit for restraining the defendant from breach of contract may at any time after commencement of the suit apply for a temporary

injunction to restrain the defendant from the breach. Counsel reiterated the submission that the applicants will suffer irreparable loss. Counsel therefore prayed that the status quo be preserved until the finalization of the suit; otherwise the effect would be rendered nugatory.

Decision of Court

I have considered the pleadings and submissions of Counsel. The applicant brought this application by Notice of Motion under **Order 41 rule 7 of the CPR**. The applicant seeks orders that; the dealership agreements subsisting between the applicants and the respondent and the terms agreed upon therein including specifically geographical territories, commissions and final obligations therein be preserved pending disposal of the main suit and costs of the application.

The grounds of the application have already been set out above. Counsel for the respondent submitted that the application is incompetent because the applicants did not apply for a permanent injunction. **Order 41 rule 7 of the CPR** is, as rightly argued by Counsel for the respondent is for application for interlocutory orders for preservation of suit property and not for temporary injunction which fall under 0.41 r 1 and 2 CPR which was the main thrust of the arguments of the Counsel for the applicant. However i am prepared to consider the application on its merits notwithstanding Counsel's errors.

Moving on to the merits of the application, **Order 41 of the CPR** provides for applications for injunctions but **rule 2(1)** specifically provides for an injunction to restrain the committal of breach of contract. The grounds to consider before the application for an injunction is granted have been discussed elaborately by both Counsel as were laid out in the case of *Kiyimba Kaggwa (supra)*. They are that; there should be a prima facie case with high probability of success, that the applicant will suffer irreparable loss which cannot be compensated for in damages and if court is in doubt, it will consider the application on a balance of convenience.

Regarding a *prima facie* case, a number of decisions have stressed the fact that there is no requirement for the plaintiff to establish a strong prima facie case. All that has to be proved is that there are facts in dispute which have to be decided in the main suit but it is expedient that the *status quo* be preserved pending the disposal of the main suit. In the facts before me, the applicant pleaded a threat to have the dealership terminated after hearing from some "scouts" he referred to in paragraph 4 of the affidavit in support of the application. Court cannot rely on just hearsay

evidence to decide upon any matter as the principle is that hearsay evidence is not admissible. [See **Section 63 of the Evidence Act** and the case of *Subramaniam Vs Public Prosecutor (1956) WLR 965*]

I am also not persuaded that the applicant has proved that he will suffer irreparable loss which cannot be compensated for in damages. Accordingly I agree with Counsel for the respondent that there are remedies that the applicant may seek when the breach of contract is occurs.

Since i am not in doubt about the above grounds I will therefore not go into determining where the balance of convenience lies.

In the result this application fails and is dismissed.

Costs will be in the cause.

B. Kainamura
Judge
28.06.2016