

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

MISC. APPLICATION No. 631 OF 2015

[Arising from Civil Suit NO.155 OF 2015]

- 1. KINETIC TELECOM LIMITED**
- 2. MUKAMA ATUKWASE ENTERPRISES ::::::::::::::::::::::::::::::: 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 be preserved pending disposal of the main suit.

The applicant further seeks costs of the application.

The grounds for the application are stated in the affidavit in support sworn by Mr. Atukwase Bernard the proprietor of the 2nd Applicant. They are that:-

The applicants filed Civil Suit No. 155 of 2015 and the same has high chances of success.

The respondent is threatening to terminate the contract by creating new territories of super dealers.

The respondent has sent out scouts who talked to him and told him they were requested by the respondent to create another dealership between Orange and Airtel making the applicants new

sub dealers, a status below a dealer as stipulated in the contracts and this reduces the commission and creates a new contractual obligation which terminates the original contract without negotiations.

The respondents are also threatening to recall their financial obligation on the products supplied to the applicants yet the applicants secured loans by mortgaging their properties, bank guarantees and corporate credit facilities which are threatened with liquidation and crystallisation before due date without default.

The applicants will suffer irreparable loss and damage if the contracts are not preserved and the respondent be ordered to maintain their 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.

In the affidavit in reply Ms. Phiona Kiwanuka stated that;

The applicants' suit discloses no *prima facie* case with any probability of success.

The procedure for termination of the dealership agreement is clearly provided for under clause 10 of the agreement.

The applicants can be compensated in terms of damages in case of any loss occasioned to them by a termination of the dealership agreements.

The termination of the dealership agreement will not render Civil Suit No. 155 of 2015 nugatory as claimed.

The balance of convenience favors the respondent as the orders sought in this application have effects of crippling the respondent's business by restraining them from redemacating territories

where the applicants failed to satisfy the business needs and sale targets in accordance with the dealership agreements.

An injunction would be unjust as it would lead to irreparable loss of business in the territories to the benefit of the respondent's competitors.

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

In rejoinder Mr. Atukwase Bernard stated that;

The 2nd applicant will suffer irreparable loss if the application is not granted in its favor.

The loss to be suffered cannot be adequately compensated for in damages and the respondent cannot hide under the right to terminate the contract to cripple the 2nd applicant's business.

The balance of convenience is in the 2nd applicant's favor.

The respondent cannot or at all suffer irreversible loss of business as alleged.

The application passes the test for grant of a temporary injunction and the status quo should be maintained to that effect.

Counsel for the applicants submitted that the applicants will suffer irreparable injury which cannot be adequately compensated for in damages. Counsel relied on the case of ***Kiyimba Kaggwa Vs Haji N. Katende [1985] HCB 43***. Counsel added that Court ought to weigh the balance of convenience which in this case is in the favor of the applicants since they will lose more than the respondent. Counsel further stated that the purpose of the injunction is to maintain the status quo till the determination of the issues in controversy and relied on the case of ***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 be preserved by court pending the final disposal of the main suit such that the same is not rendered nugatory.

Counsel for the respondent in reply submitted that it was held that in the case of ***Geoffrey Kisebo David Vs Standard Chartered Bank Uganda Limited H.C.M.A 344 of 2015*** that an application for a temporary injunction is incompetent where no relief of a permanent injunction is sought in the plaint. He therefore argued that for this reason the application is incompetent. Counsel further argued that the applicant has not fulfilled the conditions laid out in the case of ***Kiyimba Kaggwa Vs Haji N. Katende [1985] HCB 43*** which are that there must be a prima facie case, the applicant must show that irreparable damage will be suffered or that the balance of convenience is in the application favour. Counsel submitted that under clause 10 of the agreement the parties are at liberty to terminate the dealership agreement under certain circumstances. He submitted that the orders sought in this application will take away that remedy thereby forcing a party to continue with a contractual relationship they do not wish to continue with.

In rejoinder, Counsel for the applicants submitted that **Order 41(2) (1) of the CPR** is to the effect that in a suit for restraining the defendant from breach of contract, the plaintiff may at any time after commencement of the suit apply for a temporary injunction to restrain the defendant from committing the breach. Counsel prayed that the *status quo* should be preserved otherwise the case will 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 for application for interlocutors orders for preservation of suit property and not for temporary injunction 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 released 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

22.06.2016