

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[COMMERCIAL DIVISION]**

**MISCELLANEOUS APPLICATION No. 831 OF 2015**

*(ARISING OUT OF CIVIL SUIT NO. 651 OF 2015)*

**SHMUEL HIRSHBERG MULI ::: APPLICANT**

**VERSUS**

<b>1. AHARON LI RAN</b>	}	::: <b>DEFENDANTS</b>
<b>2. SHMUEL PELED</b>		
<b>3. BOB KABONERO</b>		
<b>4. AUDLEY LIMITED</b>		

**BEFORE: HON. MR. JUSTICE B. KAINAMURA**

**RULING**

The applicants brought this application under the provisions of **Order 41 rule 2 & 9 of the CPR** and **Section 98 of the CPA**. The applicant seeks orders that;

- a) The 1<sup>st</sup> respondent be restrained from transferring, alienating and /or disposing of the 60% shareholding in the 4<sup>th</sup> respondent in respect of which the applicant claims ultimate beneficial ownership until the final disposal of the suit and the Uganda Companies registrar be directed to maintain the *status quo* accordingly;
- b) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents be restrained from dealing with the operations of the 4<sup>th</sup> respondent in any manner prejudicial to the applicant's 60% beneficial ownership until final disposal of the suit;
- c) Costs of this application be provided for.

The grounds of the application are set out in the affidavit in support of the application deposed by the applicant Mr. Shmuel Hirshberg Muli and are briefly that;

The applicant has disclosed a prima facie case in the main suit with a high probability of success.

The applicant will suffer irreparable injury that cannot be compensated in damages.

It is in the interest of justice that the application is granted and the *status quo* maintained until disposal of the main suit.

Several affidavits in reply were deposed.

In an affidavit the 1<sup>st</sup> respondent Mr. Aharon Li Ran opposed the application stating that;

He has no intention whatsoever to dispose of, alienate, transfer or sell his shares to anyone and there is no need for a court order to restrain him and there is no possibility whatsoever of any irreparable injury to anyone, and in particular to the applicant.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have nothing to lose if the application is dismissed and better still the balance of convenience is in his favour.

It is in the interest of justice and fair to all parties that the application be struck out and dismissed with costs.

Mr. Momanyi Thomas a lawful attorney of the 1<sup>st</sup> respondent also deponed that;

The applicant cannot suffer irreparable damages because he has no interest or share in the business at all.

The balance of convenience does not favour the applicant who has no interest in the 4<sup>th</sup> respondent.

The 2<sup>nd</sup> respondent Mr. Shmuel Peled deponed an affidavit in reply as well and stated that;

He does not oppose the application for a temporary injunction as the business and reputation of the 4<sup>th</sup> respondent would be irreparably damaged if the operations were to be altered.

The different assertions by the applicant and other respondents raise triable issues for determination of the Court.

The 3<sup>rd</sup> respondent Mr. Bob Kabonero also deposed an affidavit in reply in which he similarly stated that;

He does not oppose the application for a temporary injunction because any alteration would irreparably damage the 4<sup>th</sup> respondent.

The different assertions by the applicant and other respondents raise triable issues for determination of the Court.

In the affidavit in rejoinder, the applicant Mr. Shmuel Hirshberg Muli stated that;

Mr. Momanyi's affidavit is fatally defective and should be struck out because the powers of attorney that he claimed to have were limited to proceedings in Misc Appl. No.832 of 2015.

The failure by the 1<sup>st</sup> respondent to answer the matters raised makes it clear that the applicant does have a *prima facie* case with strong prospects of success.

The High Court of Uganda does have jurisdiction in the matter as the assets, business and property of Audley Ltd are in Uganda.

It is in the interest of justice that the application is granted and the *status quo* maintained till the disposal of the main suit.

Counsel for the applicant submitted that the law on grant of temporary injunction is well settled. Counsel cited the case of ***Pan Afric Impex (U) Ltd Vs Barclays Bank PLC & Anor, Misc Appl. 804 of 2007*** which laid down the conditions to consider which include; showing that there is a question to be tried, the applicant stands to suffer irreparable loss should the injunction not be granted and in case of doubt, the matter can be resolved on a balance of convenience. Counsel submitted that it is the applicant's case that he has made out a *prima facie* case with good prospects of success or in other words a serious question to be tried by court. Counsel additionally stated that the applicant could not be possibly compensated in damages should it lose ownership of controlling shareholding in the two decade old casinos. Counsel also stated that the balance of convenience lies in favour of the injunction being granted. Counsel prayed that the temporary injunction be granted in the terms prayed till the final disposal of the main suit.

Counsel for the 1<sup>st</sup> respondent submitted that three issues are for determination by this Court and are;

1. *Whether this honourable court has jurisdiction to determine this application*
2. *Whether the application has been brought properly before this honourable court*
3. *Whether the applicant satisfies the conditions for grant of a temporary injunction*

Addressing the issue of jurisdiction, Counsel relied on a number of authorities such as ***Carl Zeiss Stiftung Vs Rayner and Keller Ltd (1967) AC 853,919*** where court held that it is clearly established that the authority to represent and act for corporations is governed by the law of place of incorporation. Counsel therefore prayed that the application and suit from which it arises be dismissed because the honourable court is not vested with Jurisdiction to handle a matter of the 4<sup>th</sup> respondent that was incorporated in the Isle of Man and registered in Uganda as a foreign company.

Regarding issue two, Counsel argued that the application is incurably defective for lack of a representative order for the applicant to represent the rest of the group mates and should therefore be dismissed with costs to the 1<sup>st</sup> respondent.

Finally, addressing whether the applicant satisfies the conditions for grant of a temporary injunction, Counsel for the 1<sup>st</sup> respondent submitted that the grounds for the grant of a temporary injunction stated in the case of ***American Cyanamid Co. Ltd Vs Ethicon Ltd [1975] AC 396*** and the case of ***Kiyimba Kagwa Vs Hajji A.N Katende [1985] HCB 43*** are that; granting of temporary injunction is an exercise of judicial discretion and the purpose of the same is to preserve status quo, the applicant must present a *prima facie* case with the possibility of success, the applicant might suffer irreparable injury which would not adequately be compensated by damages and if in doubt, court would decide on a balance of convenience.

Counsel submitted that the applicant has no shares in the 4<sup>th</sup> respondent Company and prayed that the court finds that the applicant has not made out a *prima facie* case to warrant the grant of the temporary injunction. Additionally regarding the suffering of irreparable damage, Counsel submitted that the applicant is not likely to suffer irreparable damage and if any injury is suffered it can be compensated for with damages. Counsel further submitted that the application is intended to alter the status quo and prayed that the application be dismissed with costs.

Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in response to the applicant's submissions argued that this court is vested with jurisdiction to determine the dispute under **Section 15 of the CPA**. Counsel added that under the doctrine of **Forum Conveniens**, a Court will take jurisdiction where it is the most appropriate forum available for the parties.

Counsel for the applicant in reply to the 1<sup>st</sup> respondent's preliminary objections and rejoinder on the temporary injunction submitted that jurisdiction is vested in the Uganda court over the defendants who carry on business in Uganda or where the cause of action arises wholly or in part in Uganda in accordance with **Section 15 of the CPA**. Counsel further stated that the preliminary objection should be dismissed wholly for lack of merit. Counsel then discussed the merits of the application submitting that there is a serious question to be tried by this court in the matter. Additionally, Counsel submitted that regarding irreparable loss / injury it follows that the irreparable loss/injury criteria is made out. Lastly regarding the balance of convenience, Counsel submitted that the balance of convenience does not arise as the answers to the first two issues removes any element of doubt as would bring into play the question of balance of convenience. In conclusion, Counsel prayed that the preliminary objections be dismissed and the application be allowed.

### **Decision of Court**

I have given due consideration to the application and reviewed the supporting affidavits and the submissions by Counsel. Counsel for the 1<sup>st</sup> respondent raised a preliminary objection that the court has no jurisdiction because the 4<sup>th</sup> respondent was incorporated in the Isle of Man. In the case of **Wasswa Primo Vs Moulders (U) Ltd Miscellaneous Application No.999 of 2014** where the issue of jurisdiction arose in an application, court among others ruled that;

*“The necessity for a court to cloth itself with jurisdiction has since been determined by the Supreme Court in the case of **Bank of Uganda Vs TransRoad Ltd Supreme Court Civil Appeal No. 3 of 1997** for the Supreme Court while quoting learned author **Mulla on the Code of Civil Procedure, 14<sup>th</sup> Edition at page 225** defined **jurisdiction** in the following words:;*

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted and may be extended or restricted by the like means. If restriction or limits is imposed the jurisdiction is unlimited.”*

Court while discussing the place where the cause of action arose and the place of incorporation vis-a-vis where the matter was filed held that;

*“When this contention is put in the context of the Supreme Court definition of the meaning of jurisdiction in the case of **Bank of Uganda Vs TransRoad** (above) it is apparent that where there is an allegation as to the competence of a court to try a matter is raised arising from the fact that it lacks jurisdiction then that fact ought to be investigated since jurisdiction is a creature of the statute. This allegation would therefore warrant further investigations proving that indeed there are triable issues raised. That alone would warrant the grant of this application.”*

Basing on the facts in this matter, it is clear that the companies spoken of including the fourth respondent were not incorporated in Uganda. The issue regarding jurisdiction can best be argued in the main suit where the facts regarding the incorporation and business of the company can be discussed at length. The preliminary objection is accordingly overruled. Additionally, Counsel raised an objection regarding a representative order which I also prefer to discuss in the main suit. That said, I move on to discuss the merits of the application.

The only issue for determination is whether a temporary injunction should be granted pending the determination of Civil Suit No. 651 of 2015. The grant of an interlocutory injunction is an exercise of judicial discretion but legal principles upon which court exercises its discretion to grant a temporary injunction have evolved over time. An applicant for a Temporary Injunction must prove that:

- i. *He wants to preserve the status quo*
- ii. *He has a prince facie case with chances of success*
- iii. *He will suffer irreparable damage/injury if the injunction is not granted and*

iv. *If the court is still in doubt, the issue will be settled on the balance of convenience*

***(see Robert Kavuma Vs Hotel International SCCA No 8 of 1990 reported in (1993) 11 KALR 73***

Counsel for the 1<sup>st</sup> respondent argued that the applicant has not made out a *prima facie* case to warrant the grant of the temporary injunction. It should however be noted that at this stage all the applicant/plaintiff needs to show and has indeed in my opinion shown that there are serious questions to be tried and the action is not frivolous or vexatious. The applicant does not have to establish a strong *prima facie* case ***(see American Cynamide Co Vs Ethicon [1975] 1 ALL E R 504) and Kiyimba Kagwa Vs Haji Nasser Katende (1988) HCB 43)***

Regarding the need to preserve status quo, the applicant as well as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their affidavits stated that any alteration in the company operations would affect the business. This points to the fact that there is an urgent need to preserve the status quo and the granting of the application would keep the company preserved. In similar regard, I agree with Counsel for the applicant that the applicant could not be possibly compensated in damages should it lose ownership of the controlling shareholding in the two decade old casinos. That being the case, I am of the opinion that the application meets the conditions discussed above which warrant the grant of the temporary injunction.

That said, I am alive of the fact that the court has powers to impose such conditions as it deems fit in the interest of justice, were it to grant a temporary injunction. **O 41 r 1 CPR** reads:-

*“..... The court may by orders 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 disposal of the property as the court thinks fit until the disposal of the suit or until further orders.”*

In circumstances and in the exercise of my discretion I will allow the application and the following orders shall issue;

1. The 1<sup>st</sup> respondent is restrained from interfering, alienating, and/or disposing of the 60% share holding in the 4<sup>th</sup> respondents in respect of which the applicant claims ultimate beneficial ownership and the 13.3% shareholding in the 4<sup>th</sup> respondent in respect of which the 3<sup>rd</sup> respondent claims ultimate beneficial ownership and/or from interfering directly or indirectly with the operations of Kampala Casino and Pyramids Casino other than through duly convened beneficial shareholders meetings and/or meetings of the current registered Uganda operations operators directors until the final disposal of the suit and Registrar of Companies Uganda is directed to maintain the *status quo* accordingly.
2. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are restrained from dealing with the operations of the 4<sup>th</sup> respondent in any manner prejudicial to the applicants 60% beneficial ownership until the final disposal of the suit.

It is further ordered that costs shall be in the cause.

**B. Kainamura**

**Judge**

**20.05.2016**