

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

MISC. APPLICATION No. 124 OF 2017

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[Arising Civil Suit No. 127 of 2017]

NDIBURUNGI SUGAR WORKS LIMITED ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. CRANE BANK [IN LIQUIDATION]

2. DFCU BANK LIMITED ::::::::::::::::::::::::::::::::::: RESPONDENTS

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BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

This is an application for an order that a temporary injunction restraining the respondents/defendants, their agent, servants, assignees, successors-in-title or legal representatives or other persons claiming through or under them howsoever from recalling the entire loan amount and/or commencing recovery measures against the applicant/plaintiff; that is, advertising, selling, foreclosing, occupying or in any way dealing with the mortgaged properties comprised in **FRV 605 Folio5, plot2, Hoima Road and LRV 1440 Folio 6, Block 733 plots 7 and 8 Bulemezi, Kyamufumba Katikamu**, until the Civil Suit No. 127 of 2017 is heard and disposed of.

This brief background to this application is as follows. On 7th July, 2014, the applicant was advanced a loan facility of UGX 4,500,000/= (Uganda Shillings Four Billion Five Hundred Million) by the 1st respondent for a term f 12months. The loan was secured among others by property comprised in FRV 605 Folio 5, Hoima Road and LRV 1440 Folio 6, Block 733 Plots 7 and 8 Bulenzi, Kyamufumba, Katikamu. On the 8th June, 2015, the 1st respondent gave the

applicant a further advance of UGX 3,000,000,000/= (Uganda Shillings Three Billion). On the 6th February 2016, the applicant applied for a “Bridge loan” of USD 1,000,000/= (Uganda States Dollars One Million). On the 23rd January, 2017, the lawyers for the 2nd respondent; who took over the assets and liabilities of the respondent, issued the applicant with a notice of default demanding that she rectifies her default within 45 working days. The notice warned that if the loan remained unpaid after the 45 days, the 2nd respondent would exercise her rights under the loan and mortgage agreement. The applicant instituted Civil Suit No. 127 of 2017 against the respondents and also filed the instant application.

The application is brought by Chamber Summon under S. 33 and 38 of the Judicature Act, Cap. 13 and O41 r.1, 2 and 9 of the Civil Procedure Rules S.1 71-1, and supported by the affidavit of Vinay P. Rangani. Their application is premised on eight grounds which I will reproduce. The said grounds are as follows;

(a) The respondents are in breach of the loan and mortgage agreement and are planning to recall the entire loan and commence recovery measures against the applicant.

(b) The applicant is the lawful and equitable owner of the suit property and are in physical possession of the same.

(c) That under the loan and the mortgage agreements, the respondents were supposed to facilitate the conversion of the bridge loans from European Investment bank at low interest rate from which the bridge loans would be repaid;

(d) The respondents are illegally and fraudulently planning to sale the suit premises and have threatened to forcefully evict the applicant.

(e) That the applicant has filed a main suit challenging the said breach of the contract and it is yet to be heard and disposed of;

(f) The said main suit shall be rendered nugatory if a temporary injunction is not issued against the respondents;

(g) That the applicants shall suffer irreparable damage if the respondents are not restrained from continuing with their breach;

(h) The probability of success in the main suit is high and the balance of convenience is in favour of the applicant who are in physical and constructive possession;

(i) *That it is in the interest of justice that this honorable court be pleased to grant the order of temporary injunction pending final determination of the main suit.*

From the outset, I must state that, the granting of an order of temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the *status quo* until the question to be investigated in the main suit is finally disposed of (see ***E.L.T. Kiyimba Kaggwa Vs Hajji Abdu Nesser Katende [1985] HCB 43***).

In order for this court to exercise its discretion in favour of the applicant, the applicant must satisfy three conditions. (***Kiyimba Kaggwa*** case supra).

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Accordingly, the issues for court's determination are the following;

1. *Whether the applicant has a prime facie case with probability of success?*
2. *Whether the applicant stands to suffer irreparable loss or damage if this application is not granted?*
- 15 3. *Whether the balance of convenience, in case of doubt in resolving the first two issues above, is in favour of the applicant?*

Issue One: Whether the applicant has a prima facie case with probability of success

The applicant alleges in paragraph (a) of her Chamber Summons that the respondents are in breach of the loan and the mortgage agreements and are planning to recall the entire loan and commence recovery measures against the applicant. The applicant further alleges in paragraph (c) that under the loan and mortgage agreements the respondents were supposed to facilitate the conversion of bridge loans into development term loans from European Development Bank at low interest rates from which the bridge loans were to be repaid. The applicant alleges in paragraph (d), (e) and (h) that the respondents are planning to fraudulently sale off the securities.

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In the affidavit in support by Vinay P. Ranganii, a Director in the applicant company, he states in paragraphs 5,7 and 9 that the applicant applied and obtained loans of UGX 4,500,000,000/=, UGX 3,000,000,000/= and USD 1,000,000,000. He states in paragraph 3 that by an oral agreement, it was agreed that the 1st respondent provides the above loans as bridge loans to enable the applicant subsequently obtain loans from European Development Bank at low interest rates to finance her projects. He further states in paragraph 4 that it was agreed by the parties that the bridge loan would be repaid out of the loans from European Development Bank. He states in

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paragraph 10 that the respondents instead of restructuring the loans into European Development Bank loans at low interest rates jointly and severally issued to the applicant letters demanding the repayment of all the three loans. He further deposes in paragraph 12 of his affidavit in support that the respondent's refusal to convert the loans as agreed amount to a breach for which they are
5 solely liable.

The respondents filed an affidavit in reply on the 22nd day of March 2017, deposed by Pious Olaki, the 2nd respondents Legal Manager. The 2nd respondent took over the assets and liabilities of the 1st respondent. He states in paragraph 3 of his affidavit that the applicant approached the 1st
10 respondent, and upon request, was offered a loan facility of UGX 4,500,000,000/= and later another facility of UGX 3,000,000,000/=. These facilities were offered and agreed upon on the terms among others, that they were subject to the demand nature of the advance. He states in paragraph 4 that the terms of the facility were clearly stipulated in the sanction letters, and were not issued to enable the applicant obtain loan from the European Development Bank or any third
15 parties.

In paragraph 5 of his affidavit, he denies that there was any oral agreement between the applicant and 1st respondent. In paragraph 6, he admits contents of paragraph 5, 6 and 7 of the affidavit in support of Vinay P. Rangani. He adds that the facilities were also secured by demand promissory
20 notes issued by the applicant. He states in paragraph 10 that the applicant applied for a third loan of USD 1,000,000 which was also included in the demand promissory notes which were attached to his affidavit in reply. He states in paragraph 13 that the 1st respondent was a participant in a global loan facility managed by the European Investment Bank under the Contonou agreement. He further states in paragraph 15 that the 1st respondent's obligation under the said Contonou
25 agreement was to collect the application of a client, evaluate it and submit an allocation request to the European Investment Bank. In paragraph 20 he states that the 1st respondent fulfilled all its obligations under the finance contract with the European Investment Bank and/or allocation request was pending approval by the European Investment Bank. And in paragraph 31, he states that the application to European Investment Bank was frustrated by the takeover of the 1st
30 respondent's operations by Bank of Uganda and the lapse of time under the finance contract with European Investment Bank. That the 1st respondent had fulfilled all its contractual obligations under the finance contract.

The applicant filed an affidavit in rejoinder on 29th day March 2017, deposed by Vinay P. Rangani. In paragraph 3 he reiterates that the payment of the loans was to be made from the funds secured from the European Investment Bank with 1st respondent acting as the arranging bank. He states in paragraph 5 of the affidavit in rejoinder that as the arranging bank, all the funds were to be advanced to the 1st respondent for onward transmission to the applicant. In paragraph 7, he states that there was no frustration whatsoever of the contract to facilitate and arrange the European Investment Bank loans and neither is the takeover of the management a supervening act that led to cancellation of the European Investment Bank loans.

Both Counsel addressed this court through written submissions. Counsel for the applicant submitted that the applicant and 1st respondent had an oral contract that the loans advanced by the 1st respondent were to be rapid from the loans from European Investment Bank. That the respondents have recalled the entire loan in total breach of the oral contract which led the applicant to file Civil Suit No. 127 of 2017 to challenge the alleged breach. He submitted that the applicant has a *prima facie* case with probability of success. He relied on the case of **Ramanlal T. Bhatt Vs R [1957] E.A 332** to buttress his argument that the applicant has a *prima facie* case. He submitted that if the temporary injunction is not granted, the applicant's suit would be rendered nugatory.

In reply, Counsel for the respondent submitted that Civil Suit No. 127 of 2017 filed by the applicant against the respondents does not involve serious questions at all. He relied on **Halsbury's Law of England 4th Edition, Volume 24, paragraph 858** and the case of **Pan Afric Impex (U) Limited Vs Berclays Bank PLC HCT-00-CC-MA-0804-2007**. He submitted that the case of **Ramanlal T. Bhatt Vs R** (supra) relied upon by Counsel for the applicant defined *prima facie* case in criminal cases.

On the oral contract, Counsel submitted that the burden of proof lies on the applicant. He relied on the case of **Black Pool and Fyde Aero Club Vs Black pool BC [1990] 1 WLR 1195 at 1202**. He submitted that the applicant does not provide any details of the alleged oral contract. In the documents filed in court, the plaintiff does not mention the person with whom its officials made the oral contract with. Neither does it mention the dates or details pertaining the alleged oral

contract. He submitted that the court should not permit oral evidence to vary the terms of written contract.

In the alternative, Counsel submitted that if at all there was an oral contract, it would be unenforceable. He relied on **S. 10 (5) of the Contract Act, 2010**. He cited the case of ***John Kagwa Vs Insaat Turizm & Others HCT-OO-CC-CS-0318-2012***. He submitted that the loans were approved by the respondent on terms set out in the facility letters. There was no term that the repayment of the loans would be contingent on receipt of the European Investments Bank funds. He submitted that court cannot make contracts for parties but will give effect to the clear intention of the parties. He relied on the case of ***Jiwali Vs Jiwali [1968] E.A 547***.

In rejoinder, Counsel for the applicant submitted that the bridge loans are not issued in vain. They are meant to bridge a certain activity and in this case, the conversion of the loans into development European Investment Bank, is to provide the 1st respondent with the loans, and the 1st respondent grants sub-loans to its clients. The obligation to provide sub-loans is that of the 1st respondent bank. It is also the duty of the respondents to communicate the rejection or approval of the loan.

On the issue of the oral contract, he submitted that oral contracts are not outlawed or unenforceable. He relied on **S. (10) (2) of the Contracts Act, 2010**. He submitted that the applicant's officials were forced to sign agreements for waiver of independent advice as per annexure LD2 (h) of the plaint.

Issue Two: Whether the applicant stands to suffer irreparable loss or damage if this application is not granted.

The application states in paragraph (b) of the Chamber Summons that the applicant is the lawful and equitable owner of the suit properties and are in physical possession of the same. The affidavit in support of Vinay P. Rangani, states in paragraph 15 that the applicant stands to suffer irreparable damage if the respondents are not restrained from continuing with their breach.

In reply, Pious Olaki, the Legal Manager of the 2nd respondent states in paragraph 30 that the 2nd respondent remains operational in Uganda and is able to meet any adjudication of damages to the applicant and as such, the applicant's loss, if any, is compensable by an award of damages.

Counsel for the applicant, submitted that the applicant is the lawful and equitable owners of the suit lands and are in physical possession of the said lands. He submitted that the applicant has filed a suit to challenging the respondent's breach of the oral contract between the applicant and the respondents. He further submitted that if court does not issue a temporary injunction to
5 restrain the respondents against commencing recovery measures, the applicant stands to suffer irreparable damages.

In reply, Counsel for the respondents submitted that the applicant is entitled to only damages but not a temporary injunction against the respondent. He relied on the case of ***E.L.T Kiyimba Kaggwa Vs Haji Abdu Nesser Katende [1985] HCB 43*** to support his argument. He further
10 submitted that the applicant agreed to mortgage the suit lands as security for the facilities and the terms of the respective facilities are clear. The applicant and its guarantors were well aware of the consequences of the default on the demand facilities, and cannot therefore, suffer irreparable damage when the 2nd respondent enforce its contractual right. He cited the case of ***Smile Communication Limited Vs Eaton Towers Uganda Limited Misc. Appl No. 791 of 2016*** where
15 court held that; "...an injunction should not be granted where indebtedness is admitted".

In rejoinder, surprisingly, Counsel for the applicant concentrated his submission on the oral contract and the facility from the European Investment Bank. He did not respond to the submissions of Counsel for the respondent.

***Issue Three: Whether the balance of convince, in case of doubt in resolution of the
20 above two issues, is in favor of the applicant.***

The applicant states in paragraph (h) of the Chamber Summons that the probability of success in the main suit is high and the balance of convenience is in favour of the applicant. This is reiterated in paragraph 16 of the affidavit in support of Vinay P. Rangani, a Director of the applicant company.

25 In reply, in paragraph 32 of the affidavit in reply Pious Olaki states that the balance of convenience is in favour of the 2nd respondent as the applicant obtained and utilized the credit facilities from the 1st respondent. The 2nd respondent would suffer great inconvenience if the applicant is permitted, through the granting of this application, to unscrupulously avoid its contractual obligations having already obtained and utilized the credit facilities.

Counsel for the applicant submitted that the balance of convenience is in favour of the applicant as they are in physical possession of the suit lands. He further submitted that the main suit has a high probability of success.

In reply, Counsel for the respondents submitted that the 1st respondent gave the applicant loans and the applicant has since defaulted. As a mortgagee, the 2nd respondent has full legal right over the suit lands and as such, its rights should not be curtailed by the applicant. He relied on the case of *American Cyanamid Vs Ethicon Limited [1975] 2 WLR 316*.

Ruling

The applicant brings this application by way of Chamber Summons under S.33 and 38 of the Judicature Act, Cap.13 and O.41 r .1, 2 and 9 of the CPR S.1.71, for a temporary injunction restraining the respondents/defendants, their agents, servants, assignees, successors-in-title or legal representatives or other persons claiming through or under them howsoever from recalling the entire loan amount and/or commencing recovery measures against the applicant/plaintiff; that is, advertising, selling, foreclosing, occupying or in any way dealing with the mortgaged properties comprised in **FRV 605 Folio 5, Plot 2, Hoima Road and LRV 1440 Folion6, Block 733 Plots 7 and 8 Bulemezi, Kyamufumba katikamu**, until the Civil Suit No. 127 of 2017 is heard and disposed. The background to this application was briefly stated herein and I need not repeat it. The applicant raised about eight grounds in its chamber Summons support by the affidavit of Vinay P, a Director of the applicant company. The respondents oppose the application through the affidavit in reply of Pious Olaki, the Legal Manager of the 2nd respondent.

The conditions for a grant of temporary injunction were laid down in the case of *E.L.T Kiyimba Kaggwa Vs Hajji Abdu Nasser Katende* (supra) and I need not state them here. I will therefore handle each issue as first set out above.

25 Issue Number One

The gist of the applicant's contention is that the applicant and the 1st respondent entered into an oral contract under which the 1st respondent was to convert the bridge loans into development loans of European Investment Bank which the respondents breached prompting the applicant to file Civil Suit No. 127 of 2017 to challenge the alleged breach. On the other hand, the 1st respondent denies ever entering into any oral contract. The applicant does not deny obtaining

and utilizing the loan facilities from the 1st respondent. In the affidavit of Vanay P. Rangani he asserts that there was an oral contract. Counsel for the respondent in his reply, submitted that the applicant's or the documents filed in court did not provide details of the oral contract. Details as to where and with which official of the 1st respondent did the applicant's official enter the oral contract with. Counsel for the respondents relied on the case of ***Balck Pool and Fydle Aero Club Vs Balck Pool BC [1990] 1 WLR 1195 at 2012*** for the principle that the burden of proving the existence of an oral contract lay of the person claiming its existence. In the instant case Counsel argued that the applicant merely alleges the existence of an oral contract but does not provide any details say with which official of the 1st respondent the oral contract was made. According to Counsel, the applicant has not established that there was an oral contract.

In his affidavit in reply, Pious Olaki, states in paragraph 3 that the applicant approached the 1st respondent, with a request a loan facility of UGX 4,500,000,000/= and later another facility of UGX 3000,000,000/=. These facilities were offered and agreed upon on the terms among others, that they were subject to the demand nature of the advance. He states in paragraph 4 that the terms of the facility were clearly stipulated in the sanction letters, and were not issued to enable the applicant obtain loan from the European Development Bank or any third parties. This is not contraverted in the affidavit in rejoinder of Vinay P. Rangani.

It's also important to note that the applicant does not deny executing the sanction/facility letters for the loans. Under clause 9, the facilities are of a demand nature. The respondents have a right to demand payment upon default. The applicant secured the loans with among others demand promissory notes. I have perused the sanction letters and there is no mention or reference of European Investment bank leave alone a clause that loans granted by the 1st respondent were to be repaid out of the loans from European Investment Bank. The terms of the sanction letter are clear, and what is left for this court is to give effect to the clear intention of the parties.

I agree with Counsel for the respondent that this court cannot allow an oral agreement (if indeed there was one) to vary the clear terms of the facility letters. Further Counsel for the respondents submitted that an oral contract is not enforceable under **S. 10(5) of the Contracts Act 2010**. He relied on the case of ***John Kaggwa Vs Insaat Turizm & Another*** (supra) where court considered **S. 10 (5) of the Contract Act**, and held that an oral contract whose subject matter exceeded UGX 500,000/= was illegal, *null and void*. It was therefore, enforceable.

In rejoinder, Counsel for the applicant disagreed. He submitted that **S.10 (2) of the Contracts Act, 2010**, did not outlaw oral contracts. Whereas I agree with Counsel for the applicant that S.10 (2) does not outlaw oral contracts, under S. 10 (5) where the subject matter of an oral contract exceeds Uganda Shillings Five Hundred Thousand Shillings, the courts cannot enforce such contracts. The loans in the instant case involve billions of shillings. If at all there is any oral contract, the same cannot be enforced under the Contract Act, 2010.

From the outset, I stated that the purpose of a temporary injunction is to preserve the *status quo* where the applicant has demonstrated that there are serious traible issues, but should not be used as tool for escaping from one's contractual obligations. The applicant has not demonstrated the existence of serious traible issues. The loans granted to the applicant by the 1st respondent were on clear terms as set out in the facility letters which the applicant does not deny executing. The applicant admits indebtedness. In the circumstances, I find that this application is a ploy by the applicant to delay the performance of its contractual obligations. In conclusion, the applicant has failed to demonstrate that it has a *prime facie* case with probability of success. Issue number one is answered in the negative.

Issue Number Two;

The applicant states in paragraph (b) of the Chamber Summons that the applicant is the lawful and equitable owner of the suit properties and are in physical possession of the same. The affidavit in support of Vinay P. Rangani, states in paragraph 15 that the applicant stands to suffer irreparable damage if the respondents are not restrained from continuing with their breach.

In the affidavit in reply Pious Olaki, the Legal Manager of the 2nd respondent states in paragraph 30 that the 2nd respondent remains operational in Uganda and is able to meet any adjudicating of damages to the applicant. As such, the applicant's loss, if any, is compensable by an award of damages.

Counsel for the applicant submitted that the applicant is the lawful and equitable owners of the suit lands and are in physical possession of the said lands. He submitted that the applicant has filed a suit challenging the respondent's breach of the oral contract between the applicant and the respondents. He further submitted that if court does not issue a temporary injunction. The applicant stands to suffer irreparable damages.

I agree with the submissions of Counsel for the respondent that the applicant agreed to mortgage the suit lands as security for the loans. Therefore, both the applicant and its guarantors were aware of the consequence of the default which were clearly stated in the facility letters. In my view they cannot now say they will suffer loss. As a matter of fact, they don't deny receiving
5 and utilizing the loans from the 1st respondent.

I agree with the reasoning of Justice Anna Bitature Mugenyi in *Smile Communication Limited Vs Eaton Towers Uganda Limited* (supra) that where an applicant does not deny but admits indebtedness, an injunction should not issue. Besides if the applicant suffer loss, it can be atoned by way of damages (see *E.L.T Kiyimba Kaggwa Vs Haji Abdu Nesser Katende* (supra) and
10 *American Cyanamid Vs Ethicon Limited* (supra).

In the premises, the second issue is also answered in the negative.

Issue Number Three;

Having resolved the first two issues in the negative, I need not labour to consider issue number three.

15 In the result this application is dismissed with costs.

I so order

B. Kainamura

20 **Judge**

24.07.2018