THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 344 OF 2014

(ARISING FROM CIVIL SUIT NO. 234 OF 2014)

GEOFFREY KISEMBO DAVID ::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

STANDARD CHARTERED BANK UGANDA LTD ::::::::::DEFENDANT

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

RULING

The plaintiff/applicant sued the defendant/respondent for a declaration that the scheduled disciplinary hearing against the plaintiff that had been fixed for hearing on the 16th July 2014, was unlawful; the said hearing be postponed sine die until the conclusion of the criminal proceedings instituted by the defendant against the plaintiff; and for a temporary injunction so restraining the defendants, till the disposal of the main suit.

The background of this application is that the applicant had been employed by the respondent since 1st November 2010. Upon allegations of gross misconduct where initial findings indicated that the applicant had sent funds that had not been applied for to

third parties without authorization, he was placed on investigative suspension on 30th April 2014. He was later invited for a disciplinary hearing that had been scheduled to take place on the 16th July 2014.

The plaintiff/applicant then filed HCCS 234 of 2014 for the above said orders. He also filed MA 344/2014 for a temporary injunction to restrain the respondents as indicated above. A further application MA 345 of 2014 was filed for an interim order to issue accordingly. The interim order was issued on 15/07/2014 to restrain the defendant/respondent from carrying out the actions specified above, until the final disposal of the main application which is before me right now for disposal.

This is an application brought under Order 41 Rules 1, 2 and 9 of the Civil Procedure Rules, S. 98 of Civil Procedure Act and S. 33 of the Judicature Act Cap 13 for orders that:

a) A temporary injunction doth issue restraining the respondent, its disciplinary committee, staff or agents/servants from holding the disciplinary hearing against the applicant until the disposal of the main suit.

b) The costs of the application be provided for.

The grounds on which the application is premised are:

"a) That the applicant is an employee of the respondent company.

b) That on the 30th day of April 2014, the respondent wrote to the applicant a letter suspending him from duty alleging misconduct.

c) That the respondent then immediately thereafter also commenced criminal proceedings against the plaintiff.

d) That the respondent has now summoned the applicant to attend a disciplinary hearing on the 16th of July 2014 at 9.00 a.m.

e) That subjecting the applicant to internal disciplinary hearing and at the same time with criminal proceedings contravenes the established law of res subjudice and also infringes on the applicant's right to remain silent in the criminal proceedings as the internal disciplinary hearing will prejudice the criminal hearing.

f) That there is a pending suit between the applicant and the respondent vide Civil Suit No. ……. of 2014 before this Honourable court (sic).

g) The said suit has high chances of success.

h) That the applicant will suffer substantial and irreparable loss if this application is not granted.

i) That it is in the interests of justice that this application be allowed so that the status quo is maintained."

The application is supported by two affidavits of the applicant, one in support of the application dated 14th July 2014 and the other in rejoinder, dated 22nd August 2014.

The application was opposed through the affidavit of Emily Gakiza filed on 19/08/2014 who averred that the conditions required for the grant of a temporary injunction had not been fulfilled; that the main suit did not stand a likelihood of success on account of the following reasons:

a) The main suit seeks to declare a mandatory process under the law unlawful.
b) The respondent has sufficient grounds to take disciplinary action.
c) Criminal proceedings and disciplinary action by an employer are two distinct procedures and may run concurrently.
d) The claims contained in the plaint are made without merit and are made in bad faith against the respondent.

Further, that the applicant had not proved he would suffer irreparable damage, and any claim for unlawful dismissal or malicious prosecution could be atoned for by way of damages;

further that the balance of convenience favoured the respondents, and the respondent was able to compensate if the head suit is to be decided in the applicant's favour; and lastly that the nature of the respondent's business which included custody of depositors' money dictated that disciplinary action should be taken expeditiously against those suspected of involvement.

I have considered this application, the main suit, and the submissions of Counsel on either side. There is, a procedural matter, that I wish to dispose of, before going ahead with the issues herein.

It is trite that in respect of an injunction made under Order 41 rule 2, the relief sought in the main action must be for a permanent injunction in order for an applicant to seek for a temporary one, before the case is heard. (See ***Frank Nkuyahanga Vs Esso (U) Ltd HCCS 337/92).***

In the present case the plaintiff's claim as laid down in paragraph 3 of the plaint states:

> ***"The plaintiff's claim against the defendant is for declaration order that the scheduled disciplinary hearing against the plaintiff fixed for the 16th of July 2014 is unlawful, the said disciplinary hearing be postponed sine die until conclusion of criminal proceedings instituted by the defendant against the plaintiff, temporary injunction restraining the defendant its disciplinary committee, staff or agents/servants from holding***

the said disciplinary hearing until the disposal of this suit, general damages and costs of the suit."

The same is echoed in the prayers as follows;

"WHEREFORE the plaintiff prays for judgment against the defendant for;

a) Declaration that the scheduled disciplinary hearing against the plaintiff by the defendant fixed for the 16th July 2014 is unlawful.

b) Declaration order that the said disciplinary hearing be postponed sine die until the conclusion of the criminal proceedings instituted by the defendant against the plaintiff.

c) Temporary injunction be issued restraining the defendant, its servants/employee, staff/its disciplinary committee, from holding the said disciplinary hearing until the disposal of the main suit.

d) General damages.

e) Costs."

Much as I try I cannot find a prayer for a permanent injunction in the plaint. The prayer for a declaration that the scheduled disciplinary hearing against the plaintiff by the defendant fixed for the 16th July 2014 is unlawful, is for a mere declaration.

The second one that the hearing be postponed sine die until the conclusion of the criminal proceedings instituted by the defendant against the plaintiff, is also not regarded by court as a prayer or a

permanent injunction. In fact it is the same prayer as in this application for a temporary injunction.

The other prayer is for a temporary injunction mixed in the main suit.

In another decision in ***Kihara Vs Barclays Bank Ltd [2001] 2 EA 420***, quoted with approval in ***Morris and Co. Ltd Vs KCB and others (supra);*** the point was taken that the application for interlocutory injunction under Order 39 rule 2 (similar to our Order 41 rule 2) was incompetent where no relief of a permanent injunction is sought in the plaint.
I therefore find this application incompetent and dismiss it with costs.

However, in the event that I am wrong on the procedural aspect of this matter, I will turn to the substance thereof.

It is common ground that the application must succeed or fail on the test of the principles enunciated in ***Giella Vs Casmon Brown & Co. Ltd [1973] EA 358***; and ***Kiyimba Kaggwa Vs Haji Abdu Nasser Katende [1985] HCB 43.*** These principles are firstly that the applicant must show a prima facie case with a probability of success at the trial; secondly that an interlocutory injunction not normally issue unless the applicant would be otherwise exposed to an injury which could not adequately be compensated in

damages; and thirdly if the court is in doubt it should decide on a balance of convenience.

It should be remembered also that an injunction is a discretionary equitable remedy and accordingly the same may be denied even to a party who passes those technical tests if his conduct in relation to the subject matter of the suit is shown not to meet the approval of a court of equity. (***Morris and Co. Ltd Vs Kenya Commercial Bank Ltd and Others [2003] 2 EA 605 at 610)***. I must also remind myself that at the interlocutory stage the court is not called upon to decide with finality on the facts or the law and more particularly so on the basis of conflicting affidavit evidence.

On the question of whether there was a prima facie case has been established with a probability of success at the trial, Counsel for the applicant, submitted that what one had to show under No. (1) above was that there is a serious question to be tried. (See ***American Cynamide Vs Ethicon [1975] ALL ER 504***). He pointed out two questions in the main suit where he deemed serious, that is to say;

1) Whether the respondent was not in breach of the employment policy between the applicant and the respondent which provides that criminal and civil

proceedings could only come in addition to internal disciplinary sanctions.

2) The applicant's right to silence under criminal proceedings, which is not guaranteed under the disciplinary hearing, shall be infringed on if the disciplinary hearing continues before conclusions of the criminal proceedings initiated against the applicant by the respondent itself.

On the question of irreparable injury to the applicant, which would not adequately be compensated by an award of damages, Counsel submitted that if the disciplinary hearing is to take place, it would prejudice the criminal hearing already initiated by the respondent, in that the plaintiff's right of silence in the criminal proceedings will be lost since the same is not guaranteed or provided for under a disciplinary hearing. There is no amount of compensation that could be done for the loss of that right of silence.

On the third test, that if the court is in doubt on any of the above two principles, it would decide the application on the balance of convenience, Counsel contended that if the risk of doing an injustice was to make the applicant suffer then probably the balance of convenience would favour him/her and the court would most likely be inclined to grant him/her the application or a temporary injunction. He submitted that they had already ably proved the first two conditions and may not require to prove the

third condition. However, it was clear that the balance of convenience also favoured the applicant. Compared to what the respondent claimed it would lose, if the application is not granted, the applicant will lose his right of silence in the criminal proceedings as he will be required to answer questions under the disciplinary hearing, yet whatever the respondent is to lose is not comparable to the applicant's loss of his right to silence.

Counsel prayed that the temporary injunction be granted with costs.

The respondent was of a different view. On the test of prima facie case with probability of success, Counsel for the defendant submitted that at this stage all that the plaintiff needed to show by his action is that there were serious questions to be tried and the action was not frivolous or vexatious. (See ***Herbert Kabunga Traders Vs Stanbic Bank HCMA No. 159 of 2012,)***. He contended that Civil Suit No. 234 of 2014 was without merit, unfounded and did not present any serious questions to be tried and, therefore, did not stand any likelihood of success.

Counsel further contended that the main suit sought to declare a mandatory process under the law unlawful. Here he relied on Section 66 (2) of the Employment Act, 2006 which provides that:

> ***"Notwithstanding any other provision of this part, an employer shall, before reaching any decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee under subsection (1) may make."***

It is a requirement under the law that an employer accords employees alleged to have committed gross misconduct a hearing. Failure to do so attracts a penalty under Section 66(4) of the Employment Act. The respondent was therefore fully compliant with the law when it invited the applicant for a disciplinary hearing.

It is the defendant's further contention that criminal proceedings and disciplinary action by an employer are two separate processes that may run concurrently. He relied on ***Kiwanuka Vs Attorney General HCCS 562/2005*** to state that unless parties have so agreed, an employer needn't wait for the outcome of a criminal trial before he can decide the fate of an employee provided that there are reasonable/sufficient grounds for taking such action and the respondent follows due process as set out in its manual and the Employment Act. In this case, the respondent had carried out investigations which established that the applicant was responsible for theft of depositors' funds held by the respondent. It was therefore well within the law for the respondent to conduct

a disciplinary hearing albeit criminal proceedings had been instituted and were pending.

It was the respondent's further submission that contrary to the submissions by the applicant's Counsel that the respondent could not, according to Clause 5.1 (b) of the group employee responsibilities policy initiate internal disciplinary proceedings having already commenced criminal proceedings. The above clause allows the respondent to take disciplinary action and appropriate criminal means of redress concurrently. The respondent, in inviting the applicant for a disciplinary hearing, was therefore not in breach of the above policy.

On the claim that the disciplinary hearing would infringe on his right to silence in criminal proceedings which was guaranteed by Article 28 (3) and (11) of the Constitution, the respondent reiterated that criminal proceedings and disciplinary action by an employer were two distinct processes, with different standards of proof and could run concurrently. Article 28 (11) of the Constitution provided that where a person was being tried for a criminal offence, neither that person nor the spouse of that person shall be compelled to give evidence against that person. The purpose of a disciplinary hearing was not to compel the applicant to give evidence, but to afford him an opportunity to respond to all the allegations against him and as such allow the disciplinary committee to make a decision based on the evidence

before it. The scheduled disciplinary hearing was, therefore, not a threat to the applicant's right to remain silent.

Counsel further submitted that the plaint did not disclose a cause of action. He relied on Order 7 Rule 1 (e) of the Civil Procedure Rules which provides that a plaint shall contain the facts constituting the cause of action and when it arose. The Civil Procedure Rules (Order 1 Rule 11 (a) further provides that a plaint shall be rejected where it does not disclose a cause of action.

Counsel further relied on Order 7 Rule 1 (e) of the Civil Procedure Rules, Order 1 Rule 1 (a), and ***Auto Garage Vs Motokov [1971] EA 514,*** to state that by inviting the applicant for a disciplinary hearing, the respondent did not violate any of his rights but was acting in accordance with the Employment Act, 2006. Hence, the plaint did not disclose a cause of action since it is premised on preventing a legitimate internal process.

Counsel concluded that in light of the provisions of the law and the above cited cases, the head suit stood a low likelihood of success, and no prima facie case had been made out.

On the question of irreparable loss, Counsel submitted that the applicants could not suffer irreparable loss where they could establish a legitimate claim/right. In the event that the respondent is unsuccessful in the main suit, any claim for

unlawful dismissal or malicious prosecution, if at all, could be atoned by the way of damages. He relied on ***High Court Miscellaneous Application No. 804 of 2007***; ***Pan Afric Impex Vs Barclays Bank and ABSA Bank*** to state that as a matter of law, the application for a temporary injunction must not only show that it will suffer loss that is incapable of monetary compensation, but the applicant must also show that the respondent would not be able to meet such compensation as may be ordered should the applicant succeed in the main suit. In the present case the respondent remains operational in Uganda as a going concern and is a highly reputable and profitable bank, able to pay any amount of damages assessed against it by this court.

On the question of where the balance of convenience lies, Counsel contended that it lies in declining to grant the injunction. The applicant was on 30th April placed on investigative suspension and has remained on suspension albeit with full pay due to the gravity of the allegations against him. Due to the set limit on the maximum number of employees that may be hired by the respondent, the respondent is unable to recruit a replacement. As a result, the securities service operations of the respondent have been affected by the shortfall in employees. The respondent was expending money on an employee (the applicant) who was not working and who, in the circumstances, had to go through a disciplinary hearing.

Further, that the sensitive nature of the respondent's business dictated that upon a finding of misappropriation of depositors' funds, disciplinary action should be taken expeditiously against those suspected to be involved. He concluded that the applicant's prayer for a temporary injunction be denied with costs.

In his submissions in rejoinder, Counsel for the applicant reiterated his earlier submissions on the violation of the respondent's disciplinary policy; and on the applicant's right to silent being violated; and added that the fact that the respondent in their submissions made allegations of theft against the applicant added to the applicant's contention that there was a prima facie case as the applicant disputes those allegations in toto.

Counsel further stressed the point that the respondent bypassed the internal disciplinary procedures and commenced criminal proceedings against the applicant; they could not therefore go back to internal proceedings. Further, that the Employment Act 2006, is not applicable to this case as it is not a dismissal.

I have considered evidence and the rival submission of Counsel on either side.

With regard to the first test, whether there is a prima facie case with a possibility of success, drawing from ***Kiyimba Kaggwa Vs Kasedde [1985] HCB 43***, it has now been settled that a more realistic approach is to determine whether there is a serious question to be tried, otherwise court would risk having to resolve, at this stage, issues that require evidence.

In this application and in the main suit the applicant is challenging the validity of the disciplinary proceedings being instituted while the criminal proceedings are ongoing although in his submissions in rejoinder Counsel seems to intimate that once the respondent bypassed the internal disciplinary proceedings and commenced criminal proceedings against the applicant, the respondent could not go back to internal proceeds. I find the latter not supported by the plaint. He also raises the point that the applicant's right to silence in the criminal case would be affected/injured if the respondent is allowed to proceed as he wished to do.

I have looked at the clause relied on by the applicant in the above respect, that is to say, Clause 5.1 (b) of the Group Employee Responsibilities Policy. It provides as follows:

> ***"Staff must be aware that zero tolerance will apply to cases of staff fraud which the group finds to be proven after investigation. Fraud and attempted fraud constitute gross misconduct which will lead to summary dismissal. In addition to internal disciplinary sanctions and obligations to external***

regulators, the group may also pursue the most appropriate civil and criminal means of redress."

This issue would not require evidence as it is only a question of interpretation of the clause.

I find this to be a novel claim in such proceedings. However, in my interpretation of the above clause, I tend to agree with the Counsel for the respondent that the clause does not prevent the respondent from taking disciplinary action and criminal redress concurrently or one after the other, whichever appropriate way the respondent would wish to handle the matter. I, therefore, find that the respondent did not breach the above policy by instituting disciplinary action while criminal proceedings were in progress.

Since I have found that the respondent did not breach the above stated policy, I don't see how and why the applicant should mix the procedure in the criminal proceedings with the one in the disciplinary hearing. The two proceedings/hearings are distinct and prosecuted by different entities. Be that as it may, if the respondent had done the right thing in the eyes of the applicant and started with disciplinary proceedings, the applicant would still be required to defend himself against the allegations against him which same allegations would form the basis of the criminal case. Where then would the applicant base his claim to the right to silence being violated?

In any case, I am not convinced that the alleged right to silence would be a serious question since I have found that the respondent did not breach the policy as alleged by the applicant.

The second question for determination is whether the applicant is likely to suffer irreparable harm, which cannot be compensated in damages.

The applicant is in the main suit seeking to have the declaration that the institution of the disciplinary action against him was unlawful. I have already found otherwise I don't see the need to dwell on this as I don't think the applicant is likely to suffer any injury as a result of denial of a temporary injunction. In any case if there was to be need for compensation for unlawful dismissal or malicious prosecution, the respondent being a sound highly reputable financial institution would be equal to the task.

I find that the applicant has not proved that there he will suffer irreparable injury which cannot be compensated for in damages.

If I were required to determine the question of the balance of convenience, my view is that it tilts in favour of the respondent. In the private sector, it is in the interest of the market economy

that contractual relations are regulated by the contracts which brought them into existence, or the relevant statutes.

The banking sector is a very sensitive one which should not be unnecessarily burdened with injunctions, where there are no strong grounds for so doing. Granting a temporary injunction in this respect would mean leaving the applicant on the payroll of the respondent (albeit on half pay) for as long as the main suit is not disposed of, which may be years.

In conclusion, I do hereby hold that this is not an appropriate case which the court would grant a temporary injunction to restrain the defendant from commencing disciplinary proceedings against the applicant pending the hearing of the main suit. At this stage, I would agree with the respondent's Counsel that the applicant's remedy, if successful, would lie in damages.

I hereby dismiss the applicant's application with costs to the respondent. The interim orders are hereby discharged.

Elizabeth Musoke
JUDGE
9/09/2014