

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS COMPANY CAUSE No. 0001 OF 2018

5 **XING WANG COMPANY LIMITED APPLICANT**

VERSUS

10 **ZHENG ZUPING RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

15 The application is made seeking orders that slot machines now in possession of the respondent, located in Moyo, Maracha and Koboko be collected and taken into safe custody by the applicant. the application does not specify under what provisions of the law court is being moved to grant that order.

20 The grounds upon which it is premised as gathered from the affidavit in support are that the applicant is a private limited liability company operating Casino business in Uganda. It imported 68 slot and gaming machines into Uganda and entrusted them to its Managing Director Mr. Chen Xing who has since been operating them in the districts of Moyo (4 machines), Maracha (6 machines) and Koboko (58 machines). The said Managing Director having been recently forced back to his home country, the applicant now seeks to recover possession of the machines.

25 By way of an affidavit in reply sworn by a one Ropani Hellen, Casino Machine operator of Wangula (U) Limited and wife of the respondent, the application is opposed principally on grounds that the machines in question do not belong to the applicant but rather to M/s Wangula (U) Limited. The applicant has never been licensed to own and operate gaming machines and has never operated its business in any of the districts where the machines in dispute are located. Instead, it is M/s Wangula (U) Limited which is licensed to operate such business and has at all
30 material time been operating the said machines in the districts mentioned. The application is ill motivated since it was preceded by unfairly causing the deportation of the respondent, out of

business rivalry between him and the applicant. It is the deponent in full possession and control of the machines on behalf of M/s Wangula (U) Limited pending the return of the respondent after renewal of his visa and regularisation of his work permit. The applicant has since secured an interim injunction order on which it now relies to harass the deponent and other employees of M/s Wangula (U) Limited, thus threatening the future of its business, hence the prayer for vacating the interim order and dismissal of the main application.

When the application came up for hearing, counsel for the applicant Mr. Henry Odama was not in court despite the fact that he had taken out the application for service, fixed for hearing today and there was proof of that fact by way of an affidavit of service. It is on that account that Mr. Ronald Onencan, counsel for the respondent was granted leave to proceed ex-parte. In his submissions, he argued that the applicant does not own the machines. They are the properties of Wangula (U) Limited and operated in three districts of Maracha, Koboko and Moyo with permits. He referred to annexure B - B16. The applicant is not licensed to operate a Casino Business. Under *The Lotteries and Gaming Act, 2016* one needs a licence and the applicant does not have any. Although the applicant claims ownership, the respondent has possession of the machines and is the true owner. The business of the respondent is independent of that of the applicant. He prayed that the interim order be vacated and the application be dismissed.

This is a most peculiar application. Not only is the law under which it is made unspecified but also it is not clear whether it is meant as a substantive or interlocutory application. It appears to me though based on the affidavits presented that there is a dispute over the ownership of a total of 68 gaming machines. A dispute over ownership of chattels cannot be determined in this manner without evidence. In light of that dispute, the application can only be considered in the manner of an application for a mandatory injunction since in essence the applicant seeks to secure custody of the items in dispute, pending resolution of the dispute over the property.

From that perspective, I have considered the decision in *Pacific Television Inc. v. 147250 Canada Ltd. (1987), 1987 2653 (BC CA), 14 B.C.L.R. (2d) 104, [1987] B.C.J. No. 1262 (C.A.)*, where an interlocutory mandatory injunction for the transfer of certain shares was sought. The action in which the application was brought sought specific performance of an alleged sale of the shares, so the injunction, if granted, would provide to the plaintiffs the remedy they sought in the

action. Observing that such orders, apart from certain exceptions, will not be granted, Justice McLachlin, as she then was, at p 108–109, listed the following exceptions;

1. Orders for the preservation of assets, the very subject matter in dispute, where to allow the adversarial process to proceed unguided would see their destruction
5 before the resolution of the dispute;
2. Where generally the processes of the court must be protected even by initiatives taken by the court itself;
3. To prevent fraud both on the court and on the adversary;
4. *Qua timet* (because he fears) injunctions under extreme circumstances to prevent
10 a real (threatened) or impending threat (though not yet commenced) of removal of the assets from the jurisdiction.

In this application, it has not been shown that failure to grant the order, poses a real danger of compromising the final determination of the question of ownership of the machines, if the parties come round to presenting that dispute to court in a proper manner. On the other hand, during the
15 hearing of the application it became apparent that such an injunction in the circumstances of this case has the potential of preventing a third party claiming ownership of the machines, M/s Wangula (U) Limited, from deriving income from the machines, yet it is licensed to operate them.

20 A temporary mandatory injunction is not a remedy that is easily granted. It is an order that is ordinarily passed in circumstances which are clear and the *prima facie* materials clearly justify a finding that the *status quo* has been altered by one of the parties to the litigation and the interests of justice demand that the *status quo ante* be restored by way of a temporary mandatory injunction. In circumstances of that nature, the essential condition is that the party claiming it
25 must be shown to have been in possession on the date of the order directing the parties to maintain the *status quo* and it must be further to shown that the party was dispossessed when the order was impending or after such an order was passed.

It may also be granted where the respondent attempts to forestall an interim or temporary
30 injunction, such as where, on receipt of notice that an interim or temporary injunction is about to

be applied for, the respondent hurries on the work in respect of which complaint is made so that when he or she receives notice of an interim or temporary injunction it is completed. Court should be careful though not grant an injunction that will have the effect of virtually deciding the suit without a trial (see *Cayne v. Global Natural Resources PLC [1984] 1 All ER 225*).

5

Grant of an interlocutory mandatory injunction is in the discretion of the Court, taking into consideration the facts and circumstances of a particular case and more specifically the extent of injury or inconvenience caused to the applicant by the conduct of the respondent and the extent of injury or hardship that will be caused to the respondent by the grant. It is always open to the Court to grant an alternative remedy such as security for costs or damages instead of a mandatory interlocutory injunction. The question for consideration is, whether it also applies to cases of this nature, whether on principle or of any authority.

10

In *Nottingham Building Society v. Eurodynamics Systems plc, [1993] FSR 468*, Chadwick J laid down tests for the granting of mandatory interlocutory injunctions, thus;

15

In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be ‘wrong’.....Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the *status quo*. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.

20

25

30

The other factor that is relevant is the extent to which the determination of the application at an interlocutory stage will amount to a final determination of the rights and obligations of the parties. That point was addressed in *NWL Limited v. Woods [1979] WLR 1294*. Lord Diplock

35

said there that cases where the grant or refusal of an injunction at the interlocutory stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, were exceptional “but when they do occur they bring into the balance of convenience an important additional element.” He concluded:

5 Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm which will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an
10 injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Court is also required to demand a heightened level of proof. In *Morris v. Redland Bricks Ltd*,
15 [1970] AC 652, [1969] 2 WLR 1437, [1969] 2 All ER 576, Lord Upjohn held that the requirement of proof is greater for a party seeking a *quia timet* injunction than otherwise. He said: “A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave danger will accrue to him in the future.” As Lord Dunedin said in 1919 it is not sufficient to say “*timeo*” (see *Attorney-General for the Dominion of Canada*
20 *v. Ritchie Contracting and Supply Co Ltd* [1919] AC 999). “It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly” and that “[T]he court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.” The applicant must therefore not only aver but must also prove that
25 what is going on is calculated to infringe his or her rights.

Bearing those principles in mind, it is necessary to determine whether in the case at hand, the court is justified in granting this remedy. Mandatory injunctions are ordinarily remedies in finality. The question before this court is whether in strictness a mandatory injunction can
30 properly be made. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the *status quo* and not granted to establish a new state of things, differing from the state which existed at the date when the suit was instituted.

Injunctions are a form of equitable relief and they have to be adjusted in aid of equity and justice to suit the facts of each particular case. Where appropriate, the Court may resort to its inherent jurisdiction to grant a mandatory injunction. However, because of the potential for practically prejudging the suit, and there may be other practical inconveniences of a lesser degree, it is clear
5 that the discretion to grant it must be exercised with great caution. The grant of mandatory injunctions is at the discretion of the Court and taking into account the facts and circumstances of a particular case, more specifically any delay or laches on the part of the applicant, the extent of injury or inconvenience caused or posed to the applicant by the conduct of the respondent and the extent of injury or hardship that will be caused to the respondent by the grant, it is always
10 open to the Court to grant the interlocutory mandatory injunction or alternative relief instead.

The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result at the
15 end of the trial. If there is a serious issue to be tried and the applicant could be prejudiced by the acts or omissions of the respondent pending trial and the cross-undertaking in damages would provide the respondent with an adequate remedy if it turns out that his or her freedom of action should not have been restrained, then an injunction should ordinarily be granted (see *National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica)* [2009] 1 WLR 1405). The basic
20 principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 at page 408.

In the instant application, the respondent claims the machines belong to a third party M/s
25 Wangula (U) Limited and there is prima facie evidence that it is the named company that is operating the machines. On the other hand, the applicants claim ownership but have not advanced any evidence of this nor evidence of having been licensed to operate such machines. Considering the balance of convenience, it is plain to me that damages would not be an adequate remedy for the respondent if I did not grant the injunction, and it turns out that I should have
30 done so, yet conversely, damages would be an adequate remedy for the applicant if it transpires that the injunction should not have been granted.

I consider that the balance of justice is very much in favour of the respondent. The applicant will be incapable of compensating the respondent's disadvantages in damages, since they have not taken any step towards resolving the dispute over ownership of the machines and the period it will take for the determination of that dispute cannot be reasonably estimated. I conclude that the
5 balance of convenience is against the granting of the order. The application is accordingly dismissed and the interim order that was issued by this court on 26th April, 2018 under Miscellaneous Application No. 0031 of 2018 is hereby set aside. The costs of the application and those of the interim order are awarded to the respondent.

10 Dated at Arua this 29th day of May, 2018.

.....
Stephen Mubiru
Judge.
29th May, 2018.