

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS APPLICATION NO.162 OF 2018
(ARISING FROM CIVIL SUIT NO.110 OF 2018)

HON. MWINE MPAKA RWAMIRAMA ----- APPLICANT

VERSUS

- 1. MTN (U) LIMITED**
- 2. BANK OF UGANDA ----- RESPONDENTS**
- 3. UGANDA COMMUNICATIONS COMMISSION**

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant through his lawyers M/s. Akampumuza & Co. Advocates brought this application by way of Chambers summons against the respondents jointly and severally under Section 98 of the Civil Procedure Act, Order 41 r.2(1),(2),(5), (9) and Order 50 r.3 and Order 52 r.2 of the Civil Procedure Rules, Section 33 of the Judicature Act, for orders that;

1. A temporary injunction doth issue restraining the Respondent whether acting by themselves or through their agents, workmen, representatives or any other person deriving title from them from continuing to interfere with the Applicant's communication, phone records and data and security and his constitutionally protected rights of privacy to correspondence, communication and other property pending the disposal of the main application or until further orders of this honourable court.
2. A temporary injunction doth issue restraining the 3rd Respondent from continuing with the process of renewal and/or renewal of the 1st Respondent's License pending the disposal of the main application or until further orders of this Honourable Court.

The applicant also prayed for costs of this application. The grounds in support of this application are set out in the affidavit of Hon. Mwine Mpaka Rwamirama (the applicant herein) date 20th March 2018 which briefly states;

1. That from 6th to 14th February 2018 he was away in Malaysia Kuala Lumpur on official Parliamentary duty.
2. That on 12th February 2018 he received messages telling him that he was asking for money from people using text messages from his phone number, which money he had not solicited for.

3. That on return to Uganda on 14th February 2108 he immediately complained to the 1st respondent's shop at Victoria Mall Entebbe.
4. That the 1st respondent duplicitously and pre-emptively caused the arrest of only two of its staff for involvement into hacking, swapping and tempering with his phone records, data communications and extorting money using his name.
5. That the cheating continues even after the alleged arrests. The 1st respondent and its workers continue prying and hacking into, swapping the Applicant's mobile phone communications, abusing its status, defrauding the public, misrepresenting the Applicant as soliciting for money whereas not.

In opposition to this Application the 1st, 2nd and 3rd Respondents respectively filled affidavits in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. It is not true that the 1st respondent and its workers continue prying, hacking into or swapping the applicant's phone communications as alleged disclosure of the applicant's information occurred once in the month of February 2018.
2. The 3rd respondent has at all times and continues to effectively execute its regulatory mandate in accordance with the law and the international regulatory best practices.
3. That the 2nd Respondent is not mandated by any law in Uganda to regulate mobile telecommunication networks or operators in any way.
4. That the stoppage of the licence renewal process for the 1st respondent would seriously be prejudicial to the 1st respondent and other millions of stake holders in Uganda who depend on the 1st respondent and the government of Uganda as a recipient of Tax revenue.
5. That the balance of convenience is in favour of the 1st respondent than the applicant who has not suffered any injury which is incapable of being atoned for by an award in damages.

At the hearing of this application court advised the parties to file in written submissions which the parties complied with save the 2nd respondent had not yet filed its submissions at the time of writing this ruling.

I have considered the respective submissions however I must state that counsel for the respective parties did at some extent venture into issues and preliminary points of law that in my opinion are for consideration in the main suit and not this application for temporary injunction.

The law on granting temporary injunctions in Uganda has since been well settled in the Classic case of **E.L.T Kiyimba Kaggwa Versus Haji Abdu Nasser Katende [1985] HCB 43** where **Odoki J** (as he then was) laid down the rules for granting a temporary Injunction; thus:-

The granting of a 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.

The conditions for the grant of the interlocutory injunction are;

- i. **Firstly that, the applicant must show a prima facie case with a probability of success.**
- ii. **Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.**
- iii. **Thirdly if the Court is in doubt, it would decide an application on the balance of convenience.**

I will now consider the above principles in the determination of this application.

Ground 1. The Applicant must show a prima facie case with a probability of success.

I have had the occasion of meticulously reading the Applicant's pleadings and the respondents' replies to this application and have carefully evaluated the parties' affidavit evidence on record before arriving at my decision.

When considering this ground all that the applicant has to prove to court is whether there exists a triable issue for the court to resolve in the main suit.

I must state that it is not that every dispute between private parties that should be amenable to litigation. If it were so the court would be so laden with all forms of disputes that do not necessary necessitate the adjudication of court. It is for this reason that before the consideration of an application for temporary injunction, the applicant needs to satisfy court that there is a triable issue in the main cause.

The consideration of whether there is a triable issue is the exercise of judicial discretion.

Lord Diplock in *American Cyanamide Versus Ethicon [1975] ALLER 504* had this to say about the exercise of judicial discretion when considering establishment of a prima facie case, for which I am in agreement with;

“Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability", "a prima facie case", or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.”

In that regard, I have labored to discern from the applicant's affidavit evidence together with his pleadings as to what the real complaint is whether; it is a claim for defamation and against who, enforcement against violation of the applicant's right to privacy and/or a disguised application to stop the renewal of operational license of the 1st respondent.

Notwithstanding the aforementioned, even the applicant's complaint is in enforcement of a violation to right to privacy. It is the affidavit evidence of the Applicant at paragraph 19 in his supporting affidavit to this application that "the cheating continues even after the alleged arrests and in an uncontested story published by the Daily Monitor of 21st February 2018 at page 5 which narrated that;"

"Conmen Hack ministers' phones, two arrested. When Daily Monitor contacted MP Mpaka on his number yesterday, he did not pick the call. But the recipient at the other end sent a message on the same line asking for money. 'Sorry you are calling me but I am in a meeting. I will call you later. Meanwhile help me and get me (sic) where there is mobile money and you deposit Shs 190,000 on 0701577660. It is in the names of Mbabazi Lilian. I will refund you later if you don't have borrow for me because it is urgent. Thanks.' The message read suggesting the MP's line was still being used by the conmen."

The 1st respondent at paragraph 4 in reply denied the alleged continued hacking and prying into the applicant's phone by any of its employees and contended further that the applicant has not led any evidence to that effect.

I have considered the said publication applicant's annexure M4, and the author made no allegation that the suggested continuation was being done by the 1st respondent or its employees rather conmen, which case is under investigation and already two other men standing criminal trial before a competent court of law.

It is in my view speculative for the applicant to suggest that the 1st respondent has since continued to hack into his phone number. Further I cannot take the evidence of the said publication as true facts without the author having deponed an affidavit on oath as to the facts so alleged therein. This evidence amounts to hearsay and inadmissible per se.

It is trite law that courts of law do not make determinations on mere prepositions and suggestions but on facts.

In that regard the allegation in the said publication is as the author stated a mere suggestion that the applicant's line was still being used by conmen, unless proven otherwise. This in itself would require the investigation of court, however I find that the applicant has not shown to the satisfaction of this court that there is a continuation as alleged by the applicant necessitating the grant of the orders sought.

In respect of renewal process of licence for the 1st respondent, I labour to find the nexus between the on-going license renewal process that started sometime in 2017 and the alleged claim of the applicant about a violation of the right to privacy on account of a single isolated act on 12th February 2018 allegedly committed by the 1st respondent's employees. In these circumstances I wonder what the renewal of an operating license of a private company has to do with an alleged violation of a single person's right to privacy. It begs the question whether the circumstances of

this case, the 1st respondent in renewing its operational license will violate the Applicant's right to privacy hence, necessitating the grant of the order sought.

Having found as I have that the applicant has not shown to the satisfaction of court a continued violation of his right I find no whiff of reason as to why the process for renewal of the operating licence for the 1st respondent should be stopped by the orders sought.

In this regard at this stage the law does not require Court to delve into the merits of the main suit. All that is required to be proved is that there is a serious issue which is not frivolous nor vexatious to be tried by court.

In this case the applicant's claim is in an alleged violation to his right of privacy, a right protected for by Article 27(2) of the 1995 Uganda constitution, this in itself raises a serious issue requiring court to investigate and make a determination.

However in **Kiyimba Kagwa (supra)** the purpose for granting a temporary injunction is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of.

The status quo in this case as alluded to in submissions of the respective parties is that the applicant is still a subscriber of the 1st respondent receiving telecommunication services together with other millions of both Ugandan and international customers and the 1st respondent is in the process of renewing its operational license due 21st October 2018. Counsel for the applicant further submitted that the applicant has since had his names and records for now in his control despite the threats of repetition.

I find this submission of counsel having no basis and speculative having determined above that the applicant has not to the satisfaction of this court shown a continuation of the alleged prying and hacking into the applicant's personal communications and data as alleged in his supporting affidavit.

Further, I do agree with submissions for both the 1st and 3rd respondent that there is no status quo to preserve in the present case, given that the hacking prying and swapping of the applicants phone communications and number allegedly happened once sometime between 6th and 14th February two months ago. This means that the only likely issue for court to determine in the main trial is whether for the limited period from 6th to 14th February 2018, there was any actionable breach attributable to any of the respondents.

In this regard, in as much as the applicant has a serious/triable issue I find no merit in the facts and circumstances to grant the orders sought in this application.

In the result ground one is resolved in the negative for the applicant.

Ground 2: That the applicant will suffer irreparable injury which cannot be atoned for by award of damages.

Court in **Kiyimba Kaggwa Vs. Hajji Abdu Nasser Katende (supra)**, observed that irreparable injury does not mean that there must not be physical possibility of repairing the injury but means that the injury must be a substantial or material one that is one that cannot be adequately compensated for in damages.

Counsel for the Applicant submitted that the applicant has in paragraphs 35, 36, 37 and 38 shown that he will suffer irreparable injury and damage to his seat as a Member of Parliament which is his source of livelihood unless the 1st and 3rd respondent are restrained. Counsel submitted further that the restraint against renewal of the License will atone to the Applicant's reputational damages as it will have halted the artifice that is being used to occasion the mischief and injury complained of.

In opposition, Counsels for both the 1st and 3rd respondent respectively submitted and contended that there is no proof provided by the applicant to show that the nature of loss or damage the applicant has suffered or likely to suffer cannot be adequately atoned for in monetary terms. Further that the whatever loss or inconvenience the applicant has suffered as a result of the actions or omissions of the Respondents can be adequately compensated in damages recoverable if the main suit were resolved in his favour after trial.

Lord Diplock in **American Cynamid (supra)** laid down the determining test when he held that;

“the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared at that stage.”

In applying this test I find it rather peculiar that the applicant would find it adequate in damages if the 1st respondent's renewal license was stopped. The 1st respondent as a private corporation covers a national wide business as well as international serving millions of people including the applicant and making quite substantial returns as alluded to in the 1st respondent's affidavit in reply paragraph 19 and 20. I find it uncharacteristic that in the eventuality that the applicant is successful at trial that an award in damages would be commensurate to the 1st and/or 3rd respondents' returns.

In this case like many before the courts of Uganda where violations of human rights have been in issue adequate compensatory awards in respect of the circumstances of each case have been made

and this case is no stranger to other before it. In find that adequate compensation by an award of damages in the eventuality would suffice was the applicant to succeed at trial. However with due respect to the applicant if the injunction was granted and he were to loss the main suit, I wonder if he would have the muscle to compensate in damages the 1st respondent for the business lost during the time the license expired till full determination of the main suit.

In the circumstances of this application, the applicant has not shown that he would suffer irreparable damage and that the respondents would not be able to meet such compensation in an award for damages if he were to succeed in the main suit.

In the result this consideration is also resolved in the negative for the applicant.

Ground 3. If the Court is in doubt, it would decide an application on the balance of convenience

It is trite law that if the Court is in doubt on any of the above two principles, it will decide the application on the balance of convenience. The term balance of convenience literally means that if the risk of doing an injustice is going to make the applicants suffer then probably the balance of convenience is favourable to him/her and the Court would most likely be inclined to grant to him/her the application for a temporary injunction.

In other words if the applicant fails to establish a prima facie case with likelihood of success, irreparable injury and need to preserve the status-quo, then he/she must show that the balance of convenience was in his favour.

Counsel for the applicant submitted that the balance of convenience is in the applicant's favour as he seeks to restrain and prohibit unconstitutional acts of the Respondents. To the contrary Counsel for the 1st and 3rd respondent respectively submitted and contended that if the injunctions were to be granted that they would have far reaching inconvenience to the Respondent and in particular millions of other customers the 1st respondent provides telecommunication services too and others who make their livelihood from the 1st respondent.

In the circumstances of this case the rights of a single private person vis-à-vis other millions of customers rights enjoying the same services of the 1st respondent as is the applicant; I find the balance of convenience in favour of the Respondents.

This ground is also resolved in the negative for the applicant.

In the result for the reasons stated herein above this application has no merit and is hereby dismissed with costs to the Respondents.

It is so ordered.

SSEKAANA MUSA
JUDGE
24/05/2018