

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS APPLICATION NO.480 OF 2018
(ARISING FROM CIVIL SUIT NO. 323 OF 2018)

ATC UGANDA LIMITED----- APPLICANT

VERSUS

KAMPALA CAPITAL CITY AUTHORITY----- RESPONDENT

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application by way of Chambers summons against the respondent under Section 37 of the Judicature Act cap 13 and Order 41 r 1, & 9 of the Civil Procedure Rules, for orders that;

- a) A temporary injunction doth issue restraining the respondent and/or, its agents, servants assignees, employees and one acting under the authority of the Respondent from attaching and detaining the Applicant's telecom masts sites, and obstructing the applicant's right of access and/ or possession of the sub-lease premises as contemplated under the various sub-lease agreements until the final determination of the main suit.
- b) Costs of the application be provided for.

The grounds in support of this application are set out in the affidavit of Lucky Turyaguma dated 17th August 2018 which briefly states;

1. That the applicant is a sub-lessee of numerous properties in Kampala and Uganda on which it maintains its masts and telecom towers for the provision of telecommunications services in Uganda.
2. That the respondent has imposed an unlawful property rates assessment on Fourteen of the applicants masts demanding UGX 292,630,090/= dating back to 2005 including penalties and interest.

3. The respondent unlawfully proceeded to attach two of the applicant's telecom masts to wit; Nsambya Hospital and Sir Apollo Kaggwa to enforce collection of the said unlawful property rates.
4. The respondent only released the attachment of the applicant's masts on condition that the applicant pays the said unlawful property rates on or before 26th August 2018 failing which the respondent threatened to attach more of the applicant's masts.
5. That the applicant, the Government and the public at large will suffer significant losses as a result of the respondent's actions if this injunction is not granted.
6. That the attachment and shut down of the applicant's masts would have the effect of compromising national security and disrupting business transactions such as voice and data calls, data movement, mobile money transactions, ATM operations, bank transfers, internet connectivity and a host of other telecommunication services dependant on the Applicant's ability to access, service and maintain its masts.
7. That the applicant suffered loss over a period of attachment as the applicant was forced to breach its telecommunications customers like MTN and Airtel as it could not guarantee that the said company's broadcasting equipment would be supplied and serviced and this led to disruption of the said telecom service providers' ability to provide telecommunication services to the public. That the respondent's unlawful conduct is tantamount to interference with the Applicant's lawful contractual relations with third parties.

In opposition to this Application the Respondent through Moses Atwine Kanuniira the Director, Physical Planning-KCCA and Robert Raikes Mugangaizi Ag Deputy Director, Revenue Collection-KCCA who filed affidavits in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. This application is premature, incompetent and that the applicant is not entitled to the reliefs sought and the application is premature since it never exhausted the remedies available under the law.
2. That by law, Local governments are entitled to levy rates on property within areas of jurisdiction.

3. That as per the Local Governments (Rating) Act of 2005, property is defined as immovable property and includes a building (Industrial and non-Industrial) or structure of any kind, but does not include a vacant site.
4. That the applicant admits that the telecommunication masts are firmly anchored onto the ground and therefore become part of the land onto which they are anchored.
5. That the applicant on numerous occasions sought for and obtained development permission of the said telecommunication masts under the Physical Planning Act.
6. That the property rates were rightly levied on the applicant given that it is the owner of the property being telecommunication towers as prescribed by the Local Governments (Rating) Act of 2005.

The second deponent of KCCA- also contended that the applicant has persistently refused to pay property rates following assessments. The outstanding rates on the applicant's telecommunications masts amounts to 351,528,406/= As a result of the refusal to pay, the country has continued to lose revenue despite the fact that the applicant continues to let out and make substantial earnings from the said telecommunication masts.

The respondent further contended that the issuance of a temporary injunction would infringe on the respondent's statutory obligations to levy and collect revenue in Kampala.

In the interest of time the respective counsel were made brief submissions and i have considered the respective submissions. The applicant was represented by *Mr Katende Sim and Mr John Bosco Mudde* whereas the respondent was represented *Ms Namusikwe Priscilla*.

The applicant's counsel submitted that there are three conditions that must be satisfied by the Applicant before a temporary injunction can be granted that is; - The applicant must show a prima facie case with a probability of success, that the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and if the court is in doubt, it would decide an application on the balance of convenience.

The legal principle upon which Court exercises its discretion to grant a temporary injunction in all actions pending determination of the main suit is now well settled as seen in the wealth of authorities.

The applicant's counsel submitted that the applicant has filed a suit with strong probability of success. There is an issue of legal interpretation and the duty of court is not whether the suit shall be successful. The duty should be to protect the rights of the parties.

The applicant further contended that if the respondent is allowed to attach properties/Masts, the applicant shall suffer irreparable loss once they attach the 14 towers. Some of the towers are Hub towers controlling over 200 sites in Kampala like the one at Nsambya, such that if it shut down it will affect the rest of the towers in Kampala and it will have a general impact to the public and security of the country. It will also affect the economy and mobile money transfers and the damage cannot be atoned for by way of damages.

The applicant's counsel further submitted that the law that the respondent is enforcing has an in-built remedy by way of penalties, therefore the delay of a few months would not affect or prejudice the applicant.

On balance of convenience it was the applicant's case that the applicant and the public at large will suffer more or will be more inconvenienced with the grant of the injunction. It will affect the applicant's property and cripple their business and it would make it impossible to continue operating pending the determination of their rights and this damage would be atoned for by way of damages.

The respondent's counsel in her submission contended that the applicant has not shown any evidence of attachment and that they have not threatened to attach any masts. The applicant has capacity to make the payment and the respondent is greatly affected by its inability to collect the property rates as provided by law.

Decision

The applicant's counsel has cited section 37 of the Judicature Act in support of this application for a temporary injunction.

The law on granting an Order of temporary injunction is set out in **section 64(c) of the Civil Procedure Act** which provides as follows;

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed-

(a)

(b)

(c) *grant a temporary injunction and in case of disobedience commit the person guilty of it to prison and order that his or her property is attached and sold.*

In applications for a temporary injunction, the Applicant is required to show that there must be a prima facie case with a probability of success of the pending suit.

The Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried. **(See American Cyanamide vs Ethicon [1975] ALL ER 504).**

A *prima facie* case with a probability of success is no more than that the Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried as was noted in **Victor Construction Works Ltd vs Uganda National Roads Authority HMA NO. 601 OF 2010**.

As to whether the suit establishes a *prima facie* case with probability of success, case law is to the effect that though the Applicant has to satisfy Court that there is merit in the case, it does not mean that one should succeed. It means there should be a triable issue, that is, an issue which raises a *prima facie* case for adjudication.

Before deciding to grant or to deny a temporary injunction, it's important to consider if there is a *prima facie* case , according to Lord Diplock in **American Cyanamid Co. v Ethicon Ltd [1975] AC 396 [407—408]**, the applicant must first satisfy court that his claim discloses a serious issue to be tried. The applicant in the affidavit in support has stated that there is a dispute as to whether the masts are supposed to pay the property rates. The dispute may indeed rotate around the interpretation of the Local Governments (Rating) Act 2005. The respondent have also confirmed that they are basing their demands for the said amounts of money on an interpretation of the same law. This there raises a serious issue of contention of whether it was done in accordance with the set procedures.

The applicant must set out a *prima facie* case in support of the right claimed by him. The must equally be satisfied that there is a *bonafide* dispute raised by the applicant, that there is an arguable case for trial which needs investigation and a decision on merits and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him.

The burden is on the applicant to satisfy the court by leading evidence or otherwise that he has a *prima facie* case in his favour. But a *prima facie case* should not be confused with a case proved to the hilt. It is no part of the Court's function at this stage to try and resolve the conflict neither of evidence nor to decide complicated questions of fact and law which call for detailed arguments and mature considerations.

It is after a *prima facie case* is made out that the court will proceed to consider other factors.

This application raises serious issue to be tried in the main cause and or a *prima facie* case.

The other cardinal consideration is whether in fact the Applicant would suffer irreparable injury or damage by the refusal to grant the Application. If the answer is in the affirmative, then Court ought to grant the order. See: **Giella Versus Cassman Brown & Co. [1973] E.A 358**. By irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or material one that is; one that cannot be adequately atoned for in damages.

It is the submission of the applicant that if the actions of the Respondent are not restrained by this Honourable Court, the Applicants will suffer irreparable loss that cannot be atoned by damages. This court is in agreement with the said submission since the attachment of the applicants masts will cause a shutdown of telecommunication and it would have the effect of compromising national security and disrupting business transactions such as voice and data movement, mobile money transactions, ATM operations, bank transfers, internet connectivity and a host of other telecommunication services dependent on the applicant's ability to access, service and maintain its masts. On the above principle, the instructive words of **Lord Diplock** in the case of **American Cynamide vs Ethicon [1975] 1ALL E.R. 504**. He states;

“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 a financial position to pay them, no Interlocutory Injunction should normally be granted...”

In **Commodity Trading Industries v Uganda Maize Trading Industries [2001 -2005] HCB 119**, it was held that this depends on the remedy sought. If damages would not be sufficient to adequately atone the injury, an injunction ought not to be refused.

The nature of loss or injury will affect a wider public including national security to the extent that there may be a breakdown in the telecommunication system. The disruption that may arise if the masts are attached can never be quantified to any specific damage and definitely it cannot be atoned for in any amount of money by way of compensation.

The damage to the applicant's person will be material and substantial and no amount of compensation can atone it. The nature of damage or injury that is likely to be suffered is non-pecuniary and cannot be quantified.

It is trite law that if the Court is in doubt on any of the above 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 Applicant suffer then probably the balance of convenience is favorable to him/her and the Court would most likely be inclined to grant to him/her the application for a Temporary Injunction.

In the case of **Victor Construction Works Ltd Versus Uganda National Roads Authority HMA NO. 601 OF 2010**. The High Court while citing the decision in **J. K. SENTONGO versus SHELL (U) LTD [1995] 111 KLR 1**; by Justice Lugayizi observed that 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.

The balance of convenience simply means that the applicant has to show that failure to grant the temporary injunction is to his greater detriment. In ***Kiyimba Kaggwa v Haji A.N Katende [1985] HCB 43*** court held that the balance of convenience lies more on the one who will suffer more if the respondent is not restrained in the activities complained of in the suit.

The applicant counsel has already submitted that the applicant will suffer irreparable harm. The applicant will be more likely to suffer if the masts are attached and this will seriously affect the business of the applicant which will intern lead to breach of its service agreements with the telecommunications customers like MTN and Airtel which will disrupt the provision of different telecommunication services.

The respondent's argument and contention that the issuance of a temporary injunction would infringe on the respondent's statutory obligations to levy and collect revenue in Uganda is not tenable since the Local Government (Rating) Act was enacted in 2005, the respondent has not been collecting revenue from the applicant and the same argument cannot be used as a ground to deny a temporary injunction.

The applicant is not refusing to pay the taxes but should only pay lawful taxes and when the court finds that they are liable to pay the tax, the law- Local Government (Rating) Act has an inbuilt remedy for inform of penalties and fines for any delay in collection of these taxes should court find that the taxes are properly levied.

The court should always be willing to extend its hand to protect a citizen who is being wronged or is being deprived of property without any authority of law or without following procedures which are fundamental and vital in nature. But at the same time, judicial proceedings cannot be used to protect or perpetuate a wrong committed by a person who approaches the court.

The court's power to grant a temporary injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of temporary injunction being equitable remedy, it is in discretion of the court and such discretion must be exercised in favour of the plaintiff or applicant only if the court is satisfied that, unless the respondent is restrained by an order of injunction, irreparable loss or damage will be caused to the plaintiff/applicant. The court grants such relief *ex debito justitiae*, i.e to meet the ends of justice. See ***Section 64 of the Civil Procedure Act***.

In the result for the reasons stated herein above this application succeeds and is allowed with costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
18th/10/2018