

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS APPLICATION NO.346 OF 2019
(ARISING FROM CIVIL SUIT NO.221 OF 2019)

- 1. GEOFFREY NTAMBIRWEKI KANDEEBE**
- 2. GRACE KYOSHABIRE**
- 3. CLAUDIUS TABULA**
- 4. ROSE NYANZI----- APPLICANTS**

VERSUS

- 1. ATC UGANDA LIMITED**
- 2. NATIONAL ENVIROMENT MANAGEMENT AUTHORITY----- RESPONDENTS**

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

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

- a) A temporary injunction doth issue restraining and/or stopping the respondent/defendant, constructing, commissioning, operating and maintaining a Telecommunication mast situated at Ben Kiwanuka Zone, Rubaga on Kibuga, Block 1 Plot 318 pending the disposal of the main suit.
- b) Provision be made for the costs of this application.

The grounds in support of this application are set out in the affidavit of GEOFFREY NTABIRWEKI KANDEEBE undated which briefly states;

1. That the applicants are residents of Ben Kiwanuka village wherein they reside with their families and young children and the 1st respondent is

constructing a highly Radio Active and hazardous Telecommunication mast approximately 10-20 meters away from the plaintiffs' residences in the residential neighbourhood wherein the applicants reside.

2. That on a balance of convenience the applicants shall be more inconvenienced than the respondent if the temporary injunction does not issue because the construction, commission and operation of telecommunication mast is highly radioactive and hazardous to human health of the applicants and their families and children.
3. That the interest of justice will be better served if the temporary injunction is granted against the 1st respondent to stop the construction, commissioning and operation of the telecommunication mast on Kibuga Block 1 Plot 318, Ben Kiwanuka zone, Rubaga.
4. That such a Telecommunication mast emits high levels of radioactive waste that has a great negative effect on the growth of Children and scientific evidence available proves that radioactive waste inter alia cause cancer.
5. That although the law requires the residents of the area as the directly affected persons to be involved in the Environmental Impact Assessment (EIA) process, the Respondent/defendants ignored and or did not consult the applicants before undertaking the construction of the Telecommunication Mast in the area.

In opposition to this Application the 1st Respondent through Lucky Turyaguma filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. Prior to the construction of the said telecommunications mast, the 1st respondent conducted an Environmental Impact Assessment and submitted the report to National Environmental Management Authority on the 22nd May 2018

2. Accordingly National Environmental Management Authority granted to the 1st respondent a certificate of approval of Environment Impact Assessment for the Ben Kiwanuka ATC trans-receiver station valid for a period of five years.
3. That on 4th April 2019, the Directorate of Physical Planning at Kampala capital City Authority approved and granted a permit to the 1st respondent to develop on Plot 318 Block 1 Rubaga for purposes of installing a telecommunication mast.
4. That the respondent also obtained other necessary permits for the development of its telecommunication mast from Civil Aviation Authority prior to erecting the telecommunications mast on the said land.
5. The 1st respondent consulted with the community members of Ben Kiwanuka Village wherein residents including; Naluwooza Immaculate, Busigye Kibira and Nassuna Ritah signed the neighbourhood consent agreements for the installation of the communication mast.
6. That National Environment Management Authority replied to the applicants complaint ' in Ben Kiwanuka Village, consultation of community members was held and five neighbours signed the neighbourhood consent agreements for the installation of the communication mast'. They clarified that the erection of the telecommunication mast was legal and satisfied all the requirements.
7. That the regulators were satisfied that the activity would not cause any such harm to the environment and the neighbourhood. The applicants have not adduced any evidence to the effect that the operation of a telecommunication mast will in anyway expose him and other applicants and their children to the alleged dangerous and hazardous radioactive contamination of their lives.

8. That the actions of the company will not in any way occasion irreparable loss on the applicant if the applicant is not granted and that in the event of any such loss, the company can ably atone for/repair the same by compensation and/ or even award of damages.
9. That if the temporary injunction is granted, it will in effect paralyze communication and operation of the networks hosted by the 1st respondent and further interrupting, disrupting and jeopardizing the security of the entire country.
10. That the 1st respondent stands to suffer loss of contracts from the telecommunication networks hosted on the telecommunication mast in question.

The applicants in their affidavit in rejoinder contended that no Environment Impact Assessment was ever conducted and the 1st respondent did not consult immediate neighbours.

The consultation papers presented were forged and backdated

In the interest of time the respective counsel were directed to file written submissions and I have considered the respective submissions. The applicant was represented by *Mr Luwum Adoch and Mr Alauterio Ntegyereze* whereas the respondent was represented *Mr Mudde John Bosco assisted by Ms. Hasifa Namulindwa*.

The applicants' counsel submitted that that EIA is mandatory before such a project is carried out. It is their contention that No environment impact assessment as required by law was ever carried out or approved by the residents and if it exists, then it is invalid as the applicants were never consulted in fact as required by law.

Further they contend that Section 19 and section 107 of National Environment Management Act and the regulations made thereunder for any developer to claim to have done EIA or study he must comply with the law.

The alleged consultation papers are forged and backdated and they do not satisfy the legal requirements. Secondly, the period of consultation was too short and therefore illegal since it did not involve the immediate or most affected persons. That there should have been a 14 days period between 18th and 19th April 2019.

The 1st respondent's counsel submitted that there is no status quo to preserve since such status quo is already overtaken by events and cannot be cured by a grant of temporary injunction.

The 1st respondent further contended there is no serious issue of law for adjudication raised in neither the applicants' submissions nor the affidavit in support of the application. The applicants' case was that *"no environmental impact assessment was carried out or approved by the respondents and if one exists, then it is invalid"*

That the 1st respondent has attached a copy of the Environmental Impact Assessment and the same was carried out, any submission to the contrary in absence of supporting evidence is therefore frivolous.

In ***American Cyanamid v Ethicon [1975] All.ER 504*** it was held that; All that is required to be proved in an application for a temporary injunction is that there is a serious issue to be tried by court and that, that issue is neither frivolous nor vexatious.

The claims and submissions by the applicants are therefore very speculative and this court would be setting a dangerous precedent that litigants can just walk to court, speculate and get temporary orders, should this court grant the application.

The respondents counsel submitted that even if the EIA report and its certificate of approval are a nullity as mandatory consultations never took place, then the correct procedure should have been applying to the Executive Director for the cancellation of the approved Environmental Impact Assessment pursuant to regulation 28 of the Environmental Impact Assessment Regulations SI No.1998 and not instituting a suit in court.

The 2nd respondent submitted that there is no prima facie case established by the applicants against the 2nd respondent and that the allegations that the telecommunications emit high levels of radioactive waste and that has negative effect on growth of children and scientific evidence also proves that the same causes cancer, however no evidence has been produced to confirm this position and therefore the same cannot be relied upon by this court. It was the respondent's assertion that the applicants' suit as filed and against the 2nd respondent is frivolous and vexatious.

Determination

The granting of a temporary injunction is an exercise of judicial discretion as was discussed in the case of **Equator International Distributors Ltd Versus Beiersdorf East Africa Ltd & Others Misc.Application No.1127 Of 2014.**

Discretionary powers are to be exercised judiciously as was noted in the case of **Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29.**

It should be noted that where there is a legal right either at law or in equity, the court has power to grant an injunction in protection of that right. Further to note, a party is entitled to apply for an injunction as soon as his legal right is invaded as was discussed in the case of **Titus Tayebwa vs Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009.**

The general considerations for the granting of a Temporary Injunction under **Order 41 Rule (2) CPR** are that;

(1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a Temporary Injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such Injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court thinks fit.

For a temporary injunction to be granted, court is guided by the following as was noted in the case of **Shiv Construction versus Endesha Enterprises Ltd Civil Appeal No.34 of 1992**

1. The Applicant must show that there is a substantial question to be investigated with chances of winning the main suit on his part;
2. The Applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and the *status quo* not maintained; and
3. The balance of convenience is in the favour of the Application.

WHETHER THERE IS A PRIMA FACIE CASE WITH A PROBABILITY OF SUCCESS

This application is grounded on facts that the 1st respondent is erecting a telecommunication mast in a residential area without an Environmental & Social Impact Assessment and consulting the plaintiffs which is illegal

Secondly that the said telecommunications masts which are being erected emit radioactive waste which is hazardous to human health of the plaintiffs, their families and residents.

The 1st respondent produced an Environmental & Social Impact Assessment which the applicants now contend the said report is a forgery and it was backdated or that the report and its certificate of approval is nullity since mandatory consultations never took place.

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 Cynamid 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.

On the issue of whether the Applicant has a *prima facie* case, court does not delve deep into the merits of the case but rather determines whether the claim is not frivolous or vexatious, to determine whether a *prima facie* case exists, courts have to inquire whether there is a serious issue to be tried at trial.

The applicants must set out a *prima facie* case in support of the right claimed by them. The court must equally be satisfied that there is a *bonafide* dispute raised by the applicants, 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.

In the present case, the plaintiffs claim is neither here nor there and the applicants/plaintiffs' case seems to be speculative without specific direction. The respondent has ably responded to the allegations raised in the application and this court does not wish to issue a temporary injunction to such a claim.

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 fails and is dismissed with no order as to costs.

It is so ordered.

SSEKAANA MUSA

JUDGE

16th/08/2019