

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

**MISCELLANEOUS APPLICATION NO. NO. 13 OF 2020
(ARISING FROM CIVIL SUIT NO.531 OF 2019)**

KAGUMAHO KAKUYO::: APPLICANT

VERSUS

SHILLA NINSIIMA::: RESPONDENT

BEFORE HON. LADY JUSTICE ESTA NAMBAYO

RULING

This application was brought by Chamber Summons under **Section 38 (1) of the Judicature Act Cap 13 and Order .41 r.2 & 9 of the Civil Procedure Rules SI 71-1**, seeking for orders of this Court that;

1. A temporary injunction issues to restrain the Respondent, her agents and any persons acting on her behalf or instructions from any attempts to enforce, recover and or commence any recovery process of a loan advanced by the Respondent to the Applicant in the sum of UGX. 78,340,200 with interest pending the final determination of civil suit No.531 of 2019.
2. Costs of this application be provided for.

The grounds of this application are contained in the affidavit in support of the application made by the Applicant but briefly they are that;

- i. The Applicant has filed a main suit against the Respondent seeking for declarations that the defendant's claim against the plaintiff for an outstanding loan of UGX 78,340,200 inclusive of interest is non founded, erroneous and illegal on account that the defendant did not have a money lending license, the defendant illegally levied an interest of 20% per



month on the principal sum of UGX 10,000,000/- lent to the Plaintiff contrary to the provisions of the Tier 4 Micro Finance Institutions and Money lenders Act, a declaration that the defendant and her agents have no right to the said sum together with interest, a declaration that the Plaintiff is neither liable nor indebted to the defendant in respect of a loan in the sum of UGX 78,340,200 together with interest, a declaration that the actions of the Uganda Police in enforcing civil disputes between private citizens are illegal and a breach of freedom of contract, an order of permanent injunction restraining the defendant from any attempts to enforce or to recover a loan sum of UGX 78,340,200 together with interest or commencing any recovery process for the same from the plaintiff, General damages and costs of the suit

- ii. Despite the various payments made by the plaintiff to the defendant, the defendant has continued to harass the plaintiff using frivolous criminal charges levied by Jinja Rd Police Station and threats of arrest for purposes of exerting pressure on the plaintiff
- iii. The Jinja Rd Police station has on several instances attempted to arrest the plaintiff on the basis of the said loan yet the Defendant is not entitled to recover any interest without a valid money lending license
- iv. If the Temporary Injunction restraining the Respondent from any attempts to enforce or recover a loan of ugs. 78,340,200 together with interest is not granted, the applicant's suit will be rendered nugatory
- v. The suit has a reasonable likelihood of success
- vi. The applicant will suffer irreparable damage if the orders sought are not granted
- vii. It is just and equitable and in the interest of justice that the applicant be granted the orders sought

The application is supported by the affidavit of the Applicant.

The Respondent filed her affidavit in reply opposing the application. There is also an affidavit in rejoinder by the Applicant.

The brief background of this case is that the Applicant obtained a loan facility from the Respondent sometime in 2016. Some cash payments have since been made to the Respondent amounting to 24,960,000/-. Along the way the Applicant issued postdated cheques in favor of the Respondent. The cheques were dishonored forcing the Respondent to report the matter to Jinja Rd Police Station. When the police started following up on the matter against the Applicant, he filed a case in this court against the Respondent seeking for several declarations as laid out herein above and hence this application.

When the matter came up for hearing on the 6th February, 2020, learned Counsel Ronald Oine, appeared for the Respondent while learned Counsel Anthony Bazira was for the Applicant. Oral submissions were made by counsel.

For the Applicant, Counsel Bazira submitted that the sum borrowed was UGX 10,000,000/= but it rose to UGX 42,340,200 and then UGX 78,340,200/= due to an illegal interest rate of 20% per month that was charged by the Respondent and yet she has no money lending license to transact the business of money lending. Throughout her affidavit in reply, the Respondent does not state that she has a money lenders license much as she makes reference to **annexure 'B'** under **paragraph 13 of the affidavit** in reply to purport that there was an agreement for the loan advance. Counsel contended that the said sum referred to under **annexure 'B'**, is inclusive of the principal sum that was lent to the Applicant in the sum of UGX 10,000,000/=. This rose to UGX 78,340,000/= due to the accruing interest as seen under **paragraphs 7(a) and (b)** of the affidavit in support. Counsel Bazira went on to explain that much as the Respondent claims to have given a friendly loan to the Applicant amounting to

the disputed figure of 78,340,200, she does not state anywhere in her affidavit in reply that she has an agreement with the Applicant for the said sum.

Counsel submitted that in arguing a case for temporary injunction a party does not delve more into the merits of the case but only shows that there are triable issues. He relied on the case of *Giella Vs Casman Brown & Co. Ltd CA No.51 of 1972* and explained that in this case the triable issues are the money lending license which was not contested by the Respondent in her affidavit in reply.

In reply, Counsel Ronald Oine opposed the application submitting that it is important for this Court to look at the substance of the application. The order sought to restrain the Respondent from any attempts to enforce or recover a loan advanced to the Respondent is very strange in the sense that if this Court was to grant such an order, it would even stop the Respondent from filing a Written Statement of Defence or Counterclaim. Under Contract law, the Respondent has a right to enforce her contractual entitlement or right arising out of the contractual dealing with the Applicant and search rights are not injunctable.

In this application, the Applicant wants to use this Court to stop the Uganda Police from entertaining any charges against him in respect of the false cheques. Counsel referred this Court to **paragraph 4 and annexure "A"** of the affidavit in reply. Mr. Oine explained that when you issue a false cheque it attracts a penal sanction because it is a criminal offence. He referred to paragraph 9 of the plaint and pointed out that there is even no police reference number cited. No evidence was laid to this court as to why the Applicant issued cheques totaling to UGX 61,340,400/= and when presented for payment, they were dishonored. The dishonor of these cheques created penal consequences against the Applicant and he cannot run away without giving an answer. Counsel conceded to the case of *Giella Vs Casman Brown & Co. Ltd (supra)* as cited by his colleague in respect to the principles considered by Courts in granting Temporary injunction

and submitted that no evidence has been adduced by the Applicant to show that the Respondent is in the business of money lending. On the contrary, the Respondent has sworn evidence which was not rebutted that she only extended a friendly loan to the Applicant. There is no law prohibiting a party from extending a friendly loan to another. The Applicant refused to discuss issues of cheques which also constitutes another cause of action since it is a bill of exchange as seen in the case of *Sembule Investments Ltd vs Uganda Baati Ltd MA No.664 of 2009*. Counsel prayed that this application be dismissed with costs.

I have studied the pleadings, the evidence presented and the submissions made by Counsel for the parties.

Section 38 (1) of the Judicature Act Cap 13 empowers this Court to grant an injunction to restrain any person from doing any act as may be specified by this court. It provides that the High Court shall have powers to grant an injunction to restrain any person from doing any act as may be specified by the High Court.

Granting a temporary injunction is an exercise of Judicial Discretion and the purpose of granting it is to preserve matters in status quo until the question to be investigated in the suit can finally be disposed of; see *Kiyimba-Kaggwa –v- Hajji Katende AbduNasser civil suit No 2109 of 1984*

Hon. Justice Benjamin Odoki (as he then was) went on to lay out conditions for granting the temporary injunction in the Kiyimba- Kagwa (supra) case as;

1. *The applicant must show a Prima facie case-with a probability of success*

2. *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.*
3. *If the court is in doubt, it will decide the application on the balance of convenience.*

A Prima facie case is a case in which there is evidence which will suffice to support the allegations made in it and which will stand unless there is evidence to rebut the allegation. (*Osborn's concise law dictionary, 12th edition*)

In American Cyanamid –v- Ethicon [1975] I ALLER 504; Lord Diplock pointed out that to prove a prima facie case court must be satisfied that the case is not frivolous or vexatious and that there is a serious question to be tried in the main case (emphasis is mine).

In Imelda G. Basudde Nalongo v Tereza Mwewulizi and Anor HCMA No 402 of 2003; Kibuuka Musoke J held that;

“What is normally meant by a prima facie case is that the evidence placed before the court, by way of affidavit or otherwise, in the application for the injunction must show that there exists a genuine triable issue in the main suit pending between the parties. The court must be satisfied that the dispute presented in the main or head suit is not a sham but a genuine dispute and that the applicant has probabilities of succeeding in the main suit”.

In this application before me, the Applicant claims that the Respondent lent him 10,000,000/- at an interest rate of 20% per month and yet she had no money lending license to transact the business of money lending and therefore, the interest that was levied by the Respondent on servicing the loan is illegal. Counsel explained that the sum borrowed was UGX 10,000,000/= but it rose to UGX 42,340,200 and then to UGX 78,340,200/= due to the illegal interest rate.

On the other hand, the Respondent states in paragraph 2 of her affidavit in reply that the Applicant approached her for a friendly loan of UGX 78,340,200/- which she advanced to him, in cash, on terms agreed upon between the parties.

What is clear here is that the figure of UGX 78,340,200/- needs clarification whether it was a friendly loan or an amount accumulated due to levying of interest on a principle sum of 10,000,000/-

UGX 78,340,200/- is a genuinely disputed figure that raises triable issues in the main suit pending between the parties. This establishes a prima facie.

The next issue to be determined is whether the applicant will suffer irreparable injury in case this application is not granted.

Irreparable injury is defined by *Black's Law Dictionary, 9th Edition page 447* to mean damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement.

In the case of *City Council of Kampala Vs Donozio Musisi Sekyaya C.A Civil Application No.3 of 200*. Irreparable injury has been defined as loss that cannot be compensated with money. The major purpose of granting a temporary injunction is for preservation of the parties' legal rights pending litigation. The Court does not determine the legal rights at this stage but it only preserves those rights pending disposal of the main suit.

In this case, Counsel for the Applicant submitted that if the application is not granted, the Respondent shall enforce the arrest of the Applicant yet he paid the Respondent all the outstanding sum. He explained that the amount sought by the Respondent is illegal as indicated in Paragraph 8 of the affidavit in rejoinder.

In reply, Counsel for the Respondent submitted that there is no evidence presented to this court to show that the Applicant will suffer irreparable injury.

Counsel relied on the case of *Housing Finance and Anor Vs Edward Musisi Misc. App No.158 of 2010*, where the Court of Appeal stated that irreversible damage must not only be stated but it must be proved. He pointed out to this court that the Applicant has come to Court with tainted hands and prayed that the application be dismissed to enable the speedy trial of the main suit.

Paragraph 11 of the affidavit in reply states that;

"I'm informed by my lawyers Tumusiime, Kabega & Co Advocates, whose advice I verily believe to be true that criminal charges brought against the Applicant at Jinja Road Police Station are in relation to false cheques issued by him to me and are not in any way intended to harass the Applicant or to recover any interest in paragraph 3 and 4 respectively"

The above shows that there is a pending matter at Jinja Road Police Station in regard to the dishonored cheques. In **Kyagalanyi Coffee Ltd-Vs-Sтивен Tomusange CA No.9 of 2001 (Court of Appeal)** Hon. Justice Mukasa Kikonyogo (as she then was) observed that;

"The learned trial judge stated the correct position of the law relating to bounced, postdated cheques and those deposited for security. He came to a correct decision that the appellant should not have treated the case of the bounced cheque as a criminal case under S. 385 (1) (b). There was no justification for handing the matter over to the police."


In view of the above provision of the law and; considering that there is a suit pending before this Court in regard to matters arising out of dishonored cheques, should the Applicant be arrested and made to pay the required money at police as per the dishonored cheques and at the end of the trial this court finds in his favour, it is my view that he will suffer irreparable injury.

The balance of convenience favors the Applicant who has not yet paid the outstanding amount claimed by the Respondent. The status quo should be maintained pending determination of this case.

Accordingly, I grant this application with orders that the Respondent, her agents or any one acting on her behalf or instructions are hereby restrained from any attempts to enforce, recover and or commence any recovery process by whatever means of a loan facility that she advanced to the Applicant until the final determination of the main suit.

Costs of this application will stay in the cause.

I so order.



ESTA NAMBAYO

JUDGE

2/03/2020