THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA HOLDEN AT KAMPALA

(CORAM: ARACH-AMOKO, JSC (SINGLE JUSTICE)

CIVIL APPLICATION NO 11 OF 2015

(ARISING FROM CIVIL APPLICATION NO 10 OF 2015)

(ARISING FROM CIVIL APPEAL NO.3 OF 2015)

BETWEEN

MATTHEW RUKIKARE::::::::::::::::::::::::::::::APPLICANT

AND

INCAFEX LIMITED:::::::::::::::::::::::::::::::::::::RESPONDENT

(*An application for an interim injunction arising from Civil Application No. 10 of 2015 which arose from Civil Appeal No. 3 of 2015 (SC))*

RULING

The applicant instituted this application by Notice of Motion seeking for orders that:

1. **An interim Order of injunction do issue restraining the Respondent, its directors, shareholders, officers, employees and/or agents from accessing and/or receiving payment from the Government of Uganda of compensation in respect of the Respondent's ranches and property taken over by the Government of Uganda until final determination of the *Civil Application No.10 of 2015,* for a temporary injunction which is pending before this Court.**

2. **The costs of this application be provided for.**

It was brought under the provisions of **Rules 2 and 6 (2) (b) of the Judicature (Supreme Court) Rules**, hereinafter referred to for brevity as "the Rules of this Court".

Affidavits

The application is supported by an affidavit sworn by the Applicant on the 29th of April, 2015. It is opposed by an affidavit sworn on behalf of the Respondent on the 11th May, 2015 by Mr. Agaba Maguru, said to be its Company Secretary. There is an affidavit in rejoinder by the Applicant sworn on the 12th May, 2015.

Background:

From the documents on record, the dispute between the two parties is briefly whether the Applicant is the holder of 450 ordinary shares in the Respondent Company. The Respondent company refused to recognize the applicant's claim to those shares and as a result, the Applicant filed ***Companies Cause No.3 of 2004*** in the High Court. The High Court decided in the Applicant's favour. The Respondent successfully appealed to the Court of Appeal against the judgment of the High Court in December 2014.

The Applicant was dissatisfied with the decision of the Court of Appeal and on the 5th January, 2015, he filed a Notice of Appeal. On the 8th March, 2015 he filed ***Civil Appeal No.3 of 2015*** in this Court. Thereafter, on the 28th April, 2015 he filed ***Civil Application No. 10 of 2015*** for a temporary injunction to prohibit the Respondent from accessing compensation that is due from the Government of Uganda in respect of ranches confiscated from the Respondent company, pending determination of the appeal. The appeal and the application for a temporary injunction are pending before this Court.

Grounds

The application is based on the grounds that:

a) There is an ongoing dispute between the parties as to whether the Applicant is a holder of 45% shares in the Respondent company due for final determination in the appeal before this Court;

b) There is money in excess of Ug. Shs. 13 billion held by the Government of Uganda and due to be paid as compensation to the Respondent in respect of ranches that were confiscated by the Government of Uganda.

c) If the said compensation is paid to and received by the Respondent before disposal of the above appeal the Applicant will be prejudiced as he currently has no say in the decision making of the Respondent and the money will be siphoned off without his knowledge and consent as a substantial owner of shares in the Respondent. The Applicant is therefore in danger of suffering irreparable loss.

d) The Applicant filed a Notice of Appeal against the judgment of the Court of Appeal that overturned the judgment of the High Court which had allowed the Applicant's petition and given him relief.

e) The Applicant has also filed Appeal No. 3 of 2015 against the judgment of the Court of Appeal which is now pending hearing and determination and has overwhelming chances of success.

f) The Applicant has filed an application for an injunction which is pending hearing and determination by this Court but which hearing may delay due to heavy workload of this Court and render the injunction sought for nugatory.

Representation

At the hearing of this application, the Applicant was represented by Dr. Byamugisha and Mr. Didas Nkurunziza while Mr. Peter Walubiri appeared for the Respondent. The Respondent's Managing Director Mr. James Musinguzi and Mr. Agaba Maguru were also present in court.

Submissions

Mr. Nkurunziza based his submissions on the affidavits of the Applicant. He gave the background of the application from the High Court to the Court of Appeal. He submitted that the reason why the applicant seeks an injunction is that once the judgment of the High Court which had protected the Applicant's shareholding rights had been overturned by the Court of Appeal, then the Applicant became

vulnerable as he has no access to the operations or information of the Respondent. If the Respondent company is paid the compensation for its ranches before the appeal is disposed of, and if it is disposed of in favour of the Applicant, he runs a risk of finding a company with no money left or any assets.

He referred to paragraph 8 of the supporting affidavit where the Applicant deponed how the Government took over the ranches of the Respondent and that the approximate compensation due to be paid by the Government is in excess of shs. 13 billion. He submitted that the dispute is a live one, as evidenced by a copy of the Return of Allotment of shares annexed to the Notice of Motion which shows that the Applicant was a holder of 450 shares in the Respondent company. To drive this point home, he also referred to the first paragraph of the copy of a letter from the Managing Director of the Respondent, Mr. James Musinguzi, dated 16th January, 2004, to the Applicant which in his view, shows how the dispute arose and is proof of nationalization of the said ranches by Government as well. In that paragraph, the author said:

"1. That your associates; Multiple Hauliers, on whose behalf you purport to hold shares in trust are no longer investors in Incafex Limited: having pulled out their investments after Government "nationalized" Incafex Ranches."

He added that later in the letter, Mr. Musinguzi also contests the claim by the Applicant that he is a shareholder of the Respondent company.

He also referred to the second paragraph of the judgment of the High Court, where the learned trial judge said:

"In my mind, the deadlock among the shareholders of this case is all about disclosure and transparency with regard to the compensation due from the Government for the ranches of the Respondent Company which is its core business."

He submitted that in the application for injunction, the Applicant will be seeking protection from the Court so that by the time the appeal is decided, the compensation will not have been dissipated so as to leave the Respondent an empty shell.

In response to the contention by Mr. Maguru in his affidavit in reply that the Respondent has not yet applied for compensation and therefore, there is nothing for the Applicant to worry about, Mr. Nkurunziza's submission is that it is precisely what the Applicant is worried about. He does not know what is going on in the Respondent company. He knows that ranches were confiscated by Government and he also knows that compensation is due because the Government is obliged to pay for the ranches that were confiscated. That there is nothing to prevent the Respondent from applying for and accessing that compensation without the applicant's knowledge. That this danger was recognized by the High Court when it issued the interim order in Annexture "A" to the affidavit in rejoinder, prohibiting the Respondent from accessing that compensation. That the danger resurrected in light of the Court of Appeal's decision.

He submitted that the intention of the Applicant is therefore for the status quo to be maintained until the main application is heard and disposed of and thereafter, until the appeal is decided by this Court. He emphasized that the duty of the Court is not to allow an appeal, if successful, to be rendered nugatory. He relied on the decisions of this Court in ***Alcon International v New Vision Newspaper (SCCA No. 04 of 2010),*** and ***Gashumba Maniraguha v Sam Nkundiye, (SCCA NO.24 OF 2015)*** in support of his submissions.

He clarified that the status quo is that there has been no payment of the compensation by the Government and even if the money is paid, the monies should not be utilized until the matters before the Court are resolved.

He prayed that the application ought to be allowed since the Applicant has not only filed a Notice of Appeal but the appeal itself was filed in good time.

Mr. Walubiri opposed the application on the ground that there is no justification whatsoever to grant the relief sought. He began by clarifying the background regarding Annexture "A" and submitted that the said order was by consent and was necessitated because the Respondent had applied for adjournment of the hearing of the application for injunction before the High Court. That the order was very restrictive and since it lapsed on the 1st January, 2005, there has been no order to stop the Respondent from pursuing the alleged compensation.

He submitted that as deponed by Mr. Maguru in his affidavit in reply, the Respondent has not applied for compensation from Government at all; the Government has not agreed to pay any compensation to the Respondent; there is not a single letter from the Respondent to the Government about this alleged compensation; there is no pending suit against the Government for this compensation; there is no order of any court or any authority about this alleged compensation; and the whole figure of shs.13 billion has no basis since there is no valuation report.

According to Mr. Walubiri, the claim by the Applicant is therefore very very speculative and this Court would be setting a dangerous precedent that litigants can just walk to court, speculate and get orders, even from the Supreme Court.

Regarding the letter referred to by Mr. Nkurunziza, Mr. Walubiri contended that it was written eleven years ago. The ranches in question are even unknown; the defences by the Government are not indicated; and no iota of evidence is provided by the Applicant after eleven years that there is a threat of pursuing compensation and dissipating this money.

With respect to the reference to the statement in the judgment of the High Court referred to by Mr Nkurunziza, his reply is that, the judgment was luckily set aside by the Court of Appeal.

Mr. Walubiri further submitted that the authorities including the ones supplied by the Applicant are very clear, they emphasize that in order to succeed in an application of this nature, the Applicant must show to the court by evidence that there is a serious threat of execution. In the instant case, there is no evidence whatsoever that there is a serious threat:

i) To process
ii) To pay; and
iii) To dissipate the alleged compensation.

He referred to ***Hon. Theodore Ssekikubo and 3 Others vs The Attorney and Others (Constitutional Application No.04 of 2014, SC)*** at page 12, last paragraph and ***Alcon International v New Vision Newspaper (supra)*** in support of his submissions on this point.

Lastly, he submitted that the Applicant must give reasons. In ***Gashumba Maniraguha v Sam Nkundiye***, ***SCCA No.24 of 2015,*** there was evidence of the house and the threat of demolition. In the instant case, there is no evidence of the alleged shs.13 billion lying somewhere to be paid by Government.

He prayed that this application which is based on no evidence at all should be dismissed with costs to the Respondent.

Dr. Byamugisha made a brief rejoinder and submitted that it is not true that the Applicant has not provided evidence. He contended that the statement in the High Court judgment referred to cannot be ignored as Mr. Walubiri would like to, because it was derived from the evidence before the learned judge. That is why the judge directed that a special audit should be made. He submitted that in order to defeat justice, the Respondent has kept that lack of transparency by denying that the Applicant is a shareholder and by denying that there is no compensation from the Government. That is why the Applicant is applying for this order.

He submitted further that if the Respondent could consent to Annexture "A" to the affidavit in rejoinder, how is it that the money has now vanished. According to counsel, the Applicant is hiding behind the lack of knowledge of the current affairs of the company but:

i) Ranches of the Respondent were taken over, and they are not denying this; and
ii) Government has promised compensation.

Dr. Byamugisha asked why the Respondent was objecting to this application if it is not claiming any compensation.

He also prayed that the court grants the application because ranches were taken over by the Government and the Government has promised compensation. That the Applicant wants that money protected.

The principles

This Court has stated in several cases including ***Hon. Theodore Ssekikubo and 3 Others vs The Attorney and Others Constitutional (supra)*** that:

"Rule 2(2) of the Judicature Supreme Court Rules gives this Court very wide discretion to make such orders as may be necessary to achieve the ends of justice. One of the ends of justice is to preserve the right of appeal"

The rule reads:

" Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of this Court and the Court of Appeal, to make such orders as may be necessary for achieving the end of justice or to prevent abuse of the process of any such Court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any Court caused by delay."

In the same case, the Court stated further in the paragraph referred by Mr. Walubiri that the:

"Consideration for the grant of an interim order of stay of execution or interim injunction is whether there is a substantive application pending and whether there is a serious threat of execution before the hearing of the substantive application. Needless to say, there must be a Notice of Appeal."

The Court referred to ***Hwang Sung Industries Ltd (supra)*** where Okello JSC had held that:

"… for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application.

It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay."

In ***Alcon International,*** Okello JSC, restated the position, after referring to his decision in ***Hwang Sung Industries Ltd (supra)*** as follows:

"I ***stand by that statement. Upon being satisfied that the notice of appeal has been lodged in accordance with Rule 72 of the Rules of this court, it is only necessary for the court to satisfy itself, on evidence, that a substantive application is pending and that there is a serious threat to do the act complained of before the substantive application is heard and determined. Lodgment of the***

notice of appeal in accordance with rule 72 ensures the competence of the pending substantive application. There is therefore, no need to pre-empt consideration of matters of substance, necessary for the success of the substantive application.…"

The Court has also stated in the cases of ***Yakobo Sekungu and Others v Crensio Mukasa, (Civil Application No. 05 of 2013)*** and ***Guiliano Gariggio vs Claudio Casadio (Civil Application No. 03 of 2013),*** that:

"…***the granting of interim orders is meant to help parties to preserve the status quo and then have the main issues between them determined by the full Court as per the Rules."***

Consideration of the merits of the Application

In the instant application, upon perusal of the application, the affidavit in support and in reply, as well as the affidavit in rejoinder, and after a thorough consideration of the submission by counsel for both parties, it is not in dispute that the Applicant has not only filed a Notice of Appeal, but has filed the appeal itself as well as a substantive application for a temporary injunction both of which are pending before this Court. The issue of delay did not also arise.

The bone of contention is the seriousness of the threat of execution of the decree from the Court of Appeal before the determination of the substantive application and subsequently, the appeal itself.

It is clear that the dispute between the parties as to whether the applicant is a holder of 45% shares in the Respondent company is ongoing. With respect to the Applicant's counsel, however, the allegation that there is money in excess of Ug. Shillings 13 billion being held by the Government of Uganda and is due to be paid as compensation to the Respondent in respect of ranches that were confiscated by the Government of Uganda, is not supported by any evidence at all.

In paragraph 7 of his affidavit in support the Applicant deponed as follows:

"7. I do know that one of the underlying reasons why the Respondent's Managing Director, Mr. James Musinguzi refused to acknowledge me as a

shareholder in the Respondent is that the Government of Uganda took the policy decision to compensate all persons whose land was taken during the Ranch Restructuring Scheme it carried out a number of years ago and he does not wish me to be a beneficiary to that compensation.

8. In that Scheme a number of ranches belonging to the Respondent were taken over by the Government of Uganda and the compensation sum that is due to be paid to the Respondent is in excess of Ug. Shs. 13 billion."

These averments were, in my judgment, controverted by Mr. Maguru in his affidavit in reply contended in paragraphs 4 (b) to (f) where he deponed:

"(b) That I am not aware of any policy and planned payment by Government of Uganda to the Respondent that is being processed as compensation to persons whose land was taken during the Ranches Restructuring Scheme.

c) That there is no court order in favour of the Respondent company mandating the Government to make compensation to the company for land taken during the Ranches Restructuring Scheme.

d) That there is no agreement or promise by Government to pay Ug. Shs 13,000,000,000 or any other sum to the Respondent as compensation for its ranches.

e) That the Respondent company is not processing any compensation from the Government of Uganda for land taken during the Ranches Restructuring Scheme.

f) That the Applicant is being speculative when he states that there is any money to be paid into the business and that in case of any payment such money will be siphoned off and dissipated to his prejudice and all that will remain is an empty shell of a company as he does not offer any proof of this allegation."

The affidavit in rejoinder does not also assist the Applicant's case, in my view. Indeed, there is no proof of the policy decision or existence of the shs. 13 billion. There is also no indication as to when the money, if any, is to be paid to the Respondent.

This is unlike the ***Alcon*** case, for instance, where the court was satisfied on the evidence from the supporting affidavit of Mr. Enos Tumusiime that there was a serious threat that the Respondents were going to publish matters that were prejudicial to the Applicant in respect of the matters which were pending before court.

Similarly, in the case of ***Hon. Theodore Ssekikubo and 3 Others vs The Attorney and Others (supra)***, the court granted the order on the basis of the evidence that was availed to court by the applicants' affidavits that there was indeed a serious threat in that the Rt. Hon. Speaker of Parliament had ordered them to vacate their seats before determination of their substantive application which was pending before court.

I therefore agree with Mr. Walubiri that the evidence of a serious threat has not been availed to court.

In the premises, and for the reasons given above, I have no evidence upon which to base the exercise of the court's discretion to grant the order sought. I accordingly disallow the application, with costs to the Respondent.

Dated at Kampala this ……27th………day of……May……………..2015

M.S.ARACH-AMOKO

JUSTICE OF THE SUPREME COURT