THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS CAUSE NO.171 OF 2019

1. **REN PUBLISHERS LIMITED**
2. **MULTIPLEX LIMITED---------- APPLICANTS**

VERSUS

UGANDA NATIONAL BUREAU OF STANDARDS---------- RESPONDENT

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application by way of Chambers summons against the respondent under Section 6(1) of the Arbitration and Conciliation Act Cap 4, Section 33 of the Judicature Act cap 13 and Section 98 of the Civil Procedure Act, for orders that;

a) The applicants be granted an Interim measure of protection and preservation to restrain the respondent, its servants, agents or any one acting under its authority, instruction, direction, control or agency from terminating the contract between the 1st applicant and the respondent, and the sub contract executed between the 1st and 2nd Applicants with the consent of the respondent for the provision of Electronic verification services and supply of electronic tags (UNBS E-tag) by the applicants to the respondent for the verification of standards/quality and detection of counterfeit and substandard products in Uganda, until the hearing and determination of the Arbitration Cause between the Applicants and the Respondent.

b) The applicants be granted an Interim measure of protection and preservation to restrain the Respondent, its servants, agents or any one acting under its authority, instruction, direction, control or agency stopping any implementation and engagement whatsoever by the respondent with Uganda Revenue Authority and SICPA SA premised on the contract signed on the 4th April, 2019 between Uganda Revenue Authority, SICPA SA and the Respondent, in respect of provision of electronic verification of standards/quality services and detection of counterfeit and substandard products in Uganda to wit; the supply, implementation, training, support, maintenance and verification of quality services and safety solutions/digital conformity mark and/or any other related services, until the hearing and determination of the Arbitration Cause between the Applicants and the Respondent.

c) Provision be made for the costs of this application.

The grounds in support of this application are set out in the affidavit of Ronnie Nganwa, a Director of the 1st Applicant and Moses Ndege Bbosa, a Director of the 2nd Applicant dated 24th June 2019 which briefly states;

1. That on 15th August 2014 the 1st applicant and respondent signed a five year Memorandum of Understanding for the provision of electronic verification services and supply of electronic tags (UNBS E-tags) by the 1st applicant to the respondent for the verification of standards and detection of counterfeit and substandard products in Uganda.

2. On 25th May, 2016, the respondent granted a no objection to the sub contract executed between the Applicants, mandating the 2nd Applicant jointly with the 1st applicant to purchase and install specialised digital E-tag stamps printing equipment with track and trace capabilities for the implementation of the UNBS E-Tag project for the verification of standards and detection of counterfeit and substandard products in Uganda.

3. That premised on the Memorandum of Understanding, Sub Contract and the No Objection, the applicants and the respondent commenced the implementation of the UNBS E-Tag project, and have since partly performed the obligations therein by;
    a) Acquiring and constructing premises at Plot M799 Spring Road Kampala (UNBS E-tag Hub),
    b) Purchasing and importing brand new specialised digital E-tag stamps printing equipment with track and trace capabilities,
    c) Installation of a specialised centralised call centre at UNBS offices,
    d) Installation of a centralised ICT electronic verification system,
    e) Extracting and maintain a specialised code number 114 from Uganda Communications Commission,
    f) Training personnel and engaging consults from UK and Israel, and
    g) Holding consultative meetings with manufacturers.

4. That during the implementation of the contract by the applicants and the respondent, the Solicitor General on 29th September, 2017 upon the request of the respondent issued a legal opinion to the respondent stating that any contract or procurement with any other 3rd party during the subsistence of the five year Memorandum of Understanding between the 1st Applicant and the Respondent for any similar services for the verification of standards and/or quality solutions and detection of counterfeits and substandard products in Uganda, is void.

5. The respondent on 4th April, 2019 signed another similar agreement with Uganda Revenue Authority and SICPA SA for the implementation of the digital tax stamp and digital conformity stamp and assigned them services which include; the supply, implementation, training, support, maintenance and verification of quality and safety solutions, which services were already contracted to and performed by the applicants.

6. The applicants on 8th February, 2018, wrote to the respondent and referred the dispute between the applicants and the respondent to Arbitration

which was prior to the execution of the contract on 4th April 2019 between Uganda Revenue Authority, SICPA SA and the respondent.

7. The respondent on 15th February, 2018 acknowledged receipt of the reference to Arbitration but ignored the said reference and went on to sign a contract on 4th April, 2019.

8. The Memorandum of Understanding executed between the 1st Applicant and the respondent, which binds the 2nd applicant as a subcontractor approved by the respondent provided for arbitration for any dispute, upon written request for reference to Arbitration. But the respondent has since refused to concur to the reference to arbitration.

9. The applicants shall suffer irreparable injury if the respondent is not restrained from breach of the Memorandum of Understanding by implementing the electronic/digital verification standards, quality solutions and detection of counterfeit and substandard products in Uganda, through Uganda Revenue Authority.

10. That the applicants shall suffer serious financial loss and will lose all their investment in millions of United States dollars if the respondent is not restrained from breach of Memorandum of Understanding and the approved subcontract by implementing the applicants' mandate therein through Uganda Revenue Authority and SICPA SA given that the applicants' equipment was ordered specifically for the purpose of verification of standards/quality and detection of counterfeit and substandard goods in Uganda.

11. That unless an Interim order of protection is issued in favour of the applicants, they applicants who borrowed money to finance the project and has since expended money to purchase the said equipment, human resource and materials will be wound up or liquidated as they applicants will not be able to service their loans.

In opposition to this Application the Respondent through Hellen Wenene a Legal Counsel of the respondent deposed and filed an affidavit in reply wherein she vehemently opposed the grant of the orders being sought briefly stating that;

1. The contents of the affidavits were expressly denied save for the fact that on 15th August 2014, the respondent entered into a Memorandum of Understanding with the 1st applicant for a duration of five years lapsing on or about 15th August 2019.

2. That the purpose of the MOU was to provide new electronic tags (e-tags) to enable UNBS certified companies to detect goods having forged quality marks and also protect the consumers from substandard goods.

3. That on 25th May 2016, the respondent gave a No Objection to the partnership between the 1st and 2nd applicant in relation to the provision of security labels for the e-tag project. The No Objection was granted in the spirit of the implementation of Clause 7 under the obligations of the 1st applicant to enter into third party agreements for the supply of goods and services for the effective implementation of the MOU.

4. That prior to the issuance of the No Objection, the 1st applicant had executed a contract dated 18th December 2015 with the 2nd applicant conferring exclusive rights to the 2nd applicant to provide the printing services for the e-tags for the respondent's certified goods.

5. That on 23rd July 2016, the applicants executed an addendum to the subcontract wherein the 1st applicant expanded the scope of services under the MOU from only locally manufactured goods to both imports and locally manufactured and packaged goods without the consent of the respondent. The respondent contends that it has no contractual relationship with the applicant due to variation of the terms of engagement. The applicant has no claim against the respondent and its claims herein should be struck out with costs.

6. That the Order seeking interim measure of protection to restrain the Respondent from terminating the MOU and the subcontract is misconceived. The MOU was for a duration of five (5) years and lapses on 15th August 2019. The respondent has not in any way whatsoever and/ or intimated that it intends to terminate the MOU and subcontract before the expiry and no evidence has been adduced to this effect.

7. That the MOU created obligations for each party and there was no provision of exclusivity in engaging other parties. The respondent therefore retained its right and entitlement to engage another partner to provide a similar service. The order seeking an interim measure of protection to restrain the respondent from implementation and engagement with Uganda Revenue Authority and SICPA SA in respect of the provision of electronic verification of standards and detection of counterfeits and substandard products in Uganda is misconceived and should be denied. In any event, the agreement with Uganda revenue Authority and SICPA SA will be implemented after the lapse of the duration of MOU.

8. That the Solicitors General's opinion annexed to the affidavit is not binding on the respondent, a body corporate, with capacity to sue and be sued. The said opinion concludes that upon lapse of the MOU, the respondent is at liberty to partner or engage with other parties.

9. That in light of the following, if the Court is inclined to grant any interim measure of protection to restrain the respondent from engaging with any other parties, that injunction would only be valid until the lapse of the MOU on or about 15th August 2019 and not until the hearing and determination of the alleged arbitration proceedings.

10. That there is no dispute necessitating arbitration pursuant to MOU and the 1st Applicant's letter of 8th February 2018 as the respondent has not in any way breached its obligations under the MOU.

11. The application does not disclose a prima facie case with any likelihood of success and should be dismissed with costs and the applicants shall not suffer any irreparable loss which cannot be atoned to by an award of damages.

12. That the balance of convenience stands in favour of the respondent who has fulfilled all its obligations under the MOU and subcontract as opposed to the applicants who have failed to fully execute their obligations and have the e-tag project implemented before the lapse of its five (5) year period.

The applicants filed an affidavit in rejoinder contending that;

1. The memorandum of understanding between the 1st applicant and respondent was for a period of 5 years renewable by the 1st applicant and respondent.

2. That the 2nd applicant by virtue of the No objection was conferred exclusive printing rights by the respondent for the UNBS E-tag project.

3. That the memorandum of understanding was not restricted to only locally manufactured goods, on the contrary the Memorandum of Understanding expressly stated the purpose as;
   "The Purpose of this Agreement is; To enable UNBS and certified companies detect goods having forged quality marks and to protect consumers from substandard goods, by empowering them to electronically verify whether a product is original or genuine using a centralised, forgery proof, ICT-electronic tagging (e-tag) based verification system"

4. That by the respondent failing to execute its obligations/mandate under the memorandum of understanding and going ahead to execute a contract for similar services with Uganda revenue Authority and SICPA SA, during the subsistence and implementation of the Memorandum of understanding amounts to circumvention of the respondent's mandate thereunder and an

intention to terminate without following the due process and amounts to a dispute.

5. That the respondent is a statutory body established by an Act of Parliament under the ministry of Trade, Industry and Cooperatives and therefore the legal Opinion sought for by the Respondent on whether the respondent can contract similar services.

In the interest of time the applicant's counsel made some brief oral submissions while the respondent's counsel was directed to file written submissions and i have considered the respective submissions. The applicant was represented by *Mr Enoth Tumusiime and Mr Magezi Tom* whereas the respondent was represented *Mr Ssekatawa Mathias and Mr Alex Ntale*.

The applicants' counsel submitted that, this court has jurisdiction to entertain the application under section 6 of the Arbitration Act since there is an arbitration clause.

The applicant contended that there is triable issues as can seen from affidavits of the respondent Nganwa and Bbosa. They both contend that they have done everything to meet all the conditions of the memorandum of understanding but the respondent failed to meet its obligations of setting up an integrated coordination centre and failed to integrate its ICT system with that of the applicant and the 2nd applicant's E-tag printing equipment and the parties are almost coming to the close of the agreement,

The applicants were ready with everything but the respondent failed to do its part and hence the breach and the triable issue for determination during the arbitration process.

The applicants also contended that they will suffer irreparable injury. According to the affidavit of bbosa they have invested over 75,000,000,000/= (Seventy five billion shillings) and that Uganda Investment Authority had already issued an Investment Licence to the tune of 10 million dollars. The project involved importation of the equipment, training of staff and recruitment of staff to provide

that service. This type of damage is substantial and it would occasion substantial injury.

The respondent's counsel submitted that the court must be satisfied that there is a serious issue to be tried. Citing the case of ***Pan Afric Impex (U) Ltd vs Barclays Bank PLC HCMA No. 804 of 2007*** court noted that;

> "…*Ordinarily a court ought not to express itself on the merits of the case before hearing the same. Nevertheless the court must satisfy itself that the case put forth by the applicant is not vexatious or frivolous. It must disclose a serious question to be tried by the Court*…"

It was their case that MOU was signed on 15th August 2014 for a duration of five (5) and lapses on or about 15th August 2019. The said contract will lapse on or about the said date.

The MOU provides for termination by either party giving the other party six months and that the respondent has never issued the said notice. Therefore the MOU is still valid and binding on the parties. The claim that the respondent intends to terminate the MOU is frivolous and a novel attempt by the applicants to evade fulfillment of their duties and obligations under the MOU , most importantly full implementation of the e-tag project.

The respondent's counsel further contends that the MOU never gave any exclusive rights to the applicant. The applicants seek to import into the MOU a clause that was not agreed to by the parties.

The instant application is silent on how the performance of their obligations under the MOU and subcontract and engagement with URA and SICPA SA affected the applicants' full performance of their obligations under the MOU.

It was the respondent's submission that this application is vexatious and frivolous. It is a veiled attempt by the applicants to procure a renewal of the MOU having failed successfully discharge their duties and obligations to implement the e-tag project over the duration of the five (5) year period.

The respondent contends that it offered the applicants all the necessary support and diligently fulfilled its obligations as set out at page 3 of the MOU as much as practical whilst the applicants failed to full implement the e-tag project.

The claims in the supplementary Affidavit in Rejoinder that the respondent failed to set up an integrated coordination centre and integrate its IT system with that of the applicant and 2nd applicant's e-tag printing equipment is untrue. To them set up of the coordination centre was a duty of the 1st Applicant with the respondent having an oversight role. The other duties and obligations the applicants claim were not fulfilled by the respondent were dependant on the applicants' successfully implementing the e-tag project which they failed to.

The respondent further contended that the applicants have neither shown that if they succeed in the disputed arbitration, the loss they have suffered is incapable of monetary compensation nor have they proved the respondent would not be in position to meet any compensation that could be ordered as payable to them upon conclusion of the arbitration proceedings. A mere claim that the applicants procured land, invested in machinery, human resource with private funds in addition to loans is insufficient to prove that their likely loss, if any is not ascertainable and cannot accordingly be atoned for in damages.

Determination.

The principles for the grant of temporary injunction also apply to the grant of an Interim measure of protection and preservation to restrain the respondent.

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.

Order 41 rule 2 of Civil Procedure Rules provides that in any suit for restraining the defendant from committing a breach of any contract or other injury of any kind…..apply to court for a temporary injunction to restrain the defendant from committing the breach of contract or any injury complained of……

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

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 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.

In the present case the applicants contend that the respondent failed to fulfill their obligations under the MOU; the respondent failed to set up an integrated coordination centre and integrate its IT system with that of the applicant and 2nd applicant's e-tag printing equipment is untrue.

While the respondent contends that it was the duty of 1st applicant who was supposed to set up of the coordination centre with the respondent having an oversight role. The other duties and obligations the applicants claim were not fulfilled by the respondent were dependent on the applicants' successfully implementing the e-tag project which they failed to.

It appears that there are serious issues for determination between the applicants and the respondent concerning the performance and obligations of the parties under the MOU. These issues can only be determined in the main Arbitral proceedings.

The burden is on the applicants to satisfy the court by leading evidence or otherwise that they have a *prima facie* case in their favour or serious issues for trial. 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 vs 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 was submission of the applicants 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 as the damage is substantial to a tune of over

75,000,000,000/= On the above principle, we incline our submissions in the instructive words of **Lord Diplock** in the case of **American Cynamid 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…"*

The applicant has contended that the amount involved is substantial and will therefore cause them substantial injury. A sum of 75,000,000,000/= is not a small amount and any party that is to pay the same would have to dig deep in their financial pocket or public coffers as is the case for the respondent.

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

Secondly, the respondent have not made an undertaking in their affidavit that they will be able to make good this damage/loss that may be occasioned if the Arbitrator found for the applicants.

The damage to the applicants will be material and substantial and no amount of compensation can atone it.

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 applicants will suffer more than the respondent who has not shown any inconvenience that they would suffer is the injunction is granted.

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 debitio 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
5th/ 08/2019