

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS APPLICATION NO. 635 OF 2019
(ARISING OUT OF MISCELLANEOUS CAUSE NO.171 OF 2019)

UGANDA NATIONAL BUREAU OF STANDARDS-----APPLICANT

VERSUS

1. REN PUBLISHERS LIMITED

2. MULTIPLEX LIMITED----- RESPONDENTS

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

This application is brought by way of Notice of Motion against the respondent under Section 98 of the Civil Procedure Act and Order 41 rule 4 and 9, and Order 52 rule 1 of the Civil Procedure Rules for orders that;

- a) The Interim measure of Protection issued in favour of Respondents vide Misc. Cause No. 171 of 2019 on the 5th day of August 2019 be set aside, varied or discharged.

- b) The costs of the application be provided for.

The grounds in support of this application are set out in the affidavit of Hellen Wenene which briefly states;

1. The Interim measure of protection has been overtaken by events as the Memorandum of Understanding that the injunction order seeks to preserve has since expired by effluxion of time.

2. The applicant cannot be compelled to enter into another Memorandum of Understanding with the respondents.
3. The loss (if any) suffered by the respondents, as determined in the arbitration proceedings, can be adequately compensated by the award of damages.
4. The effect of the order of Interim Measure of Protection in Misc. Cause 171 of 2019 is to stop the applicant from implementing and enforcing standards, a statutory mandate under the Uganda National Bureau of Standards Act, Cap 327 as amended, and regulations made thereunder.
5. The continued operation of the order creates undue hardship for the applicant and poses a danger for the Ugandan Public because;
 - (i) The Applicant cannot effectively exercise its statutory mandate of enforcing standards as set under the Uganda National Bureau of Standards Act as Amended.
 - (ii) The Ugandan public will continue to be exposed to dangerous, harmful and substandard products (locally manufactured and imported) if the applicant continues to be prevented from participating in any quality, standards and anti-counterfeit enforcement program.
 - (iii) The Ugandan public will incur a second and separate cost of enforcement and implementation of standards, if Uganda Revenue Authority separately implements the digital tax stamps program, without the participation of the applicant.
6. It is in the interest of justice that this application be granted.

In opposition to this Application the Respondent through Ronnie Nganwa-Director of the 1st respondent deposed and filed an affidavit in reply wherein he opposed

the setting aside, varying or discharging the Interim Measure of Protection order briefly stating that;

- (1) The Memorandum of Understanding executed between the applicant and the 1st respondent under “duration” stipulates; “This agreement is deemed to have come into effect on the date of signing of this Memorandum of Understanding and shall continue in force for 5 [five] years renewable by the parties”
- (2) The respondents commenced and instituted Arbitration proceedings against the Applicant for breach of contract on the grounds that the applicant had entered into a similar agreement with Uganda Revenue Authority and SICPA regardless of the exclusive Memorandum of Understanding executed between the Applicant and the Respondents and the right of renewal stipulated in the said Memorandum of Understanding.
- (3) The Arbitral proceedings between the applicant and the Respondents are pending determination and therefore the Interim measure of protection and preservation issued by court has not been overtaken by events.
- (4) The Applicant has at all material times (prior to the execution of the Memorandum of Understanding between the applicant and respondent , and to-date) enforced its statutory mandate of verifying and detecting counterfeit goods and the purpose of the said Memorandum of Understanding is to provide a new technology, through centralised ICT based system for the verification and authentication of goods through the new electronic tag (e-tag) service.
- (5) The respondent shall suffer substantial irreparable damages and the respondents shall be exposed to insolvency proceedings by their creditors, in the event that if the interim measure of protection is varied, set aside and/ or discharged.

In the interest of time the respective counsel filed written submissions and i have considered the respective submissions. The applicant was represented by *Mr Ssekatawa Mathias and Mr Alex Ntale* whereas the respondents was represented *Mr Magezi Tom*.

The applicant's counsel submitted that, this court has jurisdiction to entertain the application under Order 41, rule 4 of the Civil Procedure Rules. He cited the case of *Robert Kavuma v Hotel International Limited* SCCA No. 8 of 1990 where the Supreme Court held that an application to set aside, vary or discharge an interlocutory injunction may be granted upon evidence of sufficient cause.

The applicant's counsel contended that the Memorandum of Understanding expired on 15th August and therefore there is no status quo to protect. Since the Interim Measure of Protection was issued to preserve the status quo of the Memorandum of Understanding between the Applicant and 1st respondent and restrain the Applicant from terminating the same. The said contract was to run for a period of five years with effect from the date of signing of the MOU.

It was counsel's submission that there is no status quo to preserve since the Memorandum of Understanding expired on 15th August 2019 and the same has been overtaken by events. Whereas the MOU allows for renewal of the same by the parties, the parties have not exercised the option to renew it and it stands the Memorandum of Understanding is no longer operational. The applicant has no intention to renew the same and as such there is sufficient cause to warrant the setting aside or discharge of the interim Measure of Protection.

The applicant's counsel further contended that the continued operation of the Interim Measure of Protection prevents the applicant from exercising its statutory mandate and poses grave danger to public health and safety. The statutory mandate of the applicant as set out under the Uganda National Bureau of Standards Act is to formulate, implement and enforce national standards for commodities to protect the public from substandard goods.

The Interim Measure of Protection granted by this court hinders the applicant from carrying out its statutory mandate of verifying compliance with standards

and detecting counterfeit goods, as it bars the applicant from engaging a service provider of electronic verification services.

The applicant needs to engage service providers of electronic verification services, which are necessary for the applicant to detect counterfeit goods and enforce compliance with national standards. In the exercise of this mandate, the applicant needs to collaborate with Uganda Revenue Authority and draw upon resources from the URA's fully-fledged customs, anti-smuggling and compliance enforcement units.

The respondents' counsel contended that Interim Measure of Protection granted by this Honourable Court cannot be set aside, varied or discharged under Order 41 rules 4 and 9 of the Civil Procedure Act. He cited section 9 of the Arbitration Act; *"...no Court shall intervene in matters governed by the Arbitration Act"* and **Babcon Uganda Limited v Mbale Resort Hotel Limited** SCCA No. 6 of 2016.

The respondents' counsel further contended that the rules under which this application is brought erroneous and therefore this court cannot intervene in an application brought under Order 41 rule 4 & 9. Section 71 of the Arbitration Act provides for rules applicable to proceedings and applications under the Arbitration Act. All applications are supposed to be by Chamber summons.

In a nutshell, respondent's counsel submitted that the Order 41 is not applicable to proceedings commenced under Section 6 of the Arbitration Act. He cited the case of **China Communications Construction Limited v Justus Kyabahwa**, Miscellaneous Application No. 692 of 2019 where *Justice Duncan Gaswaga* held that;

"...The Arbitration Act is a specific piece of legislation governing the law and procedure on arbitration as well as the resolution of disputes by way of arbitration while Civil Procedure Act is a general Act in relation to civil proceedings. The provisions of Arbitration Act must take precedence over the Civil Procedure Act and the rules made thereunder..."

He invited this court to dismiss the application with costs given that the relief sought by the Applicant under Order 41 rule 4 and yet the original application was brought under section 6 of the Arbitration Act.

The respondent's counsel further contended that the court has power to determine whether the status quo has changed or not premised on whether right to renewal under the Memorandum of Understanding. That the mandate of the court is restricted to grant of interim measures of protection pending the determination of the arbitral proceedings as provided under section 6 of the Arbitration Act.

Any application to set aside or vary or discharge the interim measure of protection is not founded under the Arbitration Act and the court has no jurisdiction.

The respondent has also argued that the applicant has not adduced any evidence to demonstrate that the Ugandan public has been exposed to dangerous, harmful and substandard products due to the interim measure of protection order granted by this honourable court.

Determination

Whether the Interim Measure of Protection granted by this Honourable Court under Section 6 of the Arbitration and Conciliation Act can be set aside, varied or discharged?

The respondent's counsel raised this issue as a preliminary point of law and it is important that this court resolves it first since it goes to the root of the application and its determination may dispose of the entire matter.

It is true that the court should not intervene in arbitration except as provided under the Arbitration Act. The philosophy is that where parties have agreed that their dispute should be resolved by arbitration the court should not intervene except and to the extent that is necessary. The two main reasons for court intervention are;

- In order to give support to the arbitral proceedings; or
- In order to put right any serious injustice.

The powers under section 6 of the Arbitration and Conciliation Act are for the purpose of arbitration proceedings and with a view to protect the interest of the parties which otherwise cannot be protected or safeguarded by the Arbitral Tribunal. Power to pass orders with respect to interim measures cannot be exercised by a Court if it would prejudice the powers vested in the Arbitrator and renders him/her incapable to resolve the dispute between the parties. See ***Deepak Mitra v District Judge, Allahabad, AIR 2000 All 9***

Section 6 of the Arbitration Act provides that;

A party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure or protection, and the court may grant that measure.

The grant of interim injunction is an act within the jurisdiction of the High Court and intended to support arbitral proceedings. The purpose of court in such application is to give binding orders to all parties as well as third parties which an Arbitrator may not have the power to give.

Section 6(2) of the Arbitration Act; provides that; Where a party applies to the court for an injunction or other interim order and arbitral tribunal has already ruled on any matter relevant to the application....

The above provisions read together with section 9, grants court powers to entertain an application for interim measure including injunction.

One important aspect to be kept in mind is that a court exercising jurisdiction under Section 6 of the Arbitration and Conciliation Act does not cease to be a Civil court merely because it exercises the power under it. The court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. When a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication. ***S.B.P & Co. v Patel Engineering Ltd & Another, 2005 (8) SCC 618: AIR 2006 SC 450***

There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for the exercise of that power, the general rules of procedure of that court would apply. See ***Arvind Constructions Co (P) Ltd v Kalinga Mining Corporation & Others*** (2007) 6 SCC 798: AIR 2007 SC 2144

This court agrees with applicant's counsel submission where no remedy is provided under the Arbitration and Conciliation Act, the applicant can invoke Section 98 of the Civil Procedure Act to seek redress under the laws that deal with similar matter. This position was postulated in ***Ajanta Pharma Limited v Attorney General and James Nangwala*** ARBITRATION CAUSE No. 11 of 2011, where court held that in instances where Arbitration and Conciliation Act does not provide a remedy to parties to an arbitration proceeding, the court could make recourse to other legislations so as to administer the ends of justice.

Therefore this court has power to recall or set aside or vary or discharge an order issued under section 6 of the Arbitration and Conciliation Act. It would be very absurd if the court vested with the powers cannot act even if the said order is causing injustice or is abused or there is non-compliance with such an order once issued or disobedience of the terms of the terms (contempt).

The general principle of interpretation of Statutes requires that in the absence of anything to the contrary in the context or otherwise, a power being given for effectuating a purpose may be exercised not only once, but as often as may be necessary for effectuating such a purpose.

This court has jurisdiction to entertain the application and the want of form or citation of provisions of the Civil Procedure rules would not render incompetent or a nullity as counsel for the respondent submitted.

Whether the Interim Measure of Protection can be varied, set aside and or discharged.

An injunction is by its very nature a coercive order, and compliance with the court order will often have adverse economic as well as personal consequences for the respondent.

Interim injunctions are invariably granted subject to later discharge. Such an application for discharge will normally be heard by the same Judge who granted the initial injunction. Some of the grounds for discharge include:

- Material non-disclosure or concealment of facts.
- Failure by the applicant to comply with the terms on which the injunction was granted.
- That the facts do not justify interim injunctive relief.
- The oppressive effect of the injunction (though this may justify a variation of its terms)
- Material change in the circumstances of the parties or in the law since the injunction was granted.
- Failure by the applicant to prosecute the substantive claim with due speed.
- That the injunction interferes with the rights of innocent third parties.

See ***Robert Kavuma v Hotel International Ltd*** SCCA No. 8 of 1990:[1993]II KALR 73

The Interim measure of protection issued in this matter was simply holding the applicant to obligations which it had voluntarily undertaken under the Memorandum of Understanding and the same as at the time of delivering the ruling was still valid and /or had not expired.

The applicant has now come to court to vary, set aside or discharge the order on grounds of undue hardship over and above that which results from having to observe the contract whose initial term of five years expired on 15th August 2019. Injunctions should not be lightly disturbed except for clear and cogent considerations in order to preserve the sanctity of the orders of court. See ***Elbow Holdings Pte Ltd v Marina Bay Sands Pte Ltd*** [2016] SGHC 90.

The circumstances under which the injunction were granted are that there was subsisting contract/ Memorandum of Understanding between the applicant and the 1st respondent. Currently, the contract Memorandum of understanding between the parties expired on 15th August 2019. It is true that the said contract was subject to renewal and this court will not delve into issues of why it has not been renewed. The fact remains that the initial contract of 5 years indeed expired.

The main question for this court establish is whether in such circumstances the interim injunction can still be justified. See **Regent Oil Co Ltd v JT Leavesley (Lichfield) Ltd** [1966] 1 WLR 1210. The applicant’s counsel has submitted that since the order of temporary Injunction was granted to stop the breach of the Memorandum of Understanding, then it has been overtaken by events because the MOU is no more.

The respondent counsel submitted that this court has no jurisdiction to determine at this material time whether the status quo has changed or not, premised on the right of renewal stipulated in the Memorandum of understanding. That the mandate of this court is restricted to the grant of interim measures of protection pending the determination of Arbitral proceeding as provided under section 6 of the Arbitration Act.

This court during the hearing of the main cause/application issued an interim injunction and one of the major considerations was the existence of valid running contract and indeed avoided getting in speculative assumptions as to what would happen after 15th August 2019.

The application to discharge the injunction may be granted if there are “sufficiently cogent grounds” which justify the order. The present application is equally premised on changed circumstances and the undue hardship to the applicant.

The order as granted by this court bars applicant from any engagement with Uganda Revenue Authority and this will cause undue financial cost on the taxpayer in that if the Uganda Revenue Authority separately implements the digital stamps program, and the applicant subsequently implements the digital conformity program for enforcement of standards and safety, the public will incur a second and separate cost of enforcement and implementation of standards, which the Government sought to avoid in the first place.

The order impedes the applicant and is likely to become a double cost to the Government of Uganda if the two state agencies implement the digital

applications differently and the Government will definitely incur more in establishing the two projects.

The Courts should be slow in granting injunction against government projects which are meant for the interest of the public at large as against the private proprietary interest or otherwise for a few individuals. Public interest is one of the paramount and relevant considerations for granting or refusing to grant or discharge of an interim injunction. There would be wastage of resources/tax payers money as a result of the existing injunction if the two projects are implemented separately. See ***Lawrence v Fen Tigers Ltd*** [2014] AC 822

The applicant has also contended that the Order as granted by this court impedes the execution of the statutory mandate of the applicant of verifying compliance with standards and detecting counterfeit goods, as it bars the applicant from engaging a service provider of electronic verification services.

The Interim Measure of Protection poses a grave danger to public health and safety as the applicant is unable to verify compliance with national standards by local manufacturers and importers of commodities. The public will be exposed to dangerous, harmful and substandard products if the applicant continues to be prevented from participating in any quality standards and anti-counterfeit enforcement program. It therefore hinders the applicant from performing its statutory obligations and duties which poses a grave danger to public health and safety.

Injunctions against public bodies can issue against a public body from acting in a way that is unlawful or abusing its statutory powers or to compel the performance of a duty created under the statute.

The courts should be reluctant to restrain the public body from doing what the law allows it to do. In such circumstances, the grant of an injunction may perpetrate breach of the law which they are mandated to uphold.

The main rationale for this is rooted in the fact that the courts cannot as matter of law grant an injunction which will have the effect of suspending the operation of

legislation. See *R v Secretary of State for Transport ex.p Factortame Ltd* [1990] 2 AC 85.

The courts should consider and take into account a wider public interest. The public bodies should not be prevented from exercising the powers conferred under the statute unless the person seeking an injunction can establish a prima facie case that the public authority is acting unlawfully. The public body is deemed to have taken the decision or adopted a measure in exercise of powers which it is meant to use for the public good.

The circumstances of the case are that the applicant wishes to engage change policy or system of detecting counterfeit goods and enforce compliance with national standards. There is need to engage service providers of electronic verification services and this cannot be done since there is an Interim Measure of Protection.

This court also notes that the respondents have not given this court a benefit of doubt by informing it about the status of the said Arbitral proceedings that had been initiated over three months ago. It is the duty of this court to ensure that the injunction is not abused by prolonged proceedings.

It is just and equitable that the interim measure of protection be discharged and the respondent shall be compensated in damages if at all the Arbitrator finds the applicant in breach of the Memorandum of Understanding.

The public interest considerations would justify the discharge of the Order made by this court since public interest should prevail over the private rights. See *Kennaway v Thompson* [1981] QB 88 at 93.

In sum and for the reasons stated herein above this application succeeds and Interim Measure of Protection/interim injunction is discharged/or set aside. The costs shall be in the cause.

It is so ordered.

SSEKAANA MUSA
JUDGE
31st / 10/2019