

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 399 OF 2021
(ARISING FROM MISC.CAUSE NO. 157 OF 2021)**

**JOWERIA MUKALAZI:..... APPLICANT
VERSUS**

BANK OF UGANDA:.....RESPONDENT

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

This is an application for a temporary injunction against the respondent restraining their officers any other person acting under the respondent's directive from implementing or otherwise effecting the directives/orders of the respondent contained in their letter dated 26th April 2021.

The applicant filed the main application (cause) seeking orders that An Order of certiorari issues against the respondent to quash the decision contained in the letter from the respondent dated 26th April 2021 to wit:

- (a) That the applicant should cease to perform the responsibilities of Executive Director Tropical Bank Limited with immediate effect.
- (b) That the Applicant's employer's employers-Tropical Bank Limited must immediately identify a suitable officer to perform the duties of Executive Director until the position is filled substantively.
- (c) That the applicant's employers are directed to appoint an Executive Director by 30th June 2021.
- (d) That the position of Executive Director must be advertised externally and subjected to a competitive interview process.

The application was supported by an affidavit sworn by the applicant Joweria Mukalazi whereas the respondent filed an affidavit in reply sworn by Hannington Wasswa-Director Commercial Banking of the respondent.

The applicant contended that she has been acting Executive Director Tropical Bank Limited since June 2020 after the suspension and later dismissal of the former Executive Director. After satisfactory performance the Bank resolved to appoint the applicant as the substantive Executive Director. That on 24th December 2020, the respondent declined to approve the appointment contrary to their earlier approval. The Bank made an appeal to the Governor Bank of Uganda seeking for a review of the decision.

The applicant was represented by *John Mike Musisi* while the respondent was represented by *Masembe Kanyerezi* and *Alex Ntale*. The parties made brief oral submissions which I have considered in this ruling.

Whether the application is time barred?

The respondent's counsel by way of preliminary objection challenged the application for being time barred. It was his contention that the decision first arose in December 2020 and time limit for filing the application was supposed to be April 2021. It was counsel's submission that the cause of action first arose in December 2020 when the bank declined to approve the applicant as the Executive Director.

The applicant's counsel argued that the decision being challenged is contained in the letter dated 26th April 2021 which is titled "Cease and Desist order in accordance with Section 82(2)(1)(a) of the Financial Institutions Act 2004". The decisions are clearly contained in that letter with detail and further orders about the position Executive Director.

Analysis

Under Rule 5 (1) of the Judicature (Judicial Review) Rules 2009 provides that;

(1) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the

application FIRST arose, unless the court considers that there is good reason for extending the period within which the application shall be made.

The earlier decision contained in the letter of 21st December 2020 merely declined the approval of the applicant. The said letter never gave any reasons for the decline of approval. The Bank made an appeal to the Governor and this is not disputed by the respondent. The fact that the applicant was exploring available alternative remedies of appeal, time could not be deemed to have started running until when the decision was finally made in April 2021.

The earlier decision in which the respondent declined to approve the applicant's name was very shallow without any reasons for the decline. After the appeal was heard and determined by the respondent, a second decision was made with further orders of "Cease and Desist" which had not been contained in the earlier decision of December 2020. This is proper date of the new cause of action which had the effect of throwing the applicant out of that office.

The application was therefore filed within time since the decision was made on 26th April 2021.

The respondent's counsel also raised the issue of the temporary injunction application as well as the main cause application being barred by law under section 124 of the Financial Institutions Act, 2004. The determination of this preliminary matter goes to the root of the application and its determination may involve evaluation of evidence in the main cause. Since the respondent has not yet been served with the main application and has not yet filed any affidavit in reply, I would decline to make any pronouncements on this point of law at this stage. The same will be determined together with the main cause.

Whether the court should issue a temporary injunction in this matter?

The applicant's counsel submitted that the applicant is challenging the decision of the respondent contained in letter dated 26th April 2021 because it is depriving the applicant of her employment and yet the grounds upon which it is premised are subject of a challenge and or where ably responded to in their response. She denied culpability and that of her partner Saudah Nsereko in witnessing a suspicious agreement which formed the basis of denying her approval to be employed as Executive Director.

It was further argued that she will suffer irreparable injury and the cease and desist order would be a termination of her employment and a bar to practice her banking profession which she has pursued for many years. It would be an injury to her career.

The balance of convenience would be favourable for her to continue in her position as Acting Executive Director by issuing a temporary injunction rather which position is supported by her employers who have approved of her excellent performance and confirmed her appointment.

The respondent's counsel submitted that the applicant will not suffer any irreparable injury since she has never served in the substantive position of Executive Director. Even if the respondent does not approve of her new appointment as Executive Director, she can still be employed in other positions.

The respondent further contended that it is not for this court to adjudicate the propriety of the decision of the statutorily mandated regulator. The power is vested in the authority or Bank of Uganda and there is no appellate process to challenge such a decision taken.

Analysis

The jurisdictional and procedural principles governing interim injunctions or temporary injunctions must be sufficiently balanced and flexible to address the objectives of these remedies.

If the court believes that there is a serious issue to be tried, it will prospectively consider the parties' respective positions according to whether an injunction is granted or refused. In doing so, the court will gauge the hardship which would be caused to the applicant if she is refused relief and balance it against the hardship which would be caused to the respondent if the injunction is granted. If neither party would be adequately compensated, the court would ascertain where the balance of justice lies.

The jurisdiction to grant a temporary injunction is an exercise of discretion and the Discretionary powers are to be exercised judiciously as was noted in the case of *Yahaya Kariisa vs Attorney General & Another, S.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 her legal right is invaded. *See Titus Tayebwa v Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009*.

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 Cyanamid Co v Ethicon Ltd [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 v Uganda National Roads Authority HCMA NO. 601of 2010.

The applicant is challenging the decision made by the applicant of declining to approve her appointment and later directing that she vacates and stops to hold the position of Executive Director of Tropical Bank Limited. The respondent approved her appointment to the position of Acting Executive Director upon suspension of the former Executive Director. Later when the employers confirmed her to the position of Executive Director, they declined and have directed that she ceases to hold the same position.

There are serious issues to be interrogated in the main application and this court is satisfied that the case for the applicant is not frivolous or vexatious under the circumstances. The court when granting temporary injunctions/interim orders should not devolve much into issues raised in the main suit at this stage. The parties should caution themselves not to discuss the merits of the main suit but rather focus on the merits of the application before court at this stage.

The whole purpose of granting an injunction is to preserve the status quo as was noted in the case of *Humphrey Nzeyi vs Bank of Uganda and Attorney General Constitutional Application No.01 of 2013*. Honourable Justice Remmy Kasule noted that an order to maintain the status quo is intended to prevent any of the parties involved in a dispute from taking any action until the matter is resolved by court. It seeks to prevent harm or preserve the existing conditions so that a party's position is not prejudiced in the meantime until a resolution by court of the issues in dispute is reached. It is the last, actual, peaceable, uncontested status which preceded the pending controversy.

The applicant is holding the position of Acting Executive Director and the respondent in issuing the "*Cease and Desist*" order does not want her to continue holding the position. This is the status quo that ought to be

preserved to avoid prejudice of rights of the applicant pending the determination of the main cause.

This court has wide discretion at this stage to consider any factor which would have a bearing on the issue whether the injunction ought to be granted. It is for the court to determine the weight to be accorded to a particular factor weighed in balance and where they appear to be balanced the court ought to consider and strive to preserve the status quo.

Other factors that may be taken into account in determining the balance of convenience include the importance in upholding the law of the land or rule of law and the duty placed on the authority to enforce the law in public interest. The actions of the respondent must be rooted in the law and any divergence and abuse of power must be restrained as the court investigates the circumstances surrounding the decision made by the public body.

The applicant has been interrupted in her employment by the '*cease and desist order*' and this is a greater inconvenience caused to her and if the temporary injunction is not issued she may lose an opportunity which may have been filled by another person (third party) since the respondent has directed that the position be filled by 30th June 2021. The balance of convenience favours the applicant as she would suffer greater loss (loss of employment) if the injunction is not granted than the respondent who may not suffer any damage if the injunction is granted.

This court in the exercise of its discretion ought to avoid any absurdity in application of the law since the damage the applicant will suffer if court in her favour. Loss suffered as a result of stopping the applicant from this employment as Executive Director will be an infringement of a constitutional right and cannot be properly atoned for through compensatory damages.

It is a well settled preposition of the law that an interim order can be granted only if the applicant will suffer irreparable injury or loss keeping in view the strength of the parties' case.

The courts when exercising power of judicial review have a duty of ensuring that the public body or officer has acted in accordance with the law or within the 'four corners' of the legislation and thus enforcing the rule of law. The court would be greatly inclined to granting interim remedies as it establishes the propriety of the decision in order not to render the application nugatory.

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 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 applicant. The court grants such relief *ex debito justitiae*, i.e to meet the ends of justice. The court must keep in mind the principles of justice and fair play and should exercise its discretion only if the ends of justice require it. See ***Section 64 of the Civil Procedure Act.***

In the result for the reasons stated herein above this application succeeds and the costs shall be in the cause.

I so Order

Ssekaana Musa

Judge

4th June 2021