THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO.1141 OF 2020

(ARISING FROM MISCELLANEOUS CAUSE NO.377 OF 2020)

VISION EMPIRE LIMITED---------- APPLICANT

VERSUS

UGANDA COMMUNICATIONS COMMISSION---------- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this application by way of Chambers summons against the respondent under Section 33, 36, 37 and 38 of the Judicature Act cap 13 and Section 98 of the Civil Procedure Act, and Order 41 r 1, & 9 of the Civil Procedure Rules, for orders that;

a) A temporary injunction be issued restraining the Respondent, its workmen, agents, servants and or its successors from allocating the licence and frequency of 104.2 MHZ to a party other than the Applicant until the main application for judicial Review is disposed of.

b) Costs be in the cause.

The grounds in support of this application are set out in the affidavit of Mr. Fred Asiimwe the applicant's Director which briefly states;

1. That the applicant obtained a licence from the respondent to operate an FM broadcasting carrier in 2010 under frequency 104.2 MHz as a repeater station based in Ibanda and thus feeding off Spectrum 89.1 which is based in Mbarara.

2. That due to the frequency of the power cuts and other technical challenges beyond the applicant's making in Ibanda, the applicant made an application to the respondent in December 2019 for change of use of the said frequency from a repeater station to an independent station and for its transfer from Ibanda to Mbarara.

3. That on the 13th March, 2020, the respondent approved the application and further required the applicant to ensure that all technical requirements are maintained at the new station in Mbarara.

4. That due to the COVID-19 pandemic, the applicant was unable to effect the transfer of equipment to the new approved location for setting up the radio station in Mbarara as the equipment had not yet arrived in the country.

5. That on 19th August, 2020, the Respondent wrote a letter to the applicant informing it of its intention to withdraw the spectrum on grounds of hoarding if the applicant did not provide satisfactory justification as to why the Respondent should not proceed with the withdrawal.

6. That the applicant replied through a letter dated 27th August, in 2020 in which the respondent was notified that the applicant had started the process of relocation to a new location which process was halted by the outbreak of COVID-19 as according to Ministry of Health COVID-19 Guidelines, travel in and around and outside the country had been restricted.

7. That the respondent irrationally and without recourse to provisions of the law decided to withdraw the applicant's frequency and spectrum without considering the adverse impact of COVID-19 had on travel and movement restriction.

In opposition to this Application the Respondent through Alfred Joseph Bogere the Head Spectrum Management filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. The applicant was supposed and required to complete the relocation from Ibanda to Mbarara and ensure that the frequency 104.2 was operationalized within a maximum period of 3 months.

2. That contrary to the clear requirement under the spectrum authorisation that was sent to the applicant on 13th March 2020, the applicant failed to relocate and operationalize its frequency within a required period and the subject radio frequency is to date not being utilised.

3. That the respondent issued a notice to show cause why the frequency should not be withdrawn on the ground of non-operation 'Hoarding'.

4. That in response to the letter dated 27th August 2020, the applicant availed reasons for the failure to heed to the timelines which the respondent found unsatisfactory.

5. That in the applicant's response to the Notice to Show Cause, the applicant did not provide any evidence in support of its claims, other than generally stating that it was prevented from completing the relocation due to COVID-19 lockdown, yet the lockdown had ended or was lifted on 2nd June 2020.

6. That the applicant does not disclose any plausible ground for the grant of temporary injunction.

In the interest of time the respective counsel were directed to file written submissions and i have considered the respective submissions. The applicant was represented by *Ms Damali Tibugwisa* whereas the respondent was represented *Mr. Sseguya Kenneth and Ms Rita Zaramba Ssekadde*.

The applicant's counsel submitted that of granting of a temporary injunction is an exercise of judicial discretion and the purpose is preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of as was discussed in the case of ***American Cyanamide v Ethicon [1975] ALL ER 504***.

Applicant's counsel further submitted that for a temporary injunction to be granted, court is guided by the following as was noted in the case of **Shiv Construction versus Endesha Enterprises Ltd Civil Appeal No.34 of 1992**

1. The Applicant must show that there is a substantial question to be investigated with chances of winning the main suit on his part;
2. The Applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and the *status quo* not maintained; and
3. The balance of convenience is in the favour of the Application.

In this Application, the Respondent's Evidence in opposition to the prayers sought for is derived from the affidavit of reply and they contend that by a letter dated 24th November 2020, the respondent duly informed the applicant that the frequency had already been withdrawn and that they should stop any further attempt to install or set up a radio station in Mbarara since any action would be contrary to Uganda Communications Act.

That the applicant was advised to reapply for a new frequency as a fresh assignment which they have not bothered to re-apply. Therefore the respondent contended that the main application has no merit and there is no prima facie case since the withdrawal of the frequency was done in accordance with the law.

On the issue of whether the Applicant has a prima facie case, the respondent submitted that at this stage, court does not delve deep into the merits of the case or substantive issues but rather determines whether the claim is not frivolous or vexatious, to determine whether a prima facie case exists, courts have to inquire whether there is a serious issue to be tried at trial**.**

Analysis

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 applicant's counsel has cited several authorities for the grant of temporary injunction and indeed this court agrees with the said authorities.

There should be a prima facie case disclosed*;*

Before deciding to grant or to deny a temporary injunction, it's important to consider if there is a prima facie case , according to *Lord Diplock* in ***American Cyanamid Co. v Ethicon Ltd [1975] AC 396 [407—408],*** the applicant must first satisfy court that his claim discloses a serious issue to be tried. The applicant in has stated that the respondent irrationally and illegally cancelled the applicant's frequency and spectrum without following the procedures and taking into considerations prevailing at the moment of COVID-19 lockdown restrictions. This therefore raises a serious issue of contention of whether it was done in accordance with the set procedures, legally and rationally.

The applicant must set out a prima facie case in support of the right claimed by it. They must equally be satisfied that there is a *bonafide* dispute raised by the applicant, that there is an arguable case for trial which needs investigation and a

decision on merits and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him.

The burden is on the applicant to satisfy the court by leading evidence or otherwise that he has a *prima facie* case in his favour. 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.

Maintaining the status quo;

The applicant's counsel submitted on preservation of status quo; "*Status quo"* simply denotes the existing state of affairs before a given particular point in time. The purpose of the order for temporary injunction is primarily to preserve the status quo of the subject matter of the dispute pending the final determination of the case, and the order is granted in order to prevent the ends of justice from being defeated. *See*: ***Daniel Mukwaya v. Administrator General, H.C.C.S No. 630 of 1993; Erisa Rainbow Musoke v. Ahamada Kezala [1987] HCB 81***.

In the instant case, the status quo to be preserved is that the frequency has not yet been allocated to another person and the applicant wants the said frequency to be preserved and should not be dealt with in anyway before the court determines whether the cancellation of the frequency is determined.

The current state of the frequency is that it should not be allocated to any other person or affected by any act of the respondent that would cause its alteration land in respect of its registration should not be altered by whatever actions by the respondent until the determination of the suit. It is possible the respondent could before the determination of the main application give away the frequency within

range that would affect the same and may render the suit nugatory. The respondent should preserve the status quo of the said radio frequency to remain in existence.

The status quo to be maintained is in favour of the Applicant who holds an equitable interest in the said frequency before it was cancelled.

Irreparable damage;

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

The applicant has been using the said frequency at Ibanda and applied and wished to continue using the same frequency at Mbarara. The change of the frequency may indeed not be able to be atoned for by way of damages even if another frequency may be given after the determination of the suit.

The damage to the applicant's person will be material and substantial and no amount of compensation can atone it.

The balance of convenience

The balance of convenience simply means that the applicant has to show that failure to grant the temporary injunction is to her 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 applicant has already submitted that the applicant will suffer irreparable harm. I therefore submit that balance of convenience is in favour of the applicant.

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 temporary 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/03/2021