

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS APPLICATION NO.665 OF 2022
(ARISING FROM MISCELLANEOUS CAUSE NO.349 OF 2022)

SMS CONSTRUCTION LTD----- APPLICANT

VERSUS

- 1. EQUITY BANK**
- 2. SSEMAKULA HERMAN JOSEPH----- RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this application by way of Chambers summons against the respondent under Section 36 & 38 of the Judicature Act cap 13 and Order 41 r 2, & 9 of the Civil Procedure Rules, for orders that;

- a) An Order stopping the 1st defendant/respondent from making payment of Ugx 2,000,000,000/= to the 2nd defendant under Bank Guarantee Reference: Bg 108311622 until the final determination of CC No. 349 of 2022 or until condition precedent under the undertakings are duly performed.
- b) The respondents pay the applicants the costs of this application.

The grounds in support of this application are set out in the affidavit of Sadat Muhinda the applicant's Managing Director which briefly states;

1. That on 18th July, 2022, the 2nd respondent sold to the applicant land comprised in Block 87 Plot 890 & 892 Kyaggwe situated at Namasiga

measuring 0.1220 & 0.4450 hectares registered in the names of Henry Kaijuka Richard at a total price of 4,000,000,000/= together with stone quarrying equipment such as 4 tractors and 3 trucks to be used for stone quarrying purposes on the land in question.

2. The applicant paid 2,000,000,000/= to the 2nd respondent leaving a balance of 2,000,000,000/= and executed a bank guarantee on the 22nd October 2022 under reference no. BG 108311622 with the 1st respondent on an understanding that the same shall be payable when the 2nd respondent fulfils conditions precedent enshrined in the contract of the sale of equipment and the land.
3. That the 2nd respondent breached the agreement by not complying with terms precedent as embedded therein and to that extent in further breach has placed an order to the 1st respondent to issue the said payment.
4. That the 1st respondent has already issued an ultimatum to the applicant that they will be furnishing the 2nd respondent with payment of 2,000,000,000/= under the bank guarantee.
5. The applicant will suffer irreparable damages/financial loss due to the respondent's illegal actions if the application is not granted.

In opposition to this Application the 1st Respondent through *Martha Nimurungi Kamuhanda*-Legal Officer of the respondent filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. The applicant is a customer of the bank and applied to the 1st respondent to issue a Guarantee in favour of the 2nd respondent in respect of a purchase of properties which the applicant was to purchase from the 2nd respondent in a sum of 2,000,000,000/= towards consideration in the transaction.
2. That on 20th June, 2022, the applicant executed a Bank Guarantee/Standby Letter of Credit Application form authorizing the Bank to guarantee

payment of the above sum. The applicant unequivocally authorized the bank to pay the 2nd respondent and it undertook to indemnify and defend the bank.

3. On 13th October, 2022 the applicant obtained a credit facility from the Bank for the sum of 2,000,000,000/= the purpose of which was to facilitate a payment guarantee in favour of the 2nd respondent.
4. The contract the bank has with the applicant is the Banking facility executed on 13th October, 2022. The Bank guarantee is not a contract between the Bank and the Applicant but is rather a deed executed by the applicant authorising the bank to issue a payment guarantee in favour of the 2nd respondent guaranteeing to pay the 2nd respondent a sum of 2,000,000,000/= upon demand.

The 2nd respondent opposed the application and contended that the applicant since the payment of the first instalment of 2,000,000,000/= has been in occupation of the suit land and all quarrying equipment from the time of handing over and the balance of convenience is wholly in his favour.

The 2nd respondent has made several demands to the bank which have not been honoured and the 1st respondent is acting in breach of the bank guarantee. That the alleged encroachment was occurred after the applicant was handed possession and they neglected to protect the land boundaries from encroachers and that it is the applicant creating such squatters.

The respondent further contended that he has fulfilled his obligations under the contract and it is the applicant who is frustrating the contract.

In the interest of time the respective counsel were allowed to file submissions and i have considered the respective submissions. The applicant was represented by *Mr. Ahimbisibwe Hillary* whereas the 1st respondent was represented *Mr. Kimara Arnold* and the 2nd respondent represented himself.

The granting of a temporary injunction is an exercise of judicial discretion as was discussed in the case of ***Equator International Distributors Ltd v Beiersdorf East Africa Ltd & Others Misc. Application No.1127 Of 2014***. Discretionary powers are to be exercised judiciously as was noted in the case of ***Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29***.

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-

(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.....

For a temporary injunction to be granted, court is guided by the following as was noted in the case of ***Shiv Construction vs 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.

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/her 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 applicant contends that the 2nd respondent has breached the agreements and conditions precedent in the agreement which will make the company suffer irreparable damage. The applicant submits that the 2nd respondent has failed to perform his obligations under the agreement to wit; removing caveats on the trucks, compensating squatters on the suit land, getting all the required instruments to allow effective transfer of some titles and paying back the 6% of the withholding tax on 6% on the first installment.

The applicant is at a risk of losing his legal rights over the land because the 2nd respondent has not provided all the requirements to effect transfer of title and unresolved third party interests. This is the eminent danger that the applicant will suffer unless she is granted a temporary injunction is granted.

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 her claim discloses a serious issue to be tried. The applicant has satisfied this court that there is a prima facie or serious issue to be tried in the main suit about satisfaction of contractual obligations by the 2nd respondent. Of course the 2nd respondent has denied being in breach of the said obligations and this therefore means this is a serious question which must be determined at trial upon proper evidence being laid before the court.

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 suit and or a prima facie case.

The court should always be willing to extend its hand to protect a citizen who is being wronged or whose rights are being violated 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 debito 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 and costs shall be in the cause. The order granted is in the following terms;

- a) *A temporary injunction issues* stopping the 1st respondent from making payment of Ugx 2,000,000,000/= to the 2nd respondent under Bank Guarantee Reference: Bg 108311622 until the final determination of Civil suit No. 349 of 2022 or until condition precedent under the undertakings are duly performed.

It is so ordered.

SSEKAANA MUSA
JUDGE
6th February 2023