

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.607/90

MULJIBHAI MADHVAN & COMPANY LTD:.....:APPLICANT

—VERSUS—

1. MADHCAN INTERNATIONAL LIMITE }
2. BARCLAYS BANK OF UGANDA LTD } :.....: RESPONDENTS

BEFORE: The Hon. Mr.Justice G.M Okello

RULING

In this application the Applicant/Plaintiff M/S MuljiDhai Madhvani and Company Ltd seeks an order of this Court for a temporary injunction to restrain the defendants/Respondents, their agents or servants from selling or disposing of or in any way interfering with the Applicant/Plaintiff possession and ownership of the Properties listed in schedule A of this Chamber summons until the dispute between the parties affecting the suit properties is investigated and finalized.

The Application was brought by chamber summons under Order 37 rr 1, 2,3,5,7 and 9 of the Civil Procedure Rules, Section, 101 f the Civil Procedure Act Cap 65 of Laws of Uganda, Doctrine and Common Law.

The main rounds on which this application was brought are stated to be that the Applicant/Plaintiff is the registered Proprietor of the Suit properties which are a number of about 9 (nine) houses listed in schedule A to this Chamber summons. That these houses are Quarters of the Applicant/Plaintiff’s workers now engaged in the rehabilitation of Industrial base in Uganda. That the 1st Defendant/Respondent illegally mortgaged these houses to the 2nd Defendant/Respondent to secure a loan but that because of the 1st Defendant/respondent’s failure to repay the loan, the 2nd Defendant/Respondent now threatens to sell off these houses. That if

the threatened sale is effected before the pending suit between the parties is heard and decided the end of Justice will not be met. That the applicant/ plaintiff is likely to succeed in the main suit.

The application is supported by two Affidavits:- one sworn by H.M.B Kayondo on 16-7-90 as Counsel duly instructed to conduct the prosecution of this case and, the other sworn by Franklin Mendonca on 16-7-90 as the Company Secretary of the Applicant/Plaintiff Company.

For the 1st Respondent/Defendant an affidavit sworn by Mr. Nkambo-Mugerwa on 24-9-90 as Counsel duly instructed to conduct the defence of this case was filed in reply to the supporting affidavit.

It is the law of this Country that grant of temporary injunction is an exercise of a judicial discretion. See (Sergent vs. Patel (1949) 16 EACA. 63).

As for the purpose of a temporary injunction, the law of this Country is settled that it is to preserve the status quo in the matter in dispute until the question under investigation in the main suit is finally disposed of. (see Noor Mohamad Jan Mohamed .vs. K. Madhoni (1953) 20 EACA 8).

On the conditions for grant of a temporary injunction, it is an established law of this Country that for an applicant to be granted a temporary injunction he must show:-

1. that he has a prima facie case with a probability of success in the main suit.
2. that unless the temporary injunction is granted the applicant will suffer irreparable injury meaning substantial injury which can not adequately be compensated by an award of Damages.
3. that the balance of convenience favour the grant. For authorities for the above position see Giela -vs- Casman Brown & Co LTD (1973) EA 358; Nsubuga and Anor -vs- Mutawe (1974) EA487.

As to what amounts to a prima facie case in (1) above, it was held to mean a serious triable issue- (See Buikwe Estate Coffee Works LTD and 2 others –vs- S. Lutabi and Anor (1962) EA 328).

Having set out the legal Principles regarding grant of a temporary injunction, I should now like to examine the application before me in lights of those principles.

At the hearing, Mr. Serwanga raised a Procedural question in which he challenged this application as being incompetent and misconceived in that it had not disclosed the particular rule under which it is brought. He pointed out that it is not clear whether the applicant intends to proceed under 0.37 r.1 (a) or 1 (b) because each of those sub-rule refer to different circumstances. Counsel further pointed out that rule 2 of Order 37 is not applicable to the facts of this application since that rule applies to restrict further breach of contract.

In reply Mr. Bwonika submitted that 0 37 r 1 (a) is applicable to this application. That rule 2 of Order 37 of the Civil Procedure Rule is not restricted to restraining breach of contract. That Serwanga cited no Law which prohibits citing all applicable Law - That in any case Section 101 of Civil Procedure Act is cited and that the Court could act under this.

It is the Law of this Country that it is the duty of Counsel to comply with the rules of the Courts. (see Salume Makasa –vs- Y. Bukenya (1966) EA 433.)

Further it is the Law that an application to Court must refer to the Law under which it is made and any application made under the wrong rule is bound to be dismissed. (Kigonya .vs. AG (1966) EA 463).

In the instant application several rules under 0.37 of t Civil Procedure Rules are cited. Rules 1,2,3,5, 7 and 9 of Order 37 were cited of these, rules 1(b), 2, 5 and 7 are certainly not applicable to the facts of this case. By citing several possible rules in the hope that the Court will sort out the appropriate ones, counsel will not be discharging the duty upon him to specify the rule under which his application is bought.

As for the inherent jurisdiction under Section 101 of the Civil Procedure act, the Law regarding the principle of its application, is that this special provision can only be invoked to meet a

situation for which no express remedial provision exists under the Law— (See Jooman Jaffer v Bhambra C/A 3/67 EACA 326 Rawal v Mombasa Hardware Ltd C/A 10/68 EACA 392)

In the instant case, the application is for an Order of a temporary injunction to restrain sale of the said suit properties until the dispute between the Parties regarding the suit properties is finalised. This situation is covered under Order 37 r 1(a)3 and 9 of the Civil Procedure Rules. To that extent section 101 of the Civil Procedure Act can not be called to aid.

On the question whether the application has a prima facie case with a probability of success in the main suit, Mr. Bwanika submitted that the applicant has such a case with a probability of success. He pointed out that the mortgage Agreement under which the suit properties are now threatened with sale was illegal:- First on the ground that it was illegally executed by one MEENA who purported to be a director of the Plaintiff Company when he is not. Secondly, because at the time of execution of the said mortgage Agreement the Suit Properties were expropriated to the Government under the Expropriated properties Act 1982 in which Case they can not be mortgaged without consent of the Minister of Finance. Counsel relied on the affidavit sworn by Mr. H.M.B. Kayondo and the other sworn by Franklin Mendonea.

Both Messrs Serwanga for the 1st Defendant/ Respondent submitted that the applicant has not shown a prima facie case with a probability of success in the main suit. Mr. Mugerwa pointed out that the illegality of the mortgage Agreement which the Applicant raised is based on whether or not Meena is an authorised person to execute the mortgage Agreement. Counsel argued that this is an internal matter which does not affect the legality the Mortgage Agreement. He relied on the case of Bentley .vs. Smith (1974) 2 ALLER 653 where it was held that Court would not grant an interlocutory injunction in respect of irregularities which could be cured by internal process. He also relied on N. Jayant Madhavni vs. E.A Holdings LTD and other HCCS No.1181/88 unreported where Byamugisha Ag. Judge as she then was held that an internal management arrangement which the Plaintiff in that case sought to protect did not constitute Agreement between the parties in that case.

In reply Bwanika submitted that Applicant has shown that it has a serious triable issue in the main suit. He relied on Alfonse Odido .v. Label EA LTD HCCS 363/87.

It is pertinent to point out here that whether an applicant has shown a prima facie case or a triable issue depends on the facts of each case.

In the instant case there is evidence which is not that when the mortgage Agreement was executed on 2/7/87 the suit Properties were expropriated to the government by the Expropriated Properties Act 1982. There is also evidence that at the time of the execution of this mortgage Agreement the Repossession Certificate NO. 0341 which was issued on 21-10-85 by the Minister of Finance covering the suit Properties to EMCO LTD was cancelled by a Later dated 23/4/87 from the Deputy Minister of Finance. This clearly raise the question of the legality of the Agreement. This in my view is a serious triable issue.

On the evidence available now before court if the main Suit goes to trial without any additional evidence the Applicant is likely to be entitled to Judgment on this issue. Accordingly I find that the applicant has shown a prima facie case with a probability of success. As regards whether the applicant will suffer irreparable injury if the temporary injunction sought was withheld, Mr. Bwanika contended for the applicant that the applicant would suffer irreparable injury because currently the suit Properties are quarters for the Plaintiff's workers and that if they are sold out and the Plaintiff's workers are evicted it will be almost impossible for the Plaintiff to find alternative accommodation for its workers and that this will destabilize the Plaintiff's work. For this Counsel relied on the evidence supplied by the affidavit of Mendonca (Paragraph 8 thereof).

Both Messrs Mugerwa and Serwanga for the Respondents submitted that of the suit properties which are currently quarters of the Plaintiff's worker may cause loss of quarter for these workers but that this is a loss which can be quantified in monetary terms and that as such can adequately be compensated by payment of Damages.

It is common knowledge that both residential and commercial Accommodation either in Kampala or in Jinja is very scarce and loss of one such accommodation constitutes a loss, which cannot adequately be compensated by award of Damages.

In the instant case paragraph 8 of Mendonaca's affidavit dated 16-7-90 shows that the suit properties are currently housing the Plaintiff's most workers and that if these .properties are sold out, the Plaintiff will suffer irreparable injury. I agree with that statement given the scarcity of

accommodation both in Kampala and in Jinja. Hence I am of the view that the applicant has sufficiently shown his likelihood to suffer irreparable injury if the temporary injunction sought was withheld.

On the question of balance of convenience, Mr. Bwanika submitted for the plaintiff that this favours the grant.

For the respondents however, Mr. Mugerwa contended that the balance of convenience favours withholding the grant because the grant will deny the 2nd respondent his security as the Mortgagee.

I have considered the above arguments. The available evidence before me is that the Plaintiff's workers are currently occupying the suit Properties as their quarters. There is no dispute over this point. If those houses were to be sold, the chances of the Plaintiff's workers being evicted from them by the new landlord are very high. In the result of his workers losing their accommodation, the Plaintiff himself will have to look for alternative accommodation for his workers or the individual worker will have to absent himself from work to look for alternative accommodation. This will cause absenteeism at work by workers. This is an inconvenience to the Plaintiff.

If at the end the Plaintiff will emerge winner in the main suit, He will have suffered much inconvenience. On the other hand if the temporary injunction applied for is granted the Respondent will not suffer much inconvenience compared to that of the plaintiff apart from being denied his security.

For those reasons I find that the balance of convenience between the favours the grant.

As for the status quo to protected, the evidence on record shows that the suit properties are currently occupied by the plaintiff's workers and that the Plaintiff is the registered Proprietor of them. These are the status quo which the Plaintiff seeks to see maintained until the dispute between them over the Suit Properties is finalised.

In the whole analysis, the summary Criteria for granting a temporary injunction is in my view that the court must in the whole be satisfied from tie evidence before it and the law applicable that it is fair and just to grant the temporary injunction sought. This I think is the ultimate Criteria for the Court exercising its discretion in favour of the grant.

In the instant application, despite the procedural irregularity committed by the applicant's failure to specify under which sub rule 1 of Order 37 of the Civil Procedure Rules his Application was seeking relief, the application was properly before the Court as it was brought by Chamber Summons as provided for by O 37 r 9 of the CPR. Rule 1 Order 37 was cited though the particular sub-rule was not specified.

Considering the evidence available before me and the law applicable, it is my conviction that this is a proper case where a temporary injunction must be granted to restrain the threatened sale until the dispute under investigation between the parties regarding the Suit properties is finalised. In that case the Court can invoke its inherent power under section 101 of the Civil procedure Act since the application is already properly before it to meet the end of Justice as there is no doubt as to the relief which the Applicant is seeking.

In the circumstances the application is allowed and the temporary injunction is granted as prayed.

.....

G.M. Okello

JUDGE

28/9/1990