

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
MISCELLANEOUS APPLICATION NO. 670 OF 2003
(ARISING OUT OF CIVIL SUIT NO. 664 OF 2003).

- 1. IBRAHIM BUWEMBO**
- 2. EMMANUEL SERUNJOGI**
- 3. ZUBAIRI MUWANIKA for and on behalf of 800**

others:..... PLAINTIFFS ✓

VERSUS

M/S UTODA LTD:..... DEFENDANTS

RULING

BEFORE: JUSTICE GEOFFREY KIRYABWIRE

This ruling is in respect an application for a Temporary Injunction by way of chamber summons under 037 r 2(1) and 9 of the CPR amended and S 101 of the CPA. The application is for orders that a temporary injunction do issue restraining the respondent M/S UTODA Ltd. (herein after called UTODA) from collecting loading fees and sticker fees of 4,000/=. These fees based on the application and its supporting document action are levied on commuter Taxis (hereafter called taxis) that operate in, around and from the Kampala area. The respondent UTODA by contract with the Kampala City Council (KCC) are charged with the management of these said taxis. The application arises out of H.C.C.S 664 of 2003 involving the same parties where the

applicant/plaintiff is seeking declaratory orders and other remedies in respect of these said fees which are alleged to be illegal.

The application is supported by various affidavits and there are also lists of affidavits in reply which I shall review in the course of this ruling.

Mr. P. Kimanje appearing for the applicant made out the case for the granting of the Temporary Injunction. Mr. Kimanje argued that, the prescribed daily fee to be charged by UTODA as agreed, by them with K.C.C is Shs. 3,500/= per taxi; however UTODA charged Shs. 500/= more making it Shs. 4,000/= which was wrong. He further argued that UTODA charged what was termed a loading fee levied at every taxi stage with varied amounts depending on the stage ranging from Shs. 20,000/= on some stages to Shs. 200 - 500/= for just picking up passengers. This loading fee he termed totally illegal.

He further pointed out that while the daily fees are receipted the said loading fees are levied but no receipt is given.

He argues that his clients shall suffer irreparable loss/injury if an injunction is not granted stopping/restraining the respondents from levying the said illegal fees as it is difficult to compute the sums that have been illegally collected. In support of his arguments he has referred court to the supporting affidavits of Zubairi Muwanika a taxi driver and owner for more than 15 years, Ssalongo Sendagire Hummed a Taxi driver and member of the Association of Taxi

Owners and Drivers in Uganda and Sserunjogi Emmanuel the Chairman of the Association of Taxi owners and Drivers in Uganda and also a former Councillor of K.C.C.

Counsel for the applicant argued that his clients have a good case against the respondents because of the following reasons.

First of all he argues that the said levy contravenes Article 152 (1) of the constitution of Uganda 1995 which provides.

"No tax shall be imposed except under the authority of an Act of parliament."

He argues that this fee is a tax levied outside any Act of Parliament. He submits the nearest Act of parliament that would be applicable is the local Government Act (Act 1 of 1997) especially ss 31 (2), the second schedule thereof and part III of the Act. However such an Act would only be applicable to a District Council/Local council collecting tax and not the respondent in this case. Counsel for the applicant argues that the contract between K.C.C and the Respondent UTODA provides that it shall be governed by the law of Uganda but in this respect it has not. This is clearly a glimpse into the legal arguments for the main suit, which I shall not go into at this time.

Notwithstanding that, counsel did pray that the temporary injunction be issued pending the determination of the suit.

There was however an auxiliary matter that also came up during the said application. This is that before the file came before me, it appears that it had been sent to mediation. This is because on the 13th November 2003 Directions for mediation had been made by the Registrar of this court and that mediation take place before the 13th December 2003 (a date now passed). Counsel for the applicant was not aware of this direction but nonetheless did not have an objection to mediation.

Mr. Y. Nyanzi appeared for the respondent and objected to the application for the grant of a Temporary injunction. Mr Nyanzi argued that court deciding whether or not to grant the temporary injunction should be guided by the tests set out in well established authorities in the matter. He laid out the tests as follows:-

1. The applicant should show that he has a prima facie case with a probability of success.
2. The application should not be granted unless the applicant can show that he shall suffer irreparable injury, which can not adequately be atoned by an award of damages.
3. The order may be granted with a view to preserving the statue quo.
(Let the add here while the question to be investigated in the main suit is being disposed of).

4. Lastly where the court is in doubt the application should be determined on the balance of convenience. In this regard he referred me to

Robert Kavuma v Hotel international Ltd. CA. 8 of 1990.

The tests for court to consider while deciding whether or not to grant a temporary injunction are well know and so are the authorities. I agree with counsel for the respondent on the tests that he has outlined and I adopt them. However I must add that in any event the granting of a temporary injunction is a function of judicial discretion which must be exercised judiciously when these tests have been applied.

With regard to the first test, counsel for the respondent argues that the applicants have no chance of success in winning the main suit. He refers to order 37 r (2)(1), which states that an application can be granted where there is a fear that a contract is to be breached.

Counsel for the respondent strongly argues that in this case, that there is no contract between the applicants and the respondents. Indeed the only contract being referred to is that between the respondents UTODA and K.C.C. In support of this argument he refers me to the affidavit of Mr James Ssegane the Acting Town Clerk of K.C.C and Mr. Haji Musa Katongole chairman of

UTODA Kampala branch. The applicants are strangers to the said contract he argues and have no privity to it.

In response Mr. Kimanje for the applicants says that orders 33 r (2)(1) does not only refer to a breach of contract but injury arising there from as well. He further argues that in the main suit lies a prayer for the declaration of the rights of the parties, which under order 2 r 7, can not be objected to. The order reads.

" No suit shall be open to objection on the ground that a merely declaratory Judgement or order is sought merely, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not".

Both arguments by counsel to the parties are formidable. However the test to be applied is whether the applicant has a **prima facie** case with a probability of success. The term prima facie according to osborn's Concise Law Dictionary 6th edition means

" [Of first appearance] A case in which there is some evidence in support of the charge or allegation made in it, and which will stand unless it is displaced..."

In other words all that the applicant has to do is to present a case which on the face of it will stand unless displaced during the trial.

Secondly order 37 r (2)(1) provides.

" In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed or not, the plaintiff may, at any time after the commencement of the suit, and either before or after Judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, any injury of a like kind arising out of the same contract or relating to the same property or right".

Clearly order 37 r (2)(1) when read in its totality envisages situations not just of breach of contract but also **injury of any kind** arising from the same contract. Such injury I find can be wider than of breach to the contract but can affect other stakeholders associated with the contract as well. Indeed it would not be far fetched to state that taxi owners and drivers are stakeholders in the implementation of the contract between K.C.C. and UTODA.

In concluding this test I find that applicants have on the face of it, have a prima facie case capable of being tried in the main suit.

On the second test on whether if the application is not granted the applicant shall suffer irreparable injury that cannot adequately be atoned by an award of damages, the arguments are equally compelling.

Counsel for the respondent argues that the applicants in the main suit pray for a refund of the alleged excess of Shs. 500 over the Shs 3,500 levied as daily fees over a period of 3 years affecting same 4500 vehicles. This counsel for the respondent argues is ascertainable in monetary terms i.e Shs. 2,463,750,000/=. He says that fees levied are computable and therefore an injunction is not necessary.

Counsel for the applicant on the other hand points out that the loading fee varies from stage to stage and is not receipted so can not be calculated leading to irreparable loss for his clients.

I think this test is easier to sort out with respect to the dispute in question. I agree with counsel for the respondent that with respect to the daily fee the amount in dispute can be ascertained especially taking into account that

receipts are issued. On the basis of the test therefore this would not be a good ground to grant an injunction.

However the situation is less clear in respect of the alleged loading fee which is not receipted. Indeed no affidavit from the respondents contradicts that the loading fee is not receipted. This is further complicated by the fact that it is not uniform throughout in Kampala. I need to observe without going into the merits of the case that in this era when there is a call for greater accountability and transparency it is unfortunate that a fee for whatever reason be it loading or Voluntary contribution for welfare is levied and is not receipted. Non receipting of monies received whether legally or not can breed problems and the respondent's UTODA need to address this issue quickly.

However from a temporary Injunction point of view it appears that this allegation is too varied to impose any meaningful injunction (i.e on a stage by stage basis). The true remedy for the applicants in this respect I find lies in the main suit where they seek a declaration that loading fee is illegal.-

With regard to the test of preserving the status quo, counsel for the respondent makes an interesting argument that the applicants in their main suit contest the increase of the daily fee from Shs. 3,500 to Shs. 4000/= per

day. However on the ground the daily fee has been increased further to Shs. 4,500/=. The affidavits of Moses Mawejje a taxi driver and Hajji Katongole (described earlier) confirm this. Counsel for the respondent argues that the fee of Shs. 3,500 was obtaining 3 years ago. The current status is therefore Shs. 4,500 and any reduction therefore would not meet this test.

Counsel for the applicant on the other hand argues that the status quo to be maintained is that agreed to by the respondents UTODA and K.C.C in the K.C.C. District Tender Board Minutes of 17th November 2000 which is Shs. 3,500/=. Clearly I find that at the time of the application the fee being levied is Shs. 4,500/= and that is the status quo (current position). It is therefore no longer Shs. 3,500/=. In fact the evidence shows the fee has increased 2 times since it was Shs. 3,500/=.

I find therefore that the status quo if any, that is to be preserved is that of Shs. 4,500/=.

The last test is that in the case of doubt the court should decide whether or not to grant a Temporary Injunction on the balance of convenience. Counsel for the respondent says that the balance of convenience is with his clients UTODA who are currently levying the fee of Shs. 4,500 per day and that if the fee is brought down it shall impact on their contract with K.C.C. In this he

relies on the affidavit of Mr. James Ssegane. Counsel for the applicant on the other hand disagrees and states that the balance of convenience is with his clients.

I think that since the taxis are already paying the Shs. 4,500 it is the respondents who will be more greatly inconvenienced if the daily fee was in any way reduced. In any event a reduction of the fee levied from Shs. 4,500 to Shs. 3,500 would be the same as granting the declaration sought in the main suit and such a temporary injunction will have the same effect of disposal of the suit.

The granting of a Temporary injunction at the end of day is a discretionary **function of** the court. Before I rule on this I cannot help but notice that this dispute is involving people in the same trade i.e. taxi transportation. I also note there are two organisations namely UTODA and The Association of Taxi Owners and Drivers in Uganda which are involved here. Clearly those involved in the running and Management of taxi business in Uganda should create an alternative forum to resolve their disputes other than court unless it really is unavoidable.

The taxi business is important for the proper functioning of the city and all shareholders must always dialogue when rough areas emerge. I am happy

therefore that both counsel are willing to try mediation in this matter according to their submissions. Taking this willingness to mediate into account, I hereby exercise the inherent powers of court to extend the time for mediation originally given on the 13th November 2003 by the Registrar of this court by another 30th days from the date of this ruling and that mediation in any event be concluded by the 20th January 2004 when parties are to report back to court for mention. I further direct that the Registrar issue Directions for mediation to that effect.

With regard to the application for a temporary injunction and in light of my findings above I in the interests of Justice and within the meaning of order r (2)(2) grant a temporary injunction preserving the status quo i.e the levy of daily fees at Shs. 4,500 to the 20th January 2004 when parties are to report back to court on the progress of the mediation. Costs for the time being shall follow the mediation.

Sgd.

Geoffrey Kiryabwire

Ag. Judge.

19th December 2003

Ruling delivered on the 19th December 2003 in the presence of

For the Applicant. Mr. P. Kimanje is absent but send apology court.

For the Respondent Mr. Y. Nyanzi

Mrs. R. Emeru C/Clerk.

Sgd.

Geoffrey Kiryabwire

Ag. Judge.

19th December 2003

19th December 2003

12: 40 p.m.

Mr. Y. Nyanzi for the respondent.

Mr. P. Kamanje appeared for applicant but informs court through Mr. Nyanzi that he is unable to attend court.

Mrs. R. Eremu C/Clerk.

Court

Ruling delivered.

Sgd.

Geoffrey Kiryabwire

Ag. Judge

19th December 2003