**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISC. APPLICATION NO. 195 OF 2012**

**(*Arising from HCCS No. 144 of 2012*)**

**C & A TOURS & TRAVEL OPERATORS LTD**

**T/A HERTZ RENT A CAR :::::::::::::::::::::::::::::::} APPLICANT**

**VEVRSUS**

**TPS (UGANDA) LTD**

**T/A SERENA HOTEL ::::::::::::::::::::::::::::::::::::} RESPONDENT**

**BEFORE : HON. LADY JUSTICE HELLEN OBURA**

**RULING**

The applicant brought this application under Order 41 rules 1 & 9 of the Civil Procedure Rules (CPR). The applicant is seeking for orders that a temporary injunction issues against the respondent restraining it from terminating the airport transfer and taxi service agreement executed between the parties on 16th October 2007 which is the subject of the head suit or in any other way interfering with performance of the agreement by the applicant until determination of the main suit or further orders of this court.

The grounds of this application are contained in the notice of motion and the affidavit in support sworn by Mr. Godfrey Jjuuko the Group General Manager/Company Secretary of the applicant company. He avers among other things that the applicant company performed all its obligations under the agreement to the satisfaction of the respondent who severally commended it as shown in annexture D to the plaint. The applicant expected the agreement to be renewed automatically for a further period of five years after expiry of the initial period of five years in October 2012 as provided for in the agreement.

Consequently, the applicant with the aid of bank loans invested USD 2,282,822 into implementation of the agreement by way of replenishing its motor vehicle fleets and additionally invested by way of premium insurance risk notes, equipment, manpower, and human resource development which it expects to recover with profits within the remaining period of the contract.

He deposed further that in the last five months, the respondent had breached and continued to breach the agreement by committing the acts set out in annexture ”D1” to the plaint and was intending to wrongfully terminate the agreement. He averred that unless restrained by an injunction, the intended wrongful termination of the agreement shall cause the applicant colossal financial loss of USD 1,512,917.44 and UGX 17,800,000/= which may lead to total collapse and winding up of the applicant company. The applicant company is an international business franchise and the effect of wrongful termination will lead to loss of business reputation and status in the industry which is irreparable.

The deponent also averred that if the orders sought are not granted the head suit shall be rendered nugatory as the collapse of the applicant company will be irreversible by the time the head suit is heard and determined. He averred that for that reason, the balance of convenience favours grant of a temporary injunction.

An affidavit in reply was sworn by Mr. Anthony Chege the General Manager of Kampala Serena Hotel. The allegation of breach of contract by the respondent was denied and he instead averred that it was the applicant that breached the agreement dated 16th October 2007 and gave particulars of the breach. The respondent in view of the breaches proposed amendment to the services being provided by the applicant so that it retains the least complained about services (VIP services) and allocate the most complained about service (airport transfers) to another service provider as per the communication that was attached and marked “A”.

He deposed further that the applicant responded to the proposal by demanding that the respondent complies with among others clauses 7.1.3 and 15.1 of the agreement. The respondent then gave the requisite 90 days written notice of termination to the applicant in accordance with clause 7.1.3 which was accepted and acknowledged (annexture “C”). Under the terms of the agreement, it was agreed that a notice of 90 days given by either party was sufficient to terminate the agreement.

It was further averred that the agreement was based on the applicant’s proposal dated 1st October 2007 and not on any representation allegedly made by the respondent prior to or during the performance of the agreement. This application is an abuse of the court process as it seeks to punish the respondent for abiding by a contractual term available to either party to the agreement. It was deposed that there was no status quo to be preserved by a temporary injunction as the contract had already been terminated.

Further that granting a temporary injunction in this case would have the effect of compelling the respondent to receive a service that continuously injures the reputation of its hotel facility. It would also make the applicant continue to unfairly gain from such service when the respondent has lost faith in its (applicant’s) ability to deliver a service commensurate with the respondent’s high expectation.

When this application came up for hearing, Mr. Alfred Okello Oryem appeared for the applicant together with Ms. Ruth Kisakye while Mr. Ernest Kalibala appeared for the respondent. Counsel for the applicant submitted that the duty of an applicant in such an application is to prove three things namely that;

1. There is a prima-facie case in the main suit which raises triable issues,
2. The applicant will suffer irreparable damage that cannot be compensated by damages if the application is not granted, and
3. Balance of convenience favours grant of application.

He relied on **Giella v Cassman Brown and Company Ltd [1973] EA 358** a leading authority on those principles. He submitted that as regards the first principle, firstly, the agreement provided for an initial term of five years and automatic renewal for another five years. He contended that the applicant performed its obligation under the agreement to the satisfaction of the respondent as confirmed by annexture “D” to the plaint. He argued that it is for those reasons that the applicant is seeking for specific performance as a remedy in the main suit which will be irretrievably lost if this application is not granted.

Secondly, he contended that because the applicant expected an automatic renewal of the contract, it invested heavily in the contract to maintain fleets of limousines and ordinary saloon cars which the respondent knew about, required it and benefitted from as per the letter dated 22nd July 2008. He submitted that to that end, the applicant took out a total of USD 2,282,822 as facilities from its bankers. He argued that for that reason, the applicant needs an equitable estoppel in the main suit which raises another triable issue as to whether the respondent is estopped from terminating the contract.

Thirdly, he contended that the respondent breached the contract by giving away business to 3rd parties without the knowledge of the applicant and 76% of the business to taxi operators. He argued that the dispute over that breach is what sparked off attempt to terminate the contract. He submitted that this also raise another triable issue as to who breached the contract and whether attempt to terminate the contract due to complaint was wrongful.

On the 2nd principle regarding irreparable damages, counsel for the applicant submitted that if the contract is terminated, firstly, the loan is likely to be recalled and this would lead to collapse of the applicant company and secondly the remedy of specific performance will not be available to the applicant in the main suit.

He referred to the case of ***Robert Coussens v Attorney General SCCA No. 8 of 1999*** where it was held that there are two types of damages namely; those that can be calculated and those that cannot be calculated. He then argued that the collapse of the applicant company and the loss of the remedy of specific performance cannot be calculated.

On the last principle on balance of convenience, he contended that it favours the applicant who faces the possibility of collapsing and losing the remedy of specific performance if the application is not granted. He argued that for the respondent it will be business as usual since the applicant has contributed to its growth. He prayed that court finds that there is a prima-facie case and grants this application with costs.

Counsel for the respondent opposed this application and contended that it should be dismissed with costs for the following reasons. Firstly, that it was brought under a wrong law, that is, Order 41 rule 1 as opposed to rule 2 of that Order. Secondly, that the status quo sought to be preserved had changed since the 90 days notice given by the respondent expired and the contract terminated a day before the interim order of injunction was granted.

As regards the first principle, he submitted that there is no prima-facie case because by the respondent giving the 90 days notice of termination of the contract, it was just enforcing the rights provided for in the contract for either party to the contract to exercise. He argued that the respondent could not be said to have wrongfully terminated the contract when it was exercising its contractual right of termination. He relied on the case of ***Pan African Centre for Strategic and International Studies v Mandela National stadium Ltd Misc. Application No. 285 of 2007 (arising from HCCS No. 288 of 2007)*** where it was held that the purpose of a temporary injunction cannot be for restraining a party from exercising its contractual right of termination solely on the ground that there is a dispute as to the expunged contract.

On irreparable injury, counsel for the applicant submitted among other things that there are prayers for both special and general damages in the plaint which have been particularized. It was therefore his argument that this means that if at all any loss occurs it can be adequately compensated by damages.

As regards the allegation of total collapse of the plaintiff company, it was argued for the respondent that the applicant had contracts with other reputable organizations as indicated in the details of securities offered to the bank by the applicant. It was contended that the hardship that the applicant will experience as a result of the termination would be a result of the bargain it entered into allowing termination and the voluntary assumption of financial burden. Counsel for the respondent argued that business risk is a common phenomenon which may manifest or not and it would therefore be wrong to penalize the respondent for the risk the applicant voluntarily assumed.

On balance of convenience, counsel for the respondent submitted that it would not be convenient to revive a contract that was terminated. He argued that it would be like court trying to revive a dead person. He concluded that the applicant had failed to meet the conditions for grant of a temporary injunction and prayed that the application be dismissed with costs.

I have listened to the submissions of both counsel and perused the affidavits and all the documents attached to them as well as the pleadings in the main suit. Before I consider the merit of this application, I will first of all deal with the two issues raised by counsel for the respondent namely that; this application was brought under a wrong law and that the status quo sought to be preserved has changed.

As regards the provisions of the law, the applicant brought this application under Order 41 rules 1 & 9 which deal with property as opposed to contracts. The proper provision that govern temporary injunctions in contracts as rightly argued by counsel for the respondent is Order 41 rule 2. However, courts have held that citing a wrong provision of the law or failure to cite a provision of the law under which a party seeks a redress before court is a technicality which should not obstruct the cause of justice. It can be ignored in terms of Article 126 (2) (e) of the Constitution. This was the ruling of ***Okello G.M. JSC*** (as he then was) in ***Alcon International Ltd v The New Vision Printing and Publishing Co. Ltd & The Editor in Chief, New Vision & Sunday Vision, Supreme Court Civil Application No. 4 of 2010***.

In view of the above authority, I find that citing Order 41 rule 1 instead rule 2 is just a matter of procedure which is not fatal and should not be used to obstruct the cause of justice.

Be that as it may, I find that even Order 41 rule 2 is not helpful to the applicant who is seeking an injunction to restrain what is not provided for under that rule. The head note of the rule is; “*injunction to restrain breach of contract or other injury*”. The applicant is seeking an injunction to restrain termination of the contract and not breach or other injury. The noun “*injury*” is defined by ***Black’s Law Dictionary 7th Edition******at page 789***as; “*the violation of another’s legal right, for which the law provides a remedy; a wrong or injustice*”.

As submitted by counsel for the respondent, termination of the agreement between the parties to this application was expressly provided for under clause 7 that listed conditions under which the respondent could terminate the contract. One of the conditions as stated in clause 7.1.3 is that the contract could be terminated upon either party giving 90 (ninety) days prior notice to the other party. This is an independent clause that does not require any reason to be given for the notice to issue. Either party could just give the notice to the other.

The respondent decided to exercise its right as given by that provision. Would it therefore be right to argue that by the respondent issuing the notice it is threatening to cause an injury to the applicant which this court can restrain by an injunction? I am afraid my answer would be no because to my mind the notice which is provided for under the agreement cannot be an injury that this court can restrain. It could probably be an injury if it was not one of the terms of the contract.

In the circumstances, I find that this application is outside the scope of Order 41 rule 2 and as such it is incompetent. For that reason, it would fail. But just in case I misdirected myself on the application of Order 41 rule 2 to this case, I will go ahead and consider the second issue raised by counsel for the respondent.

He argued that a temporary injunction is intended to preserve the status quo but what this application seeks to preserve has since changed. He contended that the 90 days notice that was to take effect from 21st January 2012 expired on the 19th April 2012 just a day before the interim order of injunction to preserve the status quo was issued by this court.

It is indeed a cardinal principle of law that a temporary injunction is intended to preserve the status quo until the dispute to be investigated in the suit can be finally disposed of. See ***Mastermind Tobacco Uganda (PTY) Ltd v Bujugiro Ayabatwa & Another Misc. Application No. 713 of 2002 (***arising from ***Misc. Application No. 712 of 2002)***; (arising from ***Civil Suit No. 497 of 2002)***.

In ***Clovergem Fish & Foods Ltd v International Finance Corp & 7 Others MA. No. 441 of 2001 (2002-2004) UCLR 132 at page 137*** it was observed that:-

*“Indeed the court needs to know the status quo intended to be preserved by the application before applying the three conditions laid down”* (emphasis added).

I have carefully looked at the notice of termination of the contract issued by the respondent vide a letter dated 19th January 2012. It was stated in that letter that the notice was effective 21st January 2012. Counting from that day, the ninety days lapsed on the 19th April 2012 and the contract terminated with its expiry on that day. It is therefore true that the interim order of injunction got by the applicant the following day on 20th April 2012 was after the contract had terminated.

In my view the most appropriate cause of action for the applicant would have been to seek remedies for breach of contract or for wrongful termination of the contract which is alleged in this application. The remedy of specific performance is sought in the main suit is no longer available since there is no contract that the respondent can be compelled to perform. With this finding, this application would fail as the status quo sought to be preserved has since changed. But again, just in case I did not also get this one right, I will still go ahead and consider the three conditions for grant of an injunction.

As rightly stated by counsel for the applicant, the legal principal upon which court exercises its discretion to grant a temporary injunction in all actions pending determination of the main suit is elaborately stated in the leading case of ***Giella*** (supra) ***Spry V – P*** at page 360 stated as follows;

***“The conditions for grant of an interlocutory temporary injunction are now I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction would normally not be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”. (Emphasis added).***

See also **Robert Kavuma v Hotel International Ltd Supreme Court Civil Appeal NO. 8 of 1990 reported in (1993) II KALR 73** as perWambuzi CJ (as he then was), ***Kiyimba Kaggwa v Katende [1985] HCB 43*** and ***Pan African Commodities Ltd v Aya Biscuits (U) Ltd Misc. Application No. 385 of 2007 (arising from HCCS No. 528 of 2007)***.

On the first principle, it was argued for the applicant that it has a prima-facie case that raise triable issues which include whether the respondent is estopped from terminating the contract; who breached the contract and whether attempt to terminate the contract due to complaint was wrongful. Counsel for the respondent in response argued that there is no prima-facie case because by the respondent giving the 90 days notice of termination of the contract, it was just exercising the rights provided for in the contract which was available to either party to the contract. He argued that the respondent could not be said to have wrongfully terminated the contract when it issued the notice in accordance with the terms of the contract.

In ***Chitty on Contracts, Volume 1, 27th Edition, London Sweet and Maxwell paragraphs 22-043 at page 1090***, it is stated that:-

*“The parties may* ***expressly provide in their contract that either of them is to have an option to terminate the contract.******The right of termination may be exercisable……….simply at the will of the party upon which the right is centered.*** *In principle since the parties are free to incorporate whatever terms they wish for the termination of their agreement, no question arises at common law whether the provision is reasonable or* ***whether it is reasonable for a party to enforce it****” (emphasis added).*

The parties in this application expressly provided under Clause 7.1.3 of their contract that either of them could terminate the contract upon giving 90 days notice to the other*.* I do not therefore find any merit in the argument for the applicant that the respondent was trying to wrongfully terminate the contract. The respondent did exactly what was agreed in the contract and so I do not see why it should be faulted.

Counsel for the applicant’s argument that the termination anticipated under clause 7.1.3 was supposed to be “*innocent*” and not motivated by a complaint of breach, in my view, is an attempt to adduce oral evidence to add to the terms of a written agreement. This clearly offends the Parol Evidence Rule and this court cannot accept it. What the parties agreed to in that clause was written in plain English language with no conditions attached to it.

For this court to find that the issuance of the notice of termination in accordance with the terms of the contract raise a triable issue as to whether it was wrongful in my view would amount to interfering with what the parties freely agreed to.

This court is mindful of the caution given by ***LS Sealy & RJA Hooley*** in their book, ***TEXT AND MATERIALS IN COMMERCIAL LAW, Butterworth’s,*** at page 391 that:-

***“In commercial transactions, the duty of the court is simply to give effect to the contract, and not to dictate to the parties what the court thinks they ought to have agreed, or what a person (reasonable or otherwise) might have agreed if he had read the contract and addressed his mind to the problem which, in the outcome has arisen”.***

The reason for this approach was stated by ***Lord Steyn*** in the case of ***Mannai Investment Co.v Eagle Star Life Assurance [1997] A.C. 749, HL*** (as reported in ***Contract Law: Cases and Materials;*** ***First Edition by Geoffrey Samuel*** at page 344) as follows:-

**“*………The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them…”***

I also found very instructive the statement by ***Lord Jessel MR*** in ***Printing and Numeral Registering Company v. Sampson (1875) L.R. Eq. 462 at 465,*** that:-

***“If there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and that contracts, when entered freely and voluntarily, shall be held enforced by the courts of justice”.***

One of the parties in the instant case has enforced an agreed term of their contract which they freely and voluntarily entered into.According to the above authorities, the duty of this court is simply to give effect to that term of the contract and not to question whether it was reasonable for that party to enforce it. To my mind questioning the reasonableness of the respondent’s action which the applicant is inviting this court to do would be an abuse of the court process as it is clearly contrary to the above established principles. For that reason I find that there is no prima-facie case or even triable issues shown by the applicant. In the result, the first condition for grant of a temporary injunction is not met.

On irreparable damages, I find very instructive the words of **Lord Diplock** in the case of ***American Cynamide Co******v Ethicon [1975]* 1** ***ALL E.R. 504*** . He states;

***“The governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted…”***

It was also held in the case of ***Kiyimba Kaggwa*** (supra) that:-

“*Irreparable damage does not mean that there must not be physical possibility of repairing injury,* ***but means that the injury must be a substantial or material one, that is, one that cannot be adequately compensated for in damages”***(emphasis added).

It was strongly argued for the applicant that it will suffer irreparable damages when the contract is terminated because first of all it will lose the remedy of specific performance and secondly if the loan is recalled it will fail to pay with the result that it will totally collapse.

On the other hand, it was submitted for the respondent that there are prayers for both special and general damages in the plaint which have been specified/particularized. It was therefore argued that it means that if at all any loss occurs it can be adequately compensated by damages. It was further argued that business risk is a common phenomenon which may manifest or not and it would therefore be wrong to penalize the respondent for the risk the applicant voluntarily assumed.

I have carefully considered the above arguments and looked at the pleadings filed by the applicant. It is true that the applicant particularized the special damages under paragraph 7 of the amended plaint and prayed for general damages for breach of contract as well. I do not therefore see any irreparable damage or injury that the applicant will suffer that cannot be compensated by an award of damages.

In the circumstances, I am not satisfied that the applicant will suffer irreparable damages if a temporary injunction is not granted. Consequently, the applicant has also not met the condition on irreparable damages.

Lastly on the balance of convenience, whereas this court is not in doubt in view of its conclusion on the two conditions, I would like to observe that due to my finding that the status quo has changed since the contract was terminated, the balance of convenience does not favour granting this application as it would have the negative effect of reinstating a contract which is already terminated.

In conclusion, this court finds that first of all this application is outside the scope of Order 41 rule 2 of the CPR. Secondly, the status quo sought to be preserved has changed and thirdly, the applicant has not met any of the conditions for grant of a temporary injunction. In the result, I decline to grant the orders sought in this application, vacate the interim order issued on 20th April 2012 and direct that the main suit be sent for mediation after which it should be set down for a scheduling conference. Costs of this application shall be in the cause.

I so order.

Dated this 6th day of July 2012.

**……………………..**

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 3.00 pm in the presence of:-

1. Ms. Ruth Kisakye for the applicant
2. Mr. Ernest Kalibala for the respondent
3. Ms. Damalie Angulo, Group Head, Legal & Regulatory Affairs of the respondent company.

**JUDGE**

26/06/2012