**THE REPUBLIC OF UGANDA**

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

**(COMMERCIAL DIVISION)**

**MISC. APPLICATION NO. 473/2014**

**(ARISING FROM CIVIL SUIT 391/2014**

**KAGURUSI REMMY NOWIITU**

**DAVID NAHURIRA ----------------------------------- APPLICANTS**

**VS**

**BAGUMA CYPRIAN BEGUMANYA**

**TAREMWA JAMES AND**

**CEDA FINANCIAL SERVICES LTD ----------------- RESPONDENTS**

**BEFORE JUSTICE FLAVIA SENOGA ANGLIN**

**RULING**

This application was brought under 0.41 RR. 1, 2 and 5 C.P.R seeking orders of this court issuing a Temporary Injunction restraining the Respondents /Defendants, their agents or any other person deriving title there from, from disposing off the assets of the Third Defendant without approval of the Board.; withdrawing money from the Third Defendant’s Bank Account with DFCU Bank Account No. 0100350017946, pending review by the new Board.

The Applicants also sought an order directing a forensic audit to be carried out immediately on the affairs of the Third Respondent.

Furthermore, the applicants demanded that the duly Elected Board of Directors be sworn in and facilitated to execute their duties with immediate effect.

Costs of the application were also applied for.

The application was supported by the affidavits of the two Applicants which were read and relied upon at the hearing; as well as two affidavits in reply deponed by the First and Second Respondents.

When the application was called for hearing on 27.08.14; Counsel for the Applicants recited the grounds thereof and referred to the supporting affidavits. He then submitted that there is a pending suit filed by the Applicants in which allegations of financial mismanagement are made and hence the prayer for a forensic audit. Counsel contended that the actions of the First Respondent are ultra vires the activities of Association and the Company’s Act.

He the contended that, in the suit there is a prayer for lifting of the veil of the Corporation so that the First and Second Respondents make good the losses.

It was asserted that from the supporting affidavits, it is evident that there are triable issues with a high probability of success.

Further those, the Applicants are raising issues in good faith taking into account their own interests as shareholders and also the interests of the Company and other unsuspecting members of the public who have invested in the Company.

It was argued that if the injunction does not issue, there is a high likelihood of irreparable damage to the Company and to the Applicants which may not be atoned for by damages.

Counsel stated that the imminent collapse of the Company touches the integrity of the people in management and may also take away equity invested by shareholders and other investors and the money may not be recoverable.

The Applicants, it was stated, stand to lose integrity and reputation and hence the need to maintain the status quo to preserve the existing assets of the Company and to oversee the spending of the money on the account.

That from what has transpired since the matter came to court, including internal fights and further mismanagement, the balance of convenience should be resolved in favor of the Applicants and the application allowed pending determination of their main suit.

The cases of **Meera Investments Ltd Vs Commissioner General of Uganda Revenue Authority C.A. 22/2007 [2007] HCB Vol. 1 p.71; Commodity Trading Industries Ltd & Mansion (U) LTD Vs. Uganda Maize Industries & Simba Distributors Ltd Civil Application 406/2003 [2001 – 2005] HCB Page 118;** and **E.L.T Kiyimba Kaggwa Vs. Hajji Abdu Nasser Katende C.S. 2/09/1984 [1985] HCB Page 43** – were relied upon to support the arguments of Counsel for the Applicants.

The cases set out the principles upon which temporary injunctions can be granted.

Counsel for the Respondent opposed the application basing on points of law and fact. He referred court to the affidavits in reply and submitted that the application was not sustainable as the orders sought could not be granted at this stage.

Counsel argued that since there is a prayer in the main suit that seeks to lift the veil of incorporation, until the veil is lifted the First Respondent and Second Respondents remain employees of the Company protected from any action by the doctrine of corporate personality.

Secondly that, to grant the orders sought will amount to disposing of the main suit before it is heard.

Moreover, that the prayers seeking to restrain sale of assets without approval of the board are the same prayers in the main suit. And if granted, the issues will be disposed of without evidence.

In respect of the prayer regarding the new board of directors, Counsel pointed out that it had no link with the plaint as there was nothing to show that they had been restrained from swearing in. Further that, the prayer contradicts the affidavit in rejoinder, as it is indicated in paragraph 13 and 15 thereof that the Board is operational as it was inaugurated on 27.06.14, thereby rendering the prayer redundant.

While the issue of mismanagement, Counsel asserted, cannot be concluded without evidence being heard.

Counsel concluded stating that the application was not made in good faith but was only intended to achieve selfish interests of the Applicants and to paralyze the operations of the Company, thereby having adverse effects that include: no salaries for staff, no payment of rent and other utilities as the company will have no funds to meet the requirements and the administration of the company will be curtailed.
It was pointed out that although the Registrar issued an interim order, he allowed salaries to be drawn so that employees can access their entitlements. As well as that the status quo is that the Company is operating with or without difficulties; whereas issuing the injunction will worsen the situation as the Company may be totally shut down.

Contending that court should only issue orders that can be implemented, Counsel wondered how court will know if Board has approved the sales.

Moreover that, by seeking conditions and not to stay operations of the First and Second Respondents, the Applicants are seeking orders that will have an effect of amending the memo and articles of Association and yet there is nothing to show that anything has been done without approval of the Board. It was prayed that application be dismissed with costs. Counsel relied upon the authority of **Mugisha Enock Vs. Rusiisi Fred, H.C.CA. No. 036/2009 [2013] UGHC 113.** The case is to the effect that ***“an injunction will normally not issue if it has the effect of disposing of the main suit”***

In rejoinder Counsel for Applicants stated that all issues raised by Counsel for the Respondents were technicalities that cannot bar the ends of justice. He stated that where a particular order disposes of issues of the main suit, it makes it lighter. Article 126 (2) (e) of Constitution was cited for the provision that ***“substantive justice should be administered without undue regard to technicalities”.*** Emphasizing that Board that was put in place has been rendered powerless as the First Respondent denies its legitimacy and that the fact that mismanagement is not easy to establish makes it more imperative for court to grant the orders.

Also that the order regarding the operations of the account is not meant to block the account as there other people who are signatories, and the Company has other accounts in Centenary Bank that can handle operational activities.

And that while court does not have to supervise orders, it is imperative that the people they are directed to obey them.

Adding that Company practice requires the Board to make decisions to be implemented by Managers, while the Articles of Association require that most actions be approved by Board of Directors; it was asserted that for the Management to take action without approval of the Board removes essence of the Board. Counsel reiterated earlier prayers.

Order 41 r. 1 Civil Procedure Rules provides for situations under which a Temporary Injunction may be granted. That is, where it is proved that:

1. Any property in dispute in a suit is in danger of being **wasted,** **damaged, or alienated** by any party to the suit, or wrongfully sold in execution of a decree; or
2. The defendant **threatens** or **intends** to remove or dispose of his or her property with a view to defraud his or her creditors.

The court may grant order of temporary injunction to restrain such act, **or make such other order for the purpose of staying or preventing the wasting, damaging; alienation,** **sale**, removal or disposition of the property as the **court thinks fit** until the disposal of the suit or until further orders.

Under 0.41 r (2) C.P.R court can issue injunction to restrain breach of contract or any injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such an injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping on account, giving security or otherwise, as the court thinks fit.

While under O.41 r. (5) C.P.R - ***An injunction to a corporation is binding on its officers:*** An injunction directed to a corporation is binding not only on the corporation itself but **also on all members and officers of the corporation** **whose personal action it seeks to restrain.**

The purpose of issuing an injunction is to maintain the status quo until the determination of the main suit. The considerations which courts have to take into account before granting an injunction have been well set up by decided cases. They include: a prima facie case with probability of success, the likelihood of suffering irreparable injury which an award of damages cannot adequately atone for; and where court is in doubt the issue will be determined on the balance of convenience.

In the present case, there is a pending suit filed by the Applicants as a result of misunderstandings that are said to have plagued the 3rd Respondent Company. The misunderstandings are said to have culminated into internal fights and financial mismanagement by the 1st and 2nd Respondents respectively.

The applicants are seeking a number of remedies referred to earlier in this ruling, which I find raise triable issues with a possibility of success as pointed out by Counsel for the applicants.

The interests of all people who are shareholders or have otherwise invested in the company including stand to be adversely affected by the continued squabbles. For as the saying goes “a house divided against itself cannot stand”.

The principles garnered form earlier decisions emphasize that ***“where applicants express dissatisfaction with such state of affairs as are said to be prevailing in the present case, they are presumed to have genuine grievances until the contrary is proved”.*** Refer to … (Supra)

Although such grievances can only be proved by hearing the parties in the main suit, courts have held that ***“pending hearing of the suit something has to be done to check the acts complained in the best interests of the company”.***

It is therefore only proper that the remaining/existing assets of the company are preserved and the spending of the money on the account is supervised by the board. If the acts complained of continue unchecked, the Applicants and all other shareholders in the company are likely to suffer irreparable damage that may not be adequately compensated for by way of damages. As submitted earlier and rightly so in my view, it may not be possible to place monetary value on lost integrity and reputation.

The submission of Counsel for the Respondents that the 1st and 2nd Respondents are protected from any action by the doctrine of corporate personality cannot be sustained. For as already pointed out in this ruling ***“an injunction against a corporation is binding not only on the company but also on its members*** **and officers *whose personal actions it seeks to restrain”. - O.41 r.5 CPR.***

The 1st and 2nd Respondents are officers of the company whose acts are complained of.

The prayer seeking to restrain further sale of assets is meant to safe guard them until all issues plaguing the company are dealt with; so will supervised operations of the company account. And with the existence of another account which is not contested by the Respondents, the likelihood of the operations of the company being paralyzed is minimal.

The money in the bank and how it is spent is the subject matter of the suit and so are the remaining assets of the company, their preservation is accordingly imperative otherwise the purpose of the main suit will be lost.

The order of the Registrar for the company to keep on paying salaries is sustained.

Court also finds that the injunction will not dispose of the whole suit as claimed but will pave way for more effective disposal of the main suit as the actions complained of will be restrained until all issues are effectively and finally determined.

No injustice will be occasioned to any of the parties if forensic audit is carried out as they will have a chance to be heard as to the findings thereof during the hearing of the main suit.

As regards the new Board members, the Applicants affidavit indicates that they were inaugurated although it is claimed that the 1st Respondent does not recognize them. The status quo is such that they are the Board members and the Respondents Counsel asserts that any actions of the company have by virtue of the Articles of association to be carried out with approval of the Board. It is therefore only proper that be facilitated to carry out their bounden duties until otherwise legally directed.

The application is accordingly allowed for all those reasons and the following orders are made:

Temporary Injunction to issue:

* Restraining the Respondents /Defendants, their agents or any other person deriving title there from, from disposing off the assets of the Third Defendant without approval of the Board.;
* Restraining the Respondents/Defendants from withdrawing money from the Third Defendant’s Bank Account with DFCU Bank Account No. 0100350017946, pending review by the new Board.
* A forensic audit to be carried out by auditors to be approved by the board.
* Costs will abide the outcome of the main suit.

Refer to: 0.41 rr.1, 2 & 5, Civil Procedure Rules; S.33 Judicature Act and S. 98 Civil Procedure Act.

**FLAVIA SENOGA ANGLIN**

**JUDGE**

**04.09.14**