

UGANDA / JUDGMENT

**Ask Without Shame Limited v Nabembezi
(Civil Miscellaneous Application No. 153
of 2020) [2021] UGHCCD 32 (21 May 2021)
[2021] UGHCCD 32**

COURT

HC: Civil Division (Uganda)

BEFORE

Boniface Wamala, J

CASE / FILE NUMBER

Civil Miscellaneous Application No. 153 of 2020

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****[CIVIL DIVISION]****MISCELLANEOUS APPLICATION NO. 153 OF 2020****5 [ARISING OUT OF CIVIL SUIT NO.354 OF 2019]****ASK WITHOUT SHAME LIMITED :..... APPLICANT****VERSUS****RUTH NABEMBEZI:..... RESPONDENT****BEFORE: HON. JUSTICE ESTA NAMBAYO****10 RULING**

The Applicant brought this application under **Section 98 of the Civil Procedure Act and Order 52 Rule 1 of the Civil Procedure Rules** against the Respondent seeking for orders of this Court that: -

1. A mandatory order be issued against the Respondent to deposit with 15 this Court a total sum of USD 50,000 (Fifty Thousand dollars) and UGX 20,000,000 (Twenty Million Shillings) being money withdrawn from the Applicant's account on the 21st day of August 2019.

2. Costs of this application be provided for.

The grounds of this application are contained in the affidavit of Etienne Salborn,

20 Director of the Applicant Company but briefly are that: -

- 1) The Applicant filed Civil Suit No.354 of 2019 on the 16th day of August 2019, seeking among others a declaration that the act of withdrawing money by the Respondent from the Applicant's account for her own use was in breach of her duties as a Director which suit is pending disposal in 25 this Court.
- 2) The Respondent was duly notified that Civil Suit No.354 of 2019 together with Misc. Application No.565 of 2019, for a temporary injunction restraining the Respondent from making further withdraws off the Applicant's account as well as Misc. Application No.566 of 2019 for an 30 interim order restraining the Respondent from making further withdraws off the Applicant's account had been instituted against her.
- 3) With the intention of rendering the suit nugatory, the Respondent withdrew USD 50,000 (Fifty Thousand Dollars) and UGX 20,000,000 (Twenty Million Shillings) on the 21st day of August 2019.
- 35 4) The Applicant has a prima facie case with a high probability of success.
- 5) The Applicant is likely to suffer irreparable loss and damage if the mandatory injunction order is not granted.
- 6) The main suit will be rendered a nugatory if this application is not granted.

40 The Respondent opposes this application on grounds that withdrawing money from the Applicant's account was one of her duties in her employment with the Applicant and that when she withdrew the said amount of money, she was not aware that Civil Suit No.354 of 2019 had been instituted against her.

Representation

45 Counsel Karoro Francis, represents the Applicant while Counsel Bifirawala Elijah is for the Respondents. Both parties filed written submissions.

Issues for determination are: -

1. Whether a mandatory injunction should issue against the Respondent ordering her to deposit the withdrawn monies with this Court:

50 2. Remedies available to the parties

Counsel Karoro, relied on the case of Xing Wang Co. Ltd –v- Zheng Zuping Misc.

Cause No.1 of 2018, where Justice Stephen Mubiru stated that;

" a temporary mandatory injunction is not a remedy that is easily granted. It is an order that is ordinarily passed in circumstances which are clear and the prima 55 facie materials clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demand that the status quo ante be restored by way of a temporary mandatory injunction. That in circumstances of that nature, the essential condition is that the party claiming it must be shown to have been in possession on the date of the order 60 directing the parties to maintain the status quo and it must be further shown that the party was dispossessed when the order was impending or after such an

order was passed...It may also be granted where the respondent attempts to forestall an interim or temporary injunction, such as where, on receipt of notice that an interim or temporary injunction is about to be applied for, the 65 respondent hurries on the work in respect of which ^a complaint is made so that when he or she receives notice of an interim or temporary injunction, it is completed. Court should be careful though, not to grant an injunction that will have the effect of virtually deciding the suit without a trial (see *Cayne -v- Global Natural Resources PLC* [1984] 1 All ER 225)."

Counsel explained that this suit was filed against the Respondent on the 16th 70 August 2019, and the Respondent's lawyers were served with the applications for interim order, temporary injunction and the Civil Suit on the 22nd August, 2019. On the 21st August, 2019, the Respondent withdrew a total sum of USD 50,000 (Fifty Thousand Dollars) and UGX 20,000,000/= (Twenty Million Shillings) (a copy of the financial 75 statement is annexure "D" to the affidavit in support of the application). Counsel further explained that the status quo at the time of filing the suit was that the account had USD 50,000 (Fifty Thousand Dollars) and UGX 20,000,000 (Twenty Million Shillings), but this was altered by the Respondent on the 21st August, 2019 when she withdrew all the above monies after she was notified that there was a pending suit 80 and applications against her. That the Respondent's intention was to have the suit and the applications nugatory.

In reply, Counsel for the Respondent submitted that the circumstances in the instant case do not favour the orders sought. He argued that an Applicant seeking a 85 mandatory injunction, must prove his case on a standard higher than the standard in prohibitory injunctions. Counsel relied on the Kenyan case of *Kenya Breweries Ltd & Anor -v- Washington O. Okeya* [2002] Eklr, where it was noted that;

"^A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, but only in clear cases either 90 where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the Court has to feel a higher degree of assurance that at the trial it would appear

95 that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

Counsel submitted that the Applicant has not demonstrated any special circumstances that would warrant the grant of an interlocutory mandatory injunction and explained that the application was brought over a year after the withdrawal of 100 the money and the amounts are substantial. That the Respondent will suffer great inconvenience and prejudice if she is tasked to deposit such a hefty sum in Court

and that it is likely that she will be unable to satisfy such orders. That such orders are also likely to put the main suit in abeyance.

Analysis:

105 In the case of **Themí Nakibuuka Ssebalu -v- Peter Ssematimba and 2 Others, Misc. Application No.52 of 2014 arising out of Civil Suit No.29 of 2014, Justice Percy Night Tuhaise** (as she then was), noted that: -

"a mandatory injunction is granted mostly to restore the status quo and not to establish a new state of things. That if the grant of a mandatory injunction may 110 lead to granting substantially the relief claimed in the main suit, Courts should be very slow in granting any such prayer."

In this case, the Applicant seeks for a refund of the sum of USD 91,000 and Ushs. 45,000,000/- in the main suit. My finding is that granting this application would in

- 115 effect lead to substantially granting the reliefs sought in the main suit. Secondly, by ordering the Respondent to have the claimed money deposited in Court, it would create a new state of affairs instead of restoring the status quo. The status quo was that the money was on the Applicant's account in the bank and not in Court.
- 120 In view of the above, I would dismiss this application with orders that costs stay in the cause.

I so order

Dated, signed and delivered at Kampala on the 21st day of May, 2021.

125 Esta Nambayo

JUDGE

21/5/2021.

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