

THE REPUBLIC OF UGANDA
IN THE HIGH COURT AT KAMPALA
(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 318 - 2012
(Arising from civil suit No 218 of 2012)

LEAF TOBACCO & COMMODITIES (U) LTD APPLICANT/ PLAINTIFF

VERSUS

COMMISSIONER OF CUSTOMS,
(Uganda Revenue Authority) RESPONDENT/DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This is an application made under Order 41 Rule 1 of the Civil Procedure Rules (CPR) for orders that a temporary injunction be granted against the respondent authority restraining them from permitting the importation into and/or through Uganda into Southern Sudan of any product under the plaintiff's "Supermatch" Trademark pending the determination of the main suit.

The brief facts are that the applicants and its sister company M/s Leaf Tobacco and commodities in Southern Sudan hold the trademark and the exclusive Supermatch commercial territorial rights for both Uganda and Southern Sudan. It is the case of the applicant that certain companies are illegally importing Supermatch cigarettes

into Uganda under the guise of re-exporting them into Southern Sudan. A perusal of the motion shows that the applicants are particularly referring to M/s Mastermind Tobacco Company Kenya and M/s Mastermind Tobacco Southern Sudan (herein after collectively referred to as "Mastermind"). It is also the case of the applicant that this had led to a dispute in the Courts of Southern Sudan whereby the applicant and its sister Company on the 23rd June 2011 obtained an order stopping Mastermind from using the applicant's trademark. This court order was then enforced on the 8th September 2011 by Southern Sudan Customs stopping all but the applicant from importing Supermatch into Southern Sudan. It is the case of the applicant that the respondent Authority despite the above has continued to escort Mastermind's cigarettes bearing the mark Supermatch to Southern Sudan with the result that the said cigarettes are then smuggled back into Uganda to the disadvantage of the applicant.

The respondent Authority in reply denies the allegations and states that it is obliged under the principle IV of the United Nations Convention on Transit Trade between land Locked states, Land locked countries to afford by all states, on the basis of reciprocity, free and unrestricted transit of goods in such a manner that they enjoy free access to regional and international trade. It further states that by reason of this dispute of not allowing Masterminds cigarettes to transit through Uganda there is a threat of retaliation from Kenya. It is also the case for the respondent that its legal mandate does not extend to solving trade disputes between companies, except where it is decreed by court that specific decisions be implemented. The respondent authority also denies the allegation of smuggling of these cigarettes back into Uganda.

The applicant was represented by Mr. Isaac Bakayana while the respondent was represented by Mr. G. Okello.

Counsel for the applicant submitted that the applicant had a prima facie case in the head suit with a high probability of success. He submitted that the Applicant has a trade mark for Supermatch cigarettes which is not denied by the respondents. That Annexure A1 and A3 show that the applicants sister company in south Sudan also has a trade mark for Supermatch cigarettes.

He went on to submit that the Supreme Court of south Sudan barred master mind Tobacco Company Kenya from using the trademark in south Sudan and that the above government only authorizes the applicant and its sister company for importing Supermatch cigarettes in to South Sudan which is also not denied.

Counsel for the applicant further submitted that his clients would suffer irreparable loss that could not be atoned for in damages because these cigarettes transiting Uganda to south Sudan are subsequently re-imported into Arua in Uganda which is smuggling and that the loss can not therefore be estimated.

As to balance of convenience the learned counsel for the applicant submitted that the respondent will not suffer anything on the contrary if the temporary injunction is granted.

In reply counsel for the respondent Authority submitted that the existence of the trademark is not denied as far as Uganda and south Sudan is concerned. He submitted that the Authority had a defence to the case because the respondent is mandated Uganda as a land locked country to provide reciprocal support to countries which do the same to Uganda to allow trade (that is Kenya). He referred

Court to Annex "R1" a convention in transit trade principle 4 to which Uganda is a signatory.

He further submitted that, the respondent is responsible for customs services in Uganda and has to respect the convention. That the respondent has to allow goods from Kenya to transit freely through Uganda to South Sudan and that that is what it has been doing. Counsel for the respondent submitted that there is no contrary evidence that this instrument does not apply to Uganda. Counsel for the respondent submitted that the respondent Authority only allowed goods through Uganda where permits existed to export to Southern Sudan.

Counsel for the respondent submitted that there was no more smuggling into the Arua area of the said cigarettes and therefore the applicants could rely on this argument.

As to irreparable loss the learned counsel for the respondent submitted that when the respondent tried to stop the transit, the Kenyan government threatened a blockade on Uganda in retaliation and that this goes also to balance of convenience. He then concluded that, should court be inclined to grant this Temporary injunction then Court should not award costs against the respondent as it was just following the international convention and as such needs protection on any consequences.

I have addressed my mind to the motion and the affidavits for and against it and the submission of both learned counsels for which I am grateful.

The objective of a temporary injunction is twofold. First the granting or refusal of a temporary injunction, which is an interlocutory order, is an exercise of judicial discretion which must be exercised judiciously. **(See: Sargent Vs Patel (1949) 16 E.A.C.A 63)**. Secondly the purpose of a temporary injunction is to preserve matters in a *status quo until* the question to be investigated in the suit can finally be disposed of. **(See: Kiyimba-Kaggwa Vs Haji Abdu Nasser Civil suit No. 2019/1984; Noor Mohamed Hanmohamed Vs Kassamali Virji Madhani (1953) 20 EACA 8 AND Garden Cottage food limited Vs Milk Marketing Vs Milk Marketing Board [1984] A.C 130)**

The law is fairly settled now as the tests required in an action such as this for Court to consider in granting a temporary injunction.

The first is whether there are serious questions to be tried a variant from the original prima facie test. (See: **Britannia Allied Industries Vs Sunrise Confectionaries Ltd MA-0288 OF 2005 my decision and Francis Babumba & Others Vs Erusa Bunju Civil suit No. 679/90 – Okello J as he then was**)

The Second is that, a temporary injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; **(See: Kiyimba-Kaggwa Vs Haji Abdu Nasser Civil suit No. 2019/1984)**

Thirdly; if the court is in doubt, it will decide an application on the balance of convenience. **(See: Giella & Cassman Brown Co. Ltd [1973] EA. 358; Industries Vs Trufoods [1972] EA 420)**

In this case the existence of the applicant's trademark is not in dispute. It is not even challenged. There are issues as to whether third parties not being the applicant can also transit Supermatch cigarettes through Uganda to Southern Sudan. As it is the said third parties especially Mastermind are not parties to this application and this question still therefore remains in the balance. There is evidence that Mastermind has been prohibited from importing Supermatch into Southern Sudan. This too is not denied. To my mind this points to the applicants having a good prima facie case.

As to irreparable injury in the case of **Britannia Allied Industries Vs Sunrise Confectionaries Ltd MA 0288 OF 2005** I held that for such cases of intellectual property violations it may not be easy to properly assess the level of irreparable loss and therefore determine whether damages may suffice. Loss may arise not only from loss of sales but also good will. In this case the respondent has not been clear on the issue of smuggling because it states that it has been contained and yet in their letter dated 12th August 2011 (marked R7 to the affidavit in reply) they write to Mastermind that Supermatch cigarettes are the most smuggled cigarettes from Southern Sudan into Uganda. Smuggling can to my mind lead to loss that is not easy to quantify.

As to the balance of convenience in the event of doubt I can only refer to the authors of Halsbury's **Laws of England 4th Edition; Volume 24** Paragraph: 938, where it is written that;

"...The court's Jurisdiction in the protection given to trade marks rests upon property, and the court interferes by injunction because that is the only mode by which property of this kind can be efficiently protected."

I find that the applicants have made out a case for a temporary injunction and I so grant it as prayed.

As to costs I agree with counsel for the respondent authority that given their statutory duty and international obligations there is no justification to award costs to the applicant. Each party is ordered to bear its own costs.

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Geoffrey Kiryabwire

JUDGE

Date: 29/08/12

11:02 a.m.

Ruling read and signed in Court in the presence of;

- I. Bakayana for Applicant
- G. Okello for Respondent

In Court

- A. Rutabire – MD of Applicant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 29/08/12