

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

MISC. APPLICATION NO. 546 OF 2004

(Arising out of C.S No. 570 of 2004)

DIGITAL SOLUTIONS LTD ::::::::::::::::::::::::::::::::::: APPLICANT/PLAINTIFF

VERSUS

MTN UGANDA LTD ::::::::::::::::::::::::::::::::::: RESPONDENT/DEFENDANT

BEFORE: THE HON. LADY JUSTICE M.S. ARACH - AMOKO

RULING:

This application was brought by the Applicant, M/S Digital Solutions Ltd, by chamber summons under 0. 37 rr 1, 2 and 9 of the CPR, seeking for:

- a. a temporary injunction restraining the Respondent and its servants or agents from further infringing the Applicant’s copyright in the soft ware and functional specifications of the Me2U application.
- b. an order restraining the Respondent its servants or agents from further use of the mark “Me2U” until the final disposal of HCCS No. 570/2004 and
- c. costs of the application.

The grounds of the application are stated in the affidavit of Mr. Joseph Ogwal, a director of the Applicant which was read and relied on at the hearing, but briefly they are:

1. The Applicant developed and wrote a software programme, which operates an application that enables peer-to-peer airtime, and service fee transfers between two pre-paid mobile telephone subscribers by way of a Short Messaging Service (“SMS”)

command.

2. The Applicant named its application “Me2U” and in order to interest the Respondent in acquiring a licence to use it, disclosed the software programme and the functional specifications of the application to the Respondent, in circumstances that imported a duty of confidentiality and without assigning its copyright to the Respondent or licensing it to exploit the said copyright.
3. After full disclosure of the software and functional specification was made to the Respondent, the Respondent pulled out of negotiations for a commercial licence from the Applicant and instead went ahead to unlawfully use the information that it had been given by the Applicant to create and launch an application that enables peer-to-peer airtime, and service fee transfers between two pre-paid mobile telephone subscribers by way of a Short Messaging Service (“SMS”) command also under the name “Me2U”).
4. The Respondent does not acknowledge the Plaintiff’s title to or authorship of the software programme or the functional specifications that it used to come up with its own application that it is calling “Me2U” and the operations of the same are so similar to those of the Plaintiff’s application that the Respondent’s application must be based on a substantial taking from the Plaintiff’s software programme and functional specification.
5. The Respondent’s unlawful actions have caused and continue to cause the Applicant loss and damage, which loss is largely incapable of remedy in damages.
6. In spite of initial assurances of a willingness to come to a negotiated and amicable settlement, the Respondent has displayed bad faith by going back on its word and seeking to continue to exploit the Plaintiff’s application and mark while stringing the

Applicant along in talks to which it is not committed.

7. The Applicant has filed HCCS No. 570 of 2004 wherein, inter alia, it is seeking for a permanent injunction restraining the Respondent from further infringing its copyright and breaching its duty of confidentiality by using the offending application it has also named "Me2U" and restraining the Respondent from using the mark "Me2U".
8. It is in the interests of justice that an interim order doth issue restraining the Respondent from continuing to act in breach of the law pending determination of the application for a temporary injunction.

Other affidavits are:

1. Supplementary affidavit by Mr. Ogwal dated 25/8/2004.
2. Affidavits in reply by Mr. Anthony Katamba - the Respondent's Company Secretary and Mr. Donald Lubega, head of Systems Development Department dated 27/8/2004.
3. Affidavits in rejoinder by Mr. Ogwal and Mr. Paul Bagyenda - another Applicant's Director dated 1/9/2004.

Mr. David F.K Mpanga and Mr. Ernest Kalibala represented the Applicant while Mr. Peter Kabatsi and Mr. Oscar Kambona appeared for the Respondent. They made very detailed and well researched submissions which have greatly assisted me to decide this application.

Basically, the dispute which gave rise to this application is about a soft ware application or programme called Me2U, introduced to the Respondent's customers in July this year. The application enables the transfer of airtime and service fee between two pre - paid subscribers

by an SMS command.

The Applicant alleges that it is the one which not only conceived this idea but wrote the software programme for the application, tested it and gave it the name “Me2U”. That it then contacted the Respondent’s employers with a view to interesting the Respondent in contracting for a licence to use the said application. The Respondent expressed interest in the application, and requested that it should be tested on its network first before formal negotiations. The Applicant’s directors delivered a laptop computer with software programme loaded on it to the Respondent’s employees at their Bugolobi Switch. The said laptop computer was installed at the switch and left for testing. The tests were successful. Thereafter the Applicant’s officials were invited by the Respondent’s employees and they made presentations on the application, detailing its functions and capabilities. The said Respondent’s officials seemed pleased with the presentation and invited the Applicant to forward and the Applicant forwarded a draft commercial proposal as well as draft software provision and support contract and most importantly, an updated technical specification of the “Me2U” application on 5/2/2004.

Having made the above disclosure and having received a positive feedback, the Applicant expected the Respondent to formalize the relationship by entering into a commercial licence agreement with the Respondent. The Applicant was therefore shocked when the Respondent launched a massive media campaign advertising an application it called “Me2U”, with exactly the same functions, without acknowledging that the same was conceived and coined by the Applicant. Several efforts to settle the matter amicably failed.

The Applicant then instituted CS No. 570/04 on 18/8/04 for inter alia, a permanent injunction, general, exemplary and aggravated damages, delivery up and account of profits arising out of the Respondents infringement of the Applicant’s copy right and trade mark and for breach of confidentiality.

The Respondent has of course, denied the claim and contends that the said software was internally developed and none of the Applicant’s information was used in the course of its

development as alleged.

The Respondent also contends that the name “Me2U” is a generic name used in the industry in respect of the said software application and has actually taken steps to have the trademark registered by the Plaintiff struck off.

These are the contentions which are repeated throughout all the affidavits on record.

The granting of a temporary injunction is an exercise of Judicial discretion. The purpose for granting a temporary injunction is to preserve matters in status quo until the question to be investigated in the suit can be finally disposed of. The conditions for the grant of a temporary injunction are well settled in law.

First, the Applicant must show a prima facie case with a probability of success. That is, the Court must be satisfied, on the basis of the material availed at this stage, that there are serious questions to be tried between the parties with a probability that the questions may be decided in favour of the Applicant.

Secondly, the circumstances should be such that if the Court does not issue the order, the Applicant would suffer irreparable injury which would not adequately be compensated by an award of damages, even if he subsequently succeeds in the action.

Thirdly, if the Court is in doubt, the Court will decide the application on the balance of convenience. See: **Giella -Vs- Casman Brown** [1973] E.A 358 (CA).

- **Kiyimba Kaggwa -Vs- Haji Abdu Nasser Katende** [1985] HCB 43.

- **American Cynamid Co. —Vs- Ethicon Ltd** [1975] AC 396. (H.L).

- **Robert Kavuma —Vs- Hotel International** C.A No. 8/1990 (SC) per Wambuzi C.J, as he then was, at page 7.

Having considered the submissions of counsel for both parties, and having perused the pleadings, the affidavits and read the authorities cited, I have formed the following conclusions:

1. Prima fade case: I find that the Applicant has raised serious questions or issues to be tried by this Court regarding the events that led to the launch of “Me2U” application by the Respondent. For instance, in paragraph 6,7,8 and 9 of Mr. Ogwal’s affidavit in support, Mr. Ogwal deponed that:

“6. That in late December 2003 or early January 2004, the Applicant contacted the Respondent’s employees, with a view to interesting the Respondent in contracting for a licence to use the “Me2U” application on its national mobile telephone network.”

7. That the Respondent expressed an interest in the application and requested for it to be tested the computer was installed at the switch and left for about a fortnight, in order that the Respondent could carry out tests that it required.

8. That after the tests had been successful on the 4th February 2004, the Applicants Mr. Paul Bagyenda and I were invited by the Respondent to make a presentation.... application.”

The affidavit of Mr. Katamba in reply does not deny these facts. He deponed in paragraphs 9 and 10:

“9. That sometime in January 2004, the Applicant approached one of the Respondents employees and sought to introduce a software programme to be run on the Respondent network.

10. That a number of tests were conducted with the Respondent’s IT department, on the Respondent’s network and eventually discovered that the Respondent was already developing a similar programme.”

In paragraphs 11 and 12 he deponed that:

“11. That after the Applicant’s presentation on the 4th February 2004, it was discovered that the application was already being internally developed by internal software developers.”

“12. The Applicants offered to provide an unsolicited and voluntary written technical specification of the application.”

Paragraph 12 is not entirely true, as Mr. Mpanga pointed out. The E-mail dated 4/2/2004 from Mr. Bagyenda to the Respondent’s employees says:

“Thank you for the opportunity to present Me2U product this morning. This has been in the works since last year and we are pleased to finally present it to your formal and have you test it. Thank you for your positive reception. As you requested in the meeting, we will provide a commercial proposal shortly, including the different pricing options, support issues and rights/licenses.”

It is possible that the Respondent could have consulted other service providers including its sister companies such as MTN S. Africa, Celtel Malawi, etc but the fact that it did consult the Applicant and actually tested the Applicant’s application is clear from the materials before this Court. There is also no E-mail on record to show that the Respondent told the Applicant that it had already developed a similar one.

2. Irreparable Injury:

Mr. Ogwal has stated in his supporting affidavit (See paragraph 18) that the Respondents continuing unlawful exploitation of the Applicant’s application is causing the Applicant substantial losses in terms of revenue in terms of branding and the ability to sell the application to other mobile telephone operators. The general public is increasingly identifying the mark and the application with the Respondent, thus reducing its value to the Respondent’s competitors. That his advocates have informed him that the loss and damage being caused to

the Applicant is not capable of remedy in damages.

Mr. Lubega on the other hand has deponed that even if the Applicant had a cause of action with a likelihood of success, the damage that would accrue to it in the event of failure to obtain the injunction prayed would be capable of remedy in damages because the suit prays for among others an account of profits out of the alleged infringement. I am respectfully persuaded by this argument. If the Applicant succeeds in its case and the Respondent is ordered to account the Applicant will then be compensated appropriately. In the Kiyimba Kaggwa case, it was held that irreparable injury does not mean that there must not be physical possibility of repairing the injury; but means that the injury must be substantial or material one, that is, one that cannot be adequately, compensated for in damage.

That is not the case in the instant application.

3. Balance of convenience:

On the basis of my findings in 1 and 2, I am constrained to decide this application on the balance of convenience. Naturally, each party to the application claimed to have the balance of convenience. However, I find that, given all the circumstances of this case, it is the Respondent which should have the benefit of the balance of convenience in the instant application. First and foremost, it is a cardinal principle of our law that an injunction should preserve the status quo. In the present application, the status quo is that the Respondent launched the application and it has been used by the general public since July this year. To grant this application would therefore be contrary to the Paid down principle because it would change the status quo.

Secondly, as Mr. Kambona pointed out, the programme is up and running. It is part of the service currently provided by the Respondent on the market. The Applicant says in its pleadings and by its affidavit that its main intention is to sell this programme; not to run it. The programme has a value which the Respondents customers attach to it. If the Court were to find that this indeed is the Applicant's programme, their ultimate aim is to benefit from it. The best way to benefit from it is thus to let it run, and not to stop it. I am therefore persuaded

that the programme should be allowed to run and the Applicants be compensated if they succeed in their claim.

The issue of an undertaking came up during Mr. Kambona's submissions. It is not founded any evidence on record. It therefore has no basis and I decline to rule on it.

In the result, this application is declined for the reasons given. Costs to abide the outcome of the main suit.

M.S. Arach - Amoko

JUDGE

20/10/2004

Ruling delivered in the presence of:

1. Mr. David Mpanga for the Applicant.
2. Applicant's shareholders - Bagyenda & Ogwal & Ian Mugarura
3. Mr. Kambona for Respondent.
4. Mr. Okuni - Court clerk.

M.S. Arach - Amoko

JUDGE

20/10/2004