THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAPALA
CONSTITUTION APPLICATION NO. 02 OF 2015

OMAR AWADH OMAR & 10 OTHERS.....APPLICANTS
VERSUS
ATTORNEY GENERAL .....RESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA
(Single Justice)

RULING OF THE COURT

The applicants were petitioners in constitutional petitions No. 55 and 56 of 2011 which were consolidated and heard together. In both petitions the applicants were challenging the constitutionality of the trial and the jurisdiction of the trial court. On 22nd October 2014 both petitions were dismissed having substantially filed.

The applicants being dissatisfied with the decision of the Constitutional Court have since filed a notice of appeal to the Supreme Court. The appeal has yet to be failed.

They have filed an application in this court seeking an order of stay of execution of the Judgment and orders of this court in the dismissed petitions. They have also filed this application seeking an interim order of stay of execution pending the hearing of the substantive application referred to above. That application has yet to be fixed and is still pending hearing in this court.

This application seeks the following orders:-

i) ***An interim Order doth issue for stay of Execution of the Judgment and orders and of the Constitutional Court in Constitution*** *Petitions of 55 and 56 of 2011, until*

determination of the main Application for stay of execution.

ii) *Provision be made for costs.*

The grounds for the application are set out in the notice of motion as follows:-

a) *The Constitutional Court entered Judgment in Constitutional Petition No. 55 and 56 of 2011 on the 22nd day of October 2014.*

b) *That the Applicants being dissatisfied with the Judgment and the orders of the Constitutional court filed a Notice of Appeal and also requested for a record of Proceedings to enable them prosecute the Appeal.*

c) *The Applicants have filed an Application for a temporary injunction seeking to stay execution of the Judgment and orders of the Constitutional Court until determination of the Appeal, with a likelihood of success.*

d) *That consequent upon the orders of the Constitutional Court and unless an order is issued to stay execution of the Judgment and orders of the Constitutional Court, prosecution of the Applicants which has been set to commence on the 20th Day of January 2015 will proceed, which will render the Main Application and the Appeal nugatory and occasion irreparable injury to the Applicants.*

e) *The Balance of convenience is in favor of the stay of execution.*

The respondent filed an affidavit in reply deponed to by Lino Anguzu a Principal State Attorney with the Directorate of Public Prosecutions. He contended that the trial which the applicant seeks to have stayed by this application has already commenced.

That this application has no likelihood of success and that the intended appeal only seeks to have the trial of the applicants delayed.

That the applicants have not been vigilant in pursuing their appeal and that no appeal has been filed at the Supreme Court.

That the balance of convenience favours the continuation of the trial at the High Court and that this is in favour of the respondent .

That it is in the public interest that the trial proceeds otherwise key witnesses may die or disappear.

At the hearing of this application learned counsel **Mr. Peter Walubiri** appeared for the applicant while **Ms. Patricia Mutesi** learned Principle State Attorney appeared for the respondent.

The Applicants were not in Court.

Mr. Walubiri submitted that this application seeks to protect the constitutional right of the applicants to a fair hearing and to preserve their right of appeal. He cited Rule 2(2) of the rules of this court that grants power to this court to ensure Justice.

That the application seeks an interim order of stay of execution of the Judgment and orders of the constitutional court in the consolidated petitions 55 and 56 of 2011.

That in the consolidated petitions the applicants had contested the legality of their trial on the grounds that it was unconstitutional. That it violated several provisions of the constitution, as the petitioners had been brought into the jurisdiction illegally, they had been tortured and a range of their rights had been violated.

That they also challenged the jurisdiction and the legal status of the court before which they were being tried, the International War Crimes Division of the High Court, as having been setup unconstitutionally by the Chief Justice.

That the petition was dismissed on 22nd October 2014 and that court ordered the High Court to expeditiously try the applicants and that the trial has since commenced.

That the applicants have filed a notice of appeal and have written a letter requesting for proceedings, but the proceedings have not yet been availed to them by this court. That the applicants have an automatic right of appeal which ought to be protected. That they have strong grounds of appeal as the draft memorandum of appeal which is attached to the affidavit in support of the motion indicates.

That the appeal therefore is not frivolous and has great likelihood of success.

That the applicants have complied with all the requirements for grant of an interim-order of stay of execution as set out by this court in various authorities. As authority for this proposition counsel cited the case of *Kyambogo University vs Prof. Isiah Omoro Ndiege Court of Appeal Civil Application No. 341 of 2013*.

Counsel also informed court that the trial judge Hon. Owiny-Dollo, J had refused to grant the applicants a stay of proceedings pending the constitutional appeal to the Supreme Court, hence this application.

Counsel submitted that the order sought to be stayed is expressly set out in the Judgment sought to be appealed, from directing the High Court to proceed with the criminal trial.

That if this order is not granted the applicant's appeal would be rendered nugatory, because the whole purpose of the constitutional petition was to stop an unconstitutional trial.

That the applicants will be put to great expense on top of the violation of their rights if this application is not granted. That there are very serious issues of law and fact to be determined on appeal especially the issue of *rendition*, a worldwide problem in which people are abducted and transported across jurisdictions illegally for trial.

He asked court to grant this application.

In reply Ms. Mutesi opposed the application and relied on the affidavit in reply of Lino Anguzi. That the trial has already commenced and as such there is nothing to stay.

That the appeal is frivolous and has no chance of success.

That there is no likelihood that the Supreme Court would allow the apeal.

Counsel submitted that the balance of convenience favours the respondent in that the charges against the applicants are very serious and extremely grave.

That once a stay of proceedings is granted, the applicants would still be held in custody and such no greater hardship would be avoided by granting this application. On the other hand if the trial is stayed, the respondent would suffer greater hardship in that the rights of victims who have been waiting since 2011 for justice would be violated by the

prolonged delay. Key witnesses may disappear or die and physical evidence may be compromised or destroyed.

On the other hand that in the unlikely event that the appeal succeeds the applicants may be compensated by way of damages and court would also order their release.

In re-joinder Mr. Walubiri submitted that court must consider that the applicants are presumed innocent until proved guilty, the seriousness of the charges against them notwithstanding.

That the position of the law as set out in the case of *Charles Onyango Obbo and Andrew Mwenda Vs Attorney General Supreme Court Constitution a Appeal No. 02 of 2002,* is to the effect that violation of rights should not be allowed to continue merely because the victim may be compensated by way of damages.

That the delay in trying the applicants can only be attributed to the state. That public interest cannot override the requirements of the Constitution, it cannot sanction an unconstitutional trial. He generally reiterated his earlier submissions and prayers.

I have listened carefully to the submissions of both counsel, I must admit both were impressive.

At this stage I am only concerned with the application for an interim order. I cannot delve into the merits of the main application or the appeal itself. I will therefore not make any determination on the issues raised by both counsel in the regard.

This application and the main application are not interlocutory applications as there is no matter in this court pending determination, the petition having been concluded. I am doubtful therefore if a single Justice of this Court or indeed a penal of three justices are seized with jurisdiction

to hear and determine an application of this nature. This is because the Judicature Act, Section 12 (1) restricts the powers of a single Justice of this Court to interlocutory applications only.

That section stipulates as follows:-

12 "Powers of a single justice of the Court of Appeal.

(1)A single justice of the Court of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.

It appears to me that such an application ought to have been placed before a full Coram of this Court. It would have been different if this application had been in respect of an interim order pending the hearing of a petition. In that case it would have been an interlocutory application envisaged under Section 12 (1) of the Judicature Act. Since this issue was not argued by counsel I will leave it for the determination by court at hearing of the main application or at another appropriate time.

It is trite law that the institution of an appeal does not operate as stay of execution. Rule 62 (b) of the Rules of this Court. The duty lies upon the applicant to satisfy court that sufficient grounds exist for grant of an order of stay of execution and that each case has to be determined on its own facts. However, the following principles have been set out by courts as a guide. They are not exhaustive:-

1. ***That the applicant has lodged a notice of appeal in accordance with Rule 76 of the Rules of this Court.***

2. ***That a substantive application for stay of execution has been filed in this court and is pending hearing.***

3. *That the said substantive application and the appeal are not frivolous and they have a likelihood of success.*

4. *That there is a serious and imminent threat of execution of the decree or order and that if the application is not granted the main application and the appeal will be rendered nugatory.*

5. *That the application was made without unreasonable delay.*

6. *The applicant is prepared to grant security for due performance of the decree.*

7. *That refusal to grant the stay would inflict greater hardship than it would avoid.*

See:- *Kyambogo University vs Prof. Isiah Omoro Ndiege (Supra)*

In the above case this court discussed at length the law relating to grant of stay of execution pending appeal in this court and I have no reason to repeat what is already set out in that case.

I am satisfied that the applicants have lodged a notice of appeal to the Supreme Court, and that a substantive application for stay has also been filed in this court and it is pending hearing.

I have perused that application and have found nothing to suggest that it is frivolous or lacks merit in anyway.

This application was also made without undue delay.

I do not think that the peculiar facts of this case warrant an order for security for due performance of the decree.

The questions that remain for determination in this application therefore are three.

(1) Whether there is serious and imminent threat of execution of the decree or order of this Court sought to be appealed from.

(2) Whether if this application is not granted the appeal would be render nugatory.

(3) Whether refusal to grant a stay would inflict greater hardship than it would avoid.

As to whether or not there is serious and imminent threat of execution is a question of fact that requires proof. No such proof has been provided. There is nothing on record to show that an application for execution has been lodged in this court. The record indicates that no warrant of execution has been issued.

This begs the question as to whether the decision of the constitutional court appealed from contains any positive order that is capable of being executed in the ordinary way.

I say so because the applicants in their Notice of motion seek an order *"for stay of execution of the judgment and orders of the Constitutional court in Petitions No. 55 and 56 of 2011...."*

The applicants are not seeking to stay the proceedings at the High Court or to stay the trial itself. In constitutional petition No. 55 and 56 the applicants were seeking for only declarations and from those declarations they were seeking the following orders;-

(a)Permanently staying all pending criminal charges and proceedings against all the Petitioners in Uganda,

(b) release forthwith from custody,

(c) permanently prohibiting the respondent from using the processes of any courts (whether civilian or military) so as to initiate and to prosecute the petitioners for any charges what so ever; arising out of or in connection with the bombing acts in Kampala in July 2010,

(d) Permanently prohibiting the respondent from using the confession statements obtained from the petitioners through trickery, force and torture in any court proceedings whatsoever,

(e) the High Court of Uganda to investigate the allegations of your petitioners set out in paragraphs 11, 12, 13 and 14 above (relating to coercive interrogations, detention incommunicado/ ill-treatment at the hands of various security agencies, and ill treatment due to detention in conditions that amount to cruel, inhuman or degrading treatment or punishment and or torture) and determine the appropriate damages payable to the petitioners.

(f) costs of this petition.

That petition was dismissed and in doing so the court concluded as follows:-

"Conclusion

Taking into account the totality of the issues that have been ventilated, and the full circumstances of the case, we conclude that this Petition only

succeeds in as far as some of the petitioners have proved that they were detained beyond 48 hours prior to their being produced in court and charged. The assessment of their compensation for this illegal detention is referred to the High Court for determination under Article 135(5) of the Constitution.

Regarding allegations that four of the petitioners were tortured, and that confession statements were obtained from them through such torture, the matter is referred to High Court, which will make decisions after hearing the parties in appropriate proceedings.

The rest of the grounds in the consolidated Petitions, namely Constitutional Petition No. 55 of 2011 and Constitutional Petition No. 56 of 2011as laid out therein are dismissed save for the detention of the petitioners beyond 48 hours before being taken before court. The prayers made including the prayer for stay of proceedings in the Criminal Division in High Court Criminal Case No. 001 of 2010 Uganda versus Hussein Hassan Agad and 14 Others are rejected for the reasons already given in the Judgment.

The Registrar is directed to remit High Court Criminal Case No.001 of 2010 Uganda versus Hussein Hassan Agad and 14 Others back to the High Court for the trial of the petitioners to proceed.

For clarity and for avoidance of any doubt, the prayer for the stay of Criminal proceedings pending at the High Court against all the petitioners in High Court Criminal Case No. 001 of

2010 Uganda versus Hussein Hassan Agad and 14 others is rejected for the following reasons:

(i) The discretion to stay proceedings must be exercised sparingly and carefully. Given the peculiar circumstances of this case we find no reason to justify a grant of the stay considering that:

a) The alleged abuse of the court proceedings involving all and/or each of the petitioners has not been conclusively established."

It is clear to me from the above excerpt that the court did not make any positive orders capable of being executed or stayed. The Court simply declined to grant the declarations sought and gave its reasons for doing so.

It is contended by Mr. Walubiri that the court made an order directing the High Court to proceed with the trial. For emphasis and at the pain of repeating what if I have already set out above, I would reproduce what the court stated. At page 58 of its Judgment the court stated thus:-

"the registrar is directed to remit High court Criminal case NO. 001 of 2010 Uganda vs Hussein Hassan Ajad and 14 others back to the High Court for the trial of the petitioners to proceed"

Clearly this order was made *ex abundantia cautela* for emphasis only. It is not directed at the High Court, even if it were, it is just a normal consequence that followed the dismissal of the Petition. The case file would still have been returned to the High Court with or without the above directive to the Registrar of this Court. The trial had been stayed by the High Court pending the determination of the Constitutional Petitions. That trial had to resume as a matter of course since the stay had lapsed with the

conclusion of the hearing of the petition which had been dismissed.

Mr. Walubiri submitted that unless this application is granted the applicants will have to go through a trial that is unconstitutional.

That the Constitutionality of the trial is a subject of appeal and that therefore if the trial is allowed to go on the appeal would be rendered nugatory. He cited the Supreme Court decision in *Charles Onyango Obbo and Andrew Mwenda Vs Attorney General Supreme Court Constitution a Appeal No. 02 of 2002.*

On the other hand Ms. Mutesi contended that the above authority was complied with when upon the filing of the constitutional petition the High Court stayed the trial pending its determination. That the petition has since been dismissed and as such the trial ought to proceed. She distinguished the decision in *Onyango Obbo case (Supra)* from the instant one as in that case the Constitutional Court had declined to stay the trial pending the determination of the petition. In this case the petition has already been dismissed.

I am persuaded by the argument of Ms. Mutesi. The considerations court has to take into account before granting an injunctive order pending a hearing or trial are not necessary the same as those it takes into account in an application for the same order pending an appeal.

The constitutional court has already determined that the trial is not unconstitutional. The matter may be subject of an appeal but as already stated above an appeal does not operate as a stay of execution or stay of proceedings.

This leads me to the next question as to whether if this application is not granted the appeal would be rendered

nugatory. If the only reason for the petition was to stop the trial then the answer is in the affirmative.

However, my reading and understanding of the both petitions (55 and 56 of 2011) is that the applicants were merely seeking to stay the trial but most importantly to avoid possible convictions that may follow.

If convictions followed the trial the appeal would not be rendered nugatory as the Supreme Court would still be able to set aside any decision resulting from the trial. If no convictions follow the applicants would have suffered the period spent in detention. As submitted by Ms. Mutesi, the grant of this application would not result in their release they would still have to remain in custody. Mr. Walubiri counter argument was that they could in fact be released on bail. I agree, even without the grant of this application, the applicants are still presumed innocent and are entitled to apply for bail.

I find therefore that refusal to grant this application would not render the appeal nugatory. All the declaration sought would still be granted except perhaps that the applicants would have endured long hours in court during the trial and would incur legal expenses. I think these two inequities could be atoned by way of damages, since this is a civil matter.

Lastly I have to consider the balance of convenience Mr. Walubiri has argued that constitutional violations are incapable of being quantified and cannot be compensated by way of damages.

I agree with him that to a large extent some violations of fundamental human rights are incapable of being fully atoned by damages. On the other hand a number of violations can in fact be atoned by damages. The Constitution envisaged this in Article 137 which stipulates that:-

"(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may-

(a)grant an order of redress; or

(b) refer the matter to High Court to investigate and determine the appropriate redress."

I think that unconstitutional detention and trial is a matter that is capable of being atoned by way of compensatory damages.

I have already stated that the grant of this application would not in itself result into the release from custody of the applicants, it would only halt the trial. The applicants would only be saved the long hours in court and maybe some of the legal expenses as already noted above.

On the other hand as submitted by Ms. Mutesi the trial would be delayed longer, having commenced in 2011.

There is a great likelihood that with passage of time the witness may die, disappear or lose interest in the trial and material evidence may be compromised, lost or destroyed.

I must add that in a case of this nature that is based largely on the memory of witnesses there is always the ever present danger that their memories would lapse and fade away with time.

I find therefore that the balance of convenience is in favour of the respondent and I hold so.

This application therefore fails and is hereby dismissed

The costs will abide the result of the substantive application.

Before I take leave of this matter I would like to note as follows:-

That an application of this nature seeking an interim order of stay of execution in respect of a constitutional matter appears not to have been envisaged under any law. I say so because Article 137 (7) of the Constitution in no uncertain terms directs that constitutional cases be heard and determined expeditiously.
Article 134(7) states that:-

> ***"Upon a petition being made or a question being referred under this article, the Court of Appeal shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it."*** *(Emphasis added)*

Applications such as this have become inevitable as a result of inordinate delays in the hearing and determination of constitutional petitions and or appeals in this court and in the Supreme Court.

Petitions filed three, four and five years ago are still pending hearing in this court. This court itself appears clearly to be in violation of the constitution. There is no excuse for violation of the Constitution by any institution in this country and courts of law are no exception. If it is a question of personnel the executive ought to ensure that at all times this Court and the Supreme Court are duly constituted.

If it is a question of funds, Parliament must as a matter of constitutional urgency appropriate enough money required

for the proper running of this Court and if need be funds ought to be specifically set aside for constitutional cases.

It appears to me also that in respect of funding of this Court Article 128(6) of the Constitution has never been complied with 20 years since its coming into force. Article 128 (6) stipulates that:-

> *128 "The Judiciary shall be self accounting and may deal directly with the Ministry responsible for finance in relation to its finances."*

The finances of the judiciary are still controlled by Public Service in total and complete disregard of this provision of the Constitution. The Judiciary therefore in this regard is not as independent as the Constitution stipulates. This violation of the Constitution must be put to an end.

Dated at Kampala this ..... day of ..... 2015.

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HON. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL.