THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CONSTITUTIONAL APPLICATION NO. 5 OF 2015

[Arising from Constitutional Application No. 4 of 2015, Arising from Constitutional Petition Number 05 of 2015]

1. Mugume Benjamin
2. Jude Kimera
3. George Wanimbi
4. Jennifer Umina
5. Korcas Konde Lule
6. James Mugisha……………………………………………………………………..Applicants

VERSUS

1. The Attorney General
2. Standard Chartered Bank (Uganda) Limited………………………………..Respondents

Coram: Before the Hon. Justice Remmy K. Kasule, Justice of Appeal/ Constitutional Court, sitting as a single Justice

RULING

The applicants are petitioners to the Constitutional Petition Number 05 of 2015 against the respondent. The Petition is the pursuant to Article 137 of the Constitution.

Through the Petition, the applicants seek to challenge as unconstitutional certain decisions and actions relating to Criminal Prosecution of the applicants in the Anti-Corruption Chief Magistrate’s Court Criminal Case No. HCT-OD-ACD-OO- CR.SC.93/2010.

The applicants, have also lodged in this Court Constitutional Application No. 4 of 2015 for a temporary injunction, and this application No. 05 of 2015 for interim orders to stay the criminal charges and proceedings, prosecution of the applicants, prohibiting the respondents from using Court processes to prosecute the applicants and an order to restrain the respondents from carrying out acts of reprisal and victimization of the applicants.

This application is made pursuant to Articles 28(1), 50(1) and (2), 126 and 137 of the Constitution, Section 33 of the Judicature Act, Sections 64(c) and (e) of the Civil Procedure Act, Rules 10 and 23 of the Constitutional Court (Petitions and References) Rules and Rules

2(2) 43(1)(2) and 44 of the Judicature (Court of Appeal Rules) Directions.

The application is based on 9 grounds and is supported by the affidavit of the first applicant. The first respondent did not file any affidavit in response to the application. The second respondent, through their country legal Counsel and Assistant Company Secretary, one Gloria Matovu, deponed to and filed an affidavit in reply in opposition to the application.

The first and sixth applicants respectively deponed to and filed in Court affidavits in rejoinder to that filed on behalf of the second respondent.

At the hearing on 05.06.2015 Dr. James Akampumuza and Nshekanabo Immaculate appeared for the applicants, while Philip Mwaka, Principal State Attorney represented the first respondent and Counsel Jet John Tumwebaze and Bruce Musinguzi were for the second respondent.

However Phillip Mwaka, Principal State Attorney for the first respondent only appeared once on 05.06.2015 but did not appear on the subsequent hearing date of 12.06.2015.No one was present for the first respondent.The hearing proceeded in the absence of the first respondent’s Counsel as Court received no explanation for the absence of Counsel, who clearly was aware of the hearing date.

As a background, the six applicants were, at all material time, employees of the second respondent, a commercial bank operating in Uganda. On 31.10.06 the first, second, third, fourth and fifth applicants, together with one Florence Byabazaire, were charged of embezzlement of shs. 1,520,000,000= the property of the second respondent. The money was allegedly embezzled between the years 2000 and to 2006 at the second respondent’s offices on Speke Road, Kampala District. The embezzlement was by virtue of the so applicants being employed by the second respondent.

In an amended charge sheet of 11.12.07 the sixth applicant was added to the charge sheet. In yet another amended charge sheet of 15.05.2013 a second count of causing financial loss contrary to Section 20 of the Anti-Corruption Act, 2009 was added to the charge of embezzlement and the applicants were accordingly so charged.

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The Director of Public Prosecutions is stated by the respondents to have consented to the amended charge sheet.

The hearing of the Criminal Case No. HCT-DO-ACD-OO-Cr. Sc 93/2010 commenced on 15.01.08 before Chief Magistrate Irene Akankwasa, in the Anti-Corruption Court, Kololo. The applicants were the accused.

The hearing proceeded up to the stage of the prosecution closing their case and a submission of a no case to answer. On 22.10.2015. The applicants had in the meantime lodged Constitutional Petition No. 05 of 2015 and applications numbers o4/2015 and 05/2015 in this Court respectively on 16.02.2015 (Petition) and on 06.03.2015 (both applications).

For the applicants, it was submitted that the applicants had established a prima facie case, in that through Constitutional Petition No. 05 of 2015 they were challenging the unconstitutionality of a number of sections of the Anti-corruption Act, 2009, the fact that they were not getting a fair trial before the Chief Magistrate’s Court in Criminal Case No. HCT-00-ACD-00- CR.SC 93/2010 and also that they had been prosecuted on a charge sheet upon which there was no proper Director of Public Prosecution’s prior consent as required by law. Further, the criminal trial was going on when the state had refused to comply with a Court Order for unconditional release of one of the applicants. All these issues had been pleaded by the applicants in Constitutional Petition Number 05 of 2015 which remained pending in this Court. The applicants had also lodged with this Court a substantive Constitutional Application No. 04 of 2015 for a temporary injunction.

Therefore the applicants had shown that they had a prima facie case against the respondents to be entitled to the interim orders prayed for. It was necessary to preserve the status quo by stopping the stated criminal prosecution of the applicants pending determination of the substantive Constitutional Application number 04 of 2015 and/or Constitutional Petition No. 05 of 2015.

The second respondent, through their Counsel, opposed the application. The applicants were never prosecuted by a private firm of lawyers of Kampala Associated Advocates as they allege, the Director of Public Prosecutions had also properly consented to the charge sheet upon which the applicants had been charged. The application No. 05 of 2015 had also been served out of time to the second respondent and as such it was invalid. The Constitutional Petition had no issues calling for a Constitutional interpretation, but rather, the same contained assertions where applicants alleged violations of certain Constitutional provisions to which then could secure redress under Article of the Constitution. Accordingly the applicants had failed to establish a prima facie case and so the application for interim orders ought to be dismissed.

In reply Counsel for applicants submitted that service of the application was by the Court and as such service of the same being out of time does not arise.

In resolving this application, it has to be appreciated that a party seeking an interim order of injunction has the burden to prove that the Court entertaining the application has the jurisdiction to grant or not to grant the order sought for, that the application for the interim order arises from a cause in the nature of a suit or petition or application that discloses triable issues and the same is not frivolous and/or vexations and that the failure to grant the orders(s) sought will render the matter, the subject of the dispute in the suit or petition or application, nugatory in a manner that cannot be redressed through an award of damages: See: Constitutional Court Miscellaneous Application No. 18 of 2007: Hon. Jim Muhwezi versus the Attorney General and the Inspector General of Government. Just in case the circumstances of the application are such that they leave the Court in doubt, as regards what is stated above, then the Court may resolve the application by considering the balance of convenience: See: Constitutional Court Constitutional Application Number 07 of 2014: Horizon Coaches Limited vs Mbarara Municipal Council & 2 Others.

This Court has jurisdiction to entertain this application pursuant to Section 12(1) of the Judicature Act, Cap. 13, Section 98 of the Civil Procedure Act, Cap.71 Rule 23(1) of the Constitutional Court (Petitions and References) Rules, 2005 and Rule 2(2) of the Judicature (Court of Appeal Rules) Directions: See also: Constitutional Application Number 04 of 2009: RO/133 Major Genera James Kazini versus The Attorney General (Constitutional Court).

It was submitted by the second respondent that this application is a nullity because it was served upon the said respondent out of time. This submission was not supported by any evidence. It was from the Bar. This Court rejects the same.

The grounds of this application, which also comprised much of what Counsel for the applicants submitted to Court are very much based on what the applicants seek in the Constitutional Petition Number 05 of 2015.

Being charged and prosecuted of the crimes of embezzlement c/s 19(a) and (iii) of the Anti-Corruption Act, 2009, and of causing financial loss c/s 2007 of the Anti-Corruption Act, 2009, the amount involved being shs. 1,520,000,000= allegedly the property of the second respondent, employer of the applicants, the applicants were the subject of intensive investigations by the Uganda Police and other state bodies before they were charged and prosecuted. Prosecution witnesses testified against the applicants and the trial Court found that a prima facie case had been proved by the prosecution against them. It was in the course of that criminal trial that the applicants filed the Constitutional Petition and the applications for interim and substantive injunction orders.

The position of the law where a Constitutional Petition arises out of a criminal prosecution or a Civil Litigation needs to be elaborated upon. Where a Court of law refers to the Constitutional Court a question that arises in proceedings (criminal or civil), the Court making the reference, must stay its proceedings and await the decision of the Constitutional Court on the question that is referred. Once the Constitutional Court arrives at a decision on the question, then the Court that referred the question has to dispose of the cause before it in accordance with the decision of the Constitutional Court. See Constitutional Court Miscellaneous Application No. 18 of 2007. Hon. Jim Muhwezi versus Attorney General of Uganda Another: (unreported). In this case, there is hardly any discretion for the Courts not to stay the proceedings from which a reference is made.

Where in proceedings, (civil or criminal) before a Court of law exercising competent Jurisdiction, a party to those proceedings on his/her own, files a Constitutional Petition to Constitutionally challenge a provision of the law or some action, under which the criminal prosecution or the civil proceedings are being conducted, then the Court conducting the proceedings should await the determination by the Constitutional Court about the challenged provision of the law: The rationale for this is because the Constitution is the basic law from which all laws and actions derive validity. See: Supreme Court Constitutional Appeal No. 2 of 2002: Charles Onyango Obbo & Another vs the Attorney General. See also: Olara Otunnu vs Attorney General: Constitutional Application No. 10 of 2010 (unreported).

The party to the proceedings from which the Constitutional Petition is arising from may move either the Constitutional Court or the Court conducting the proceedings for an order of stay.The Courts themselves may also on their own order a stay, pending resolution of the Constitutional question by the Constitutional Court.

Here the discretion for the Court not to stay the proceedings, the subject of the petition, is rather limited and should only be sparingly applied on very serious considerations.

However, where a party to the criminal or civil proceedings before a Court of law, exercising competent jurisdiction, challenges by lodging a petition in the Constitutional Court, the Constitutionality of other matters other than the provisions of the law under which the proceedings are being conducted, such as the truth and the manner of investigations leading to the proceedings in that Court, then in such a case, the Constitutional Court or the trial Court conducting the proceedings from which the petition arises has a wide discretion. The Court may decide that the criminal prosecution or the hearing of the civil proceedings, may continue despite the challenge in the Constitutional Court of the truth and the manner of investigations leading to the charges in the criminal prosecution or the civil proceedings, in the trial Court, as the case may be.

The consideration by Court in this regard is that the proceedings can go on without awaiting the decision of the Constitutional Court on the issues being challenged, where the trial Court is capable of fairly and accurately pronouncing itself on the matters before it without prejudice to the accused or the parties to the civil proceedings. Where any prejudice occurs, then the appeal system would provide a remedy.

This is to avoid situations where anyone charged of a criminal offence, or who does not want the civil proceedings to go on, rushing to the Constitutional Court with a request to stop the Criminal prosecution or the hearing of the civil proceedings pending hearing of the Constitutional challenge by that person. This, particularly on the criminal side, would result into the lodging of Constitutional Petitions in the Constitutional Court with the sole real purpose of stopping criminal prosecutions. It would lead to a breakdown of the criminal Justice System: See Twinomujuni, JA (RIP), as he then was, in Hon. Jim Muhwezi’s case (supra). See also: Kazinda V Attorney General [2013] IEA 130.

In this application, the applicants, through Constitutional Petition No. 05/2015, seek to challenge matters of violations of the Constitution, and not necessarily calling for the interpretation of the Constitution. These matters involve the way investigations were carried out, the way the applicants were arrested, the mistreatment they were subjected to, whether or not the criminal charges they were prosecuted for were properly consented to by the Director of Public Prosecutions, whether the charge sheets were properly amended and whether the prosecution witnesses were handled in such a way that caused prejudice to the applicants when testifying in the trial Court. The applicants also allege that they were being prosecuted by private lawyers of the second respondent and that this was in violation of the Constitution.

It is the above stated matters that constitute the substance as to the grounds and the whole subject matter of the applicant’s substantive Constitutional application Number 4 of 2015 for a temporary injunction and Constitutional Petition No. 5 of 2015.

In the considered view of this Court, the applicants are not, in a strict sense, petitioning the Constitutional Court to challenge the Constitutionality of the Anti-corruption Act, 2009, the law under which they are being prosecuted in criminal case No. 93 of 2010. Indeed one of the applicant’s assertions in paragraph 7(a) of the petition, that Section 19 (a) and (iii) is nonexistent in the Anti­corruption Act, 2009, and this is one of the grounds amongst others, for challenging the constitutionality of the Act, does not seem to have any factual basis since the said Section exists in the said Act.

In Kazinda V Attorney General (Supra) the applicant in his Constitutional Petition complained about the way the police had carried out investigations against him, detaining him beyond the statutory 48 hours without being taken to Court, selectively directing the investigations and charges against him, re­investigating the same matters already investigated, arresting him while sick and from a hospital bed, denying him access to medical treatment and confining him to unlawful places. There was also a complaint that the DPP had charged and prosecuted the applicant of offences that were the same, from a single transaction constituting a single or similar charge(s). The DPP had also selectively directed prosecution against the applicant, leaving out others, who too should have been prosecuted. There was also a complaint that the Criminal Prosecution of the applicant had gone on, inspite of the existence a Court Order that the applicant be released.

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The holing of Court in the Kazinda v Attorney General case, after considering the pleadings, submissions of Counsel as well as the law applicable was that:

", .....we have come to the conclusion that all that the applicant complains of are what he alleges happened in the course of his being investigated, arrested and being criminally charged in the Courts of law. We are not persuaded that his right to a fair trial in respect of the charges brought against him is being denied. In those circumstances we find that no prima facie case is made out that the petition has any chances of success.” The Court dismissed the applicant’s application for an injunction order. Court found that the applicant could have recourse to the remedy of damages if he suffered any harm/loss, and Court found it unnecessary to consider the aspect of the balance of convenience.

In another case, the Constitutional Court (Kakuru, JA/CC sitting as a single Justice), in Constitutional Application No. 07 of 2014: Horizon Coaches Limited vs Mbarara Municipal Council and two others (unreported), dismissed an application a for an interim injunction order on the ground that:

“ there is nothing on the face of the petition that requires Constitutional interpretation at all. All the issues raised here may probably be subject of enforcement of Rights under Article 50 of the Constitution in another competent Court.”

The order sought was to restrain the respondents from transferring landed property that constituted the dispute between the applicant and the respondents, pending disposal of the substantive application for a temporary injunction, the said application arising from a Constitutional Petition pending disposal in the Constitutional Court.

The above two decisions, in the considered view of this Court, appropriately apply to the facts of this application. Like in the Kazinda vs Attorney General case, the applicants’ complaints in the Constitutional Petition are, in the main, about what happened in the investigations and charging of the applicants. The hearing of the criminal case number 93 of 2010 proceeded on to the stage of the prosecution closing its case and considering whether or not a prima facie case had been proved against the applicants.

This Court notes that Article 212(c) mandates the Uganda Police Force to prevent and detect crime, while Article 120 vests in the Director of Public Prosecutions powers to direct Police to investigate Criminality and to institute criminal proceedings against anyone in any Court of competent jurisdiction, other than a Court Martial. The Director of Public Prosecutions is also vested with powers to criminally prosecute or take over the prosecution of anyone. In carrying out his/her Constitutional duties the Director of Public Prosecutions is not to be subject to any direction from any one.

It is the right of the applicants to take action, constitutional or otherwise, against the Police or any other state organ(s) and agents as well as the Director of Public Prosecutions, in respect of whatever was done in the investigations and/or prosecution of the applicants.

This Court, however finds, that there is no evidence adduced by the applicants, that whatever was done in the course of the investigations charging and/or prosecuting the applicants, denied the applicants, or anyone of them, from having a fair trial.

As to the complaint that the applicants were prosecuted by private Counsel of the second respondent, the applicants supplied no evidence of the criminal proceedings in criminal case No. 93 of 2010 to support this assertion. The second respondent through Gloria Matovu, their Country Legal Counsel and Assistant Company Secretary denied that their Counsel privately prosecuted the applicants. At any rate, if there was such a private prosecution of the applicants by the lawyers of the second respondent, this could only have been done with the authorization of the trial Court, after ensuring that the applicants would get a fair trial. No evidence to the contrary has been availed to this Court by the applicants.

There is also no evidence that the prosecution of any of the applicants was carried out by the Chief Magistrate’s Court in defiance of any lawful order to that Court not to have any particular applicant prosecuted.

It is also the finding of this Court that what the applicants, as petitioners, complain of in the Constitutional Petition, are in main instances of the violation of the Constitution and can be addressed and resolved by the Court conducting the trial itself, or later on

when the said Court has made a decision, through an appeal process by the appellate Courts. The same issues can also be addressed and enforcement reliefs sought by the applicants,  
through Article 50 of the Constitution, from Courts of competent jurisdiction.

Therefore having appreciated the facts of this application, the submissions of Counsel as well as both the statutory and case law applicable, this Court comes to the conclusion that the applicants have not made out a prima facie case that they deserve to be issued the interim orders they pray for.

This application stands dismissed with costs to the respondents.

It is so ordered.

Dated at Kampala this 26th day of April of 2016.

Hon.Justice Remmy Kasule

JISTICE COURT OF APPEAL/CONSTITUTIONAL COURT