

5 **THE REPUBLIC OF UGANDA**

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CONSTITUTIONAL APPLICATION NO. 5 OF 2015

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

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

VERSUS

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

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

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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
35 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-00-CR.SC.93/2010.**

The applicants, have also lodged in this Court **Constitutional**
40 **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
45 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

50 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,
55 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
60 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
65 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
70 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
75 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
80 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
85 charge of embezzlement and the applicants were accordingly so

charged. 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-00-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 04/2015 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

105 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
110 **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
115 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**.

120 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
125 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
130 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
135 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
140 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
165 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**.

170 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
175 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

180 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
185 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
190 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
195 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
200 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
205 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
210 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
215 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
220 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
225 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
230 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
235 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

255 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
260 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
265 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**.

270 Indeed one of the applicant's assertions in paragraph 7(a) of the
petition, that Section 19 (a) and (iii) is nonexistent in the Anti-
corruption 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
275 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
280 directing the investigations and charges against him, re-
investigating 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
285 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
290 on, inspite of the existence a Court Order that the applicant be
released.

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

295 “.....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
300 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
305 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
310 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.”

315 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
320 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
325 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
330 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
335 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
340 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
345 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**
350 **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
355 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
360 defiance of any lawful order to that Court not to have any particular applicant prosecuted.

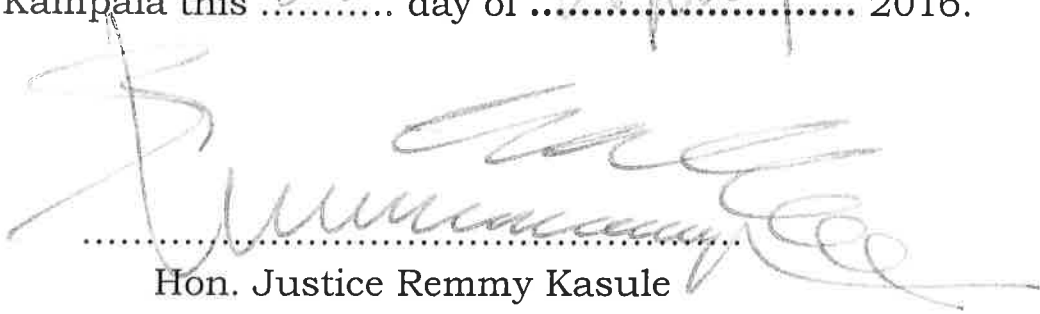
It is also the finding of this Court that what the applicants, as petitioners, complain of in the Constitutional Petition, are in main instances of the violation of the Constitution and can be addressed
365 and resolved by the Court conducting the trial itself, or later on

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 28th day of April 2016.



Hon. Justice Remmy Kasule

Justice Court of Appeal/Constitutional Court