THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CRIMINAL DIVISION)
HIGH COURT REVISION CAUSE NO.012 OF 2024
[ARISING FROM CRIMINAL MISCELLANEOUS CAUSE NO.10 OF 2024]

A1: WARREN VAN DER MERWE	]	
A2: MOKGOME MOGOBA	]	
A3: DEREK ALEXANDER	]	**APPLICANTS**
(ALL TRADING AS VANTAGE MEZZANINE	]	
FUND II PARTNERSHIP)	]	

VERSUS

UGANDA (PRIVATE PROSECUTION	]	**RESPONDENTS**
BY ATUHAIRWE WYCKLIFFE)	]	

BEFORE: HONOURABLE LADY JUSTICE ROSETTE COMFORT KANIA

RULING

Background

Warren Van Der Merwe, Mokgome Mogoba and Derek Alexander (hereinafter referred to as the applicants) brought this application under Article 139 of the Constitution of the Republic of Uganda, sections 14, 17 & 33 of the Judicature Act Cap 13, sections 48 & 50 of the Criminal Procedure Code Act Cap 116; Rule 2 of the Judicature (Criminal Procedure Application) Rules against the Respondents seeking orders that;

(a) The court calls for and revises, sets aside, reverses and vacates the trial magistrate's decision in Criminal Miscellaneous cause No. 10 of 2024 Uganda (Private Prosecution by Atuhairwe Wyckliffe) v Warren Van Der Merwe, Mokgome Mogoba, and Derek Alexander dated March 12th, 2024 as the courts findings in that decision are incorrect, improper and illegal.

(b) The court sets aside and vacates the change sheet and criminal summons the trial magistrate sanctioned and issued in Criminal Case No.179 of 2024 pursuant to the decision in Miscellaneous cause No. 10 of 2024.

(c) The court issues any further orders that may meet the ends of justice in the case.

(d) The court awards the applicants the costs of this application.

Brief Facts

On March 13th, 2024, the Applicant's lawyers learned from the media that the Chief Magistrates Court of Buganda Road granted the Respondent leave to commence a private criminal prosecution against the applicants, allegedly as partners in Vantage Mezzanine fund II partnership (hereinafter referred to as Vantage). The applicant's lawyers wrote to the chief Magistrates Court of Buganda Road at Buganda Road requesting a copy of the file. The court availed the applicants the pleadings and ruling of the court in Miscellaneous application No.10 of 2024. The applicant's lawyers learnt that the trial magistrate had granted the Respondent leave to commence private criminal prosecution against the applicants, sanctioned several charges against them, and issued a criminal summons requiring them to answer to the charges. The proceedings leading to the grant of the leave to commence private prosecution were conducted ex parte. Being dissatisfied with the outcome of those ex parte proceedings, the Applicants filed this Application, seeking the orders stated above.

In the meantime, on the 27th of March 2024, counsel for the applicants appeared before the Grade One magistrate at Buganda Road court and applied to have the proceedings stayed pending this court's determination of the pending applications for stay and revision. They also objected to the issuance of summons against the Applicants, contending that the Magistrates Court did not have the powers to do so, given that the Applicants are South African citizens who do not live in the Magistrate Court's jurisdiction or in the Ugandan territory. The learned trial magistrate overruled them and issued an arrest warrant against the applicants. Being dissatisfied with the decision of the lower court, the applicants applied to this court to call for and revise, set aside, and or vacate the decision and entire record of the lower court. They contend that the decisions and record of the lower court incorrect, improper, and illegal. The Respondent opposed the Application. He supported the learned Trial Magistrate's decision and contended that the proceedings were neither improper, nor incorrect.

The Applicants' case

The Applicant pleaded several grounds in their Motion and supported them with two affidavits. The gravamen of their case is that the learned Trial Magistrate should never have entertained Criminal Miscellaneous cause No. 10 of 2024 in the first place. The charges that the Respondent brought against them arise from a contract that has been the subject of serial litigation. Most of the matters that the Respondent pleaded have been the subject of adjudication by the High Court and the Supreme Court of Uganda. The Applicants attached several decisions to their Affidavits in support and argued in their submissions that had the Trial Magistrate addressed herself to

these various decisions, and carefully read the agreement that the Respondent had placed before her, she would have found that the Respondent did not make out a case for the sanctioning of charges against the Applicants. The Third Applicant specifically pleads that he was neither a partner nor an employee of Vantage when the partnership signed the agreement in issue. He contends that there is no basis in law or in fact, on which the Respondent could charge him with the alleged offences.

The Applicants point out that the Respondent is part of a team of lawyers representing the borrowers in the Mezzanine Term Facility Agreement (MTFA) whose legality he contests. As one of the borrower's counsel, the Respondent knew or ought to have known of all the litigation that has transpired from and relating to the MTFA As an officer of court, he was duty bound to bring these facts to the court's attention, which apparently, he did not. Consequently, they pleaded and argued that Criminal Miscellaneous cause No. 10 of 2024 was frivolous, vexatious and an abuse of court process. The Applicants also argue that the learned Trial Magistrate erred in law and fact when she issued an arrest warrant against the Applicants. It is the Applicants' case that the Magistrates Court did not have the legal authority to do so in the absence of extradition proceedings. They premise this argument on the fact that they are South African citizens, living in South Africa, neither in the Ugandan geographical jurisdiction, nor in the court's magisterial jurisdiction. They invite the court to revise, set aside, and or vacate the decision and entire record of the lower court.

The Applicants duly served Director of Public Prosecutions as duly required by Section 50 (2) of the Criminal Procedure Code Act Cap 116 on 8th April 2024.

The Respondent's case

The Respondent opposed the Application. He also raised objections on points of law. He objected to the Respondents having filed a second Affidavit in Support from Warren van der Merwe, which he averred was strange to the proceedings because it was not specifically mentioned in the Notice of Motion. The Respondent further contended that this court has no powers to revise the decision of a magistrates court unless there has been a conclusive order in the nature of a conviction or an acquittal. The Respondent also averred in his Affidavit in reply that the instant Application is moot because the Director of Public Prosecution has since taken over conduct of the proceedings in the Magistrates Court. He maintained that he placed sufficient evidence before the Magistrates Court to meet the burden of establishing a prima facie case, and that Criminal Cause 179 of 2024 was neither frivolous nor vexatious. He further argued that the Applicants are not immune from prosecution, that the Trail Magistrate acted within her powers when she issued the arrest warrant against the Applicants, and that the earlier decisions of the High Court did not legitimize their actions.

Representation

The applicants were represented by Robert Kirunda of Kirunda and Co. Advocates and the Respondent appeared pro se. The applicants filed affidavits in support of the application, the respondent filed an affidavit in reply and the applicants filed an affidavit in rejoinder. Both parties filed written submissions which have been duly considered and replied upon.

I have carefully considered the application, read the submissions of both counsel for the applicants and the Respondent, perused documentation in support of the application and the lower court record. The written submissions filed by both sides were adopted and referred to where necessary.

Issues

1) Whether it is proper for this court to call for the record, revise set aside and vacate the trial magistrate's decision in Criminal Miscellaneous Cause No. 10 of 2024.
2) Whether the sanctioning of charges and issuance of the criminal summons against the Applicants by the trial Magistrate was proper.
3) Whether it was proper for the trial Magistrate to issue an arrest warrant against the Applicants.
4) What remedies are available in the circumstances.

Analysis and determination

Before addressing the above issues, I have found it pertinent to address the Respondent's procedural objections. Firstly, the Respondent contends that the Applicant's second Affidavit deposed by Warren van der Merwe is alien to these proceedings. His main reason is that this Affidavit is not specifically mentioned in the Notice of Motion.

There are two main reasons why I do not accede to the Respondent's reasoning. The first reason lies in the nature of Affidavits in criminal proceedings. While considering the Respondent's objections, I set out the law on affidavits as follows. Black's Law Dictionary 9th Edition defines an affidavit as, "a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths. In the case of **Amtorg Trading Company-vs United States, 71 F. 2d 524,** an affidavit is defined as " a written or printed declaration or statement of facts, made voluntarily and confirmed by the oath of affirmation of the party making it, taken before an officer having authority to administer such oath."

In simple terms, an affidavit is a means of adducing evidence. There is clear statutory provision for the position that for the proof of any fact, a plurality of witnesses is not necessary. Section 133 of the Evidence Act specifically stipulates that no particular number of witnesses shall in any case be required for the proof of any fact. The Supreme Court and Court of Appeal have applied this section in the cases of **Abudala Nabulere & 2 Others v. Uganda Supreme Court Criminal**

Appeal 9 of 1978, and **Senyomo Charles v. Uganda Court of Appeal Criminal Appeal 0051 of 2012.**

In **Bankone Limited-vs- Simbamanyo Ltd HCT Miscellaneous Application No. 645 of 2020** Lord Justice Stephen Mubiru stated that, "Affidavits are a means of adducing sworn, written evidence and must be used in applications where sworn evidence is required by the court. The validity of the affidavit therefore is subject to the same rule as that which governs oral evidence found in section 117 of *The Evidence Act*, to wit; all persons are competent to swear an affidavit unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind." What is required in affidavits is the knowledge or belief of the deponent.

In the instant case, the deponent swears the affidavit as the 1st Applicant. He avers that he is knowledgeable of the facts of this case. The facts he deposes touch on the private prosecution against him and are to the best of his knowledge and belief. It would be a direct afront to the dictates of justice to shut out his evidence on the sole basis that his affidavit is not specifically mentioned in the Notice of Motion.

As further stated by Hon Justice Stephen Mubiru in **Bankone Limited-vs- Simbamanyo Estates Ltd Supra , "...** what is required in affidavits is the knowledge or belief of the deponent, rather than authorization by a party to the litigation. Their content is dictated by substantive rules of evidence and their form by the rules of procedure. Competence to swear an affidavit is pegged to ability "to depose to the facts of the case," which in turn is circumscribed by the deponent's ability to "swear positively to the facts," on account of personal knowledge or disclosure of the source, where that is permitted, " he stated further that "....the rules of evidence on the other hand confer discretion on the court to control repetitive evidence; a judicial safety valve by which a party's attempt to adduce excessive evidence in support of an affidavit should not be filed when it adds very little to the probative force of the other evidence in the case. Therefore, when the relevant facts are within the common knowledge of parties having the same interest in the litigation, an affidavit by one of them will suffice."

Secondly, the courts have taken a more liberal approach to affidavit evidence for a while now. In the case of **Busonya Jamada & 2 Others v. Daudi Giruli Supreme Court Civil Appeal 11 of 2017** Justice Lillian Tibatemwa, citing a long string of authorities, held that:

In the case of **Utex Industries Ltd. vs. Attorney General**, this Court emphasized that Article 126 (2) (c) was not intended to wipe out the rules of procedure. Furthermore, that the Article reflects the saying that rules of procedure are handmaids to justice and should be applied with due regard to the circumstances of each case.

In the case of **AG vs. Major General David Tinyefuza**, several objections were raised in respect to the defective affidavits sworn in support of the petition. The Constitutional Court overruled the preliminary objections. Manyindo DCJ as he then was held that:

"The case before us relates to the fundamental rights and freedoms of the individual like the petitioner which are enshrined in and protected by the Constitution. In my opinion it would be highly improper to deny him a hearing on technical or procedural grounds. I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on merit unless it does not disclose a cause of action. This Court should readily apply the provisions of Article 126(2) (e) of the Constitution in a case like this one and administer justice without undue regard to technicalities. It is for the above reason that I cannot uphold. Mr. Kabatsi's objections."

In the case of **Col. Dr. Besigye Kiiza vs. Museveni Yoweri Kaguta and Electoral Commission',** Odoki C.J in dealing with the objections raised against the affidavits supporting the petition stated that: "There is a general trend towards taking a liberal approach in dealing with defective affidavits. This is in line with the constitutional directive enacted in Article 126 of the Constitution that the courts should administer substantive justice without undue regard to technicalities. Rules of procedure should be used as handmaidens of justice but not to defeat it. "

I would have no reason to hold otherwise in this case. Accordingly, I overrule the Respondent's first objection. His second objection goes to the heart of issue 1 above. I will resolve it accordingly.

1. **Whether it is proper for this court to call for, revise, set aside and vacate the trial magistrate's decision and the record of proceedings in Criminal Miscellaneous Cause No. 10 of 2024.**

Revision is a tool that entails a re-examination or careful review, for correction or improvement, of a decision of a Magistrate's court by the High Court to satisfy itself as to the correctness, legality or propriety of any finding, order or any other decision, and the regularity of any proceedings of a Magistrate's court. The law on revision, particularly Section 48 of the Criminal Procedure Code Act, provides that; "The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court.''

Furthermore, Section 50 of the same Act provides for powers of the High Court on Revision. It provides that: "1. In the case of any proceedings in a magistrate's court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in those proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may. a) in case of a conviction,

exercise any powers conferred on it as a court of appeal by sections 34 and 41 and may enhance the sentence (b) in the case of any other order other than an order of acquittal, alter or reverse the order.''

In addressing the supervisory power vested in the High Court by virtue of section 17 (2) of the Judicature act, in the case of **Simba Properties Investment Co. Ltd and others-vs- Vantage Mezzanine Fund II Partnership and others-** Hon. Justice Stephen Mubiru stated that, "ordinarily this supervisory power is exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason then that the error(s) of law must be on which the decision depends. A minor, trifling, inconsequential or unimportant error, or for that matter an error which does not go to the core or root of the decision complained of; or stated differently, on which the decision does not turn, would not attract the court's supervisory intervention".

Applications for Revision invoke the supervisory powers of the High Court provided in Section 50 (1) (b) of the Criminal Procedure Code Act which provide for powers of the High Court on revision and states as follows; "In the case of **any proceedings** in a magistrate's court, the record of which has been called for or which has been reported for order or which otherwise comes to its knowledge, when it appears that in those proceedings, **an error material to the merits of any case or involving a miscarriage of justice has occurred,** the High Court may in the case of any order, **other than an order of acquittal**, **alter** or **reverse the order** (emphasis mine).

The respondent contended that the High Court can only revise orders of the Magistrates Courts that are either convictions or acquittals. It appears to me that the respondent misinterpreted the provision of Section 50 (1) (b) of the Criminal Procedure Code Act. The provision provides that the High Court may in the case of any order, except an order of acquittal, alter the order.

Section 50 (5) of the same Act provides that; "Any person aggrieved by any **finding, sentence** or **order** made or imposed by a magistrate's court may petition the High Court to exercise its power of revision under this section; but no such petition shall be entertained where the petitioner could have appealed against the finding, sentence or order and has not appealed (emphasis mine).

I have carefully considered the Respondent's submission on the powers of this court once the DPP takes over proceedings. I have also carefully addressed myself to the decision of the Court of Appeal in **Patrick Bitature & Another v. Robert Kirunda (Lawful Attorney of Vantage Mezzanine Fund II Proprietary Limited) Civil Application 008 of 2024.** With respect, the Respondent has misconstrued that decision. In that case, the Applicants sought to injunct the court from sanctioning charges against Patrick Bitature and Carol Bitature. At the time of filing their application in the Court of Appeal, however, the DPP had taken over the proceedings. The

Constitution does not dictate that the DPP takes over proceedings to discontinue the prosecution, although she has the power to discontinue them. The Applicants then insisted that the court issues the interim order they were seeking. Issuing that Interim Order would have amounted to stopping the DPP from prosecuting the case. The facts before me are different. The Applicants do not question the DPP's powers to prosecute the case. Their contention is that the magistrates court acted improperly and outside the remit of the law. I am of the considered view that this court is well within its statutory mandate to look into such a matter once a party brings it before the High Court. Put another way, the court acts within the provisions of Section 50 of the Criminal Procedure Code Act regardless of whether the underlying proceedings arise from a prosecution led by the DPP or a private prosecutor. To hold otherwise would be to curtail this court's powers under section 50 to only those cases where the DPP is not prosecutor. And that cannot be. I find that interpretation to be contrary to both the intentions of the statute and the constitution itself. It follows therefore, that the rest of the authorities that the Respondent cited on this point are, with respect, misplaced.

Section 48 and 50 of the Criminal Procedure Code Act grant the High Court supervisory powers over magistrates courts. That power is not restricted to circumstances in which the magistrates court has handed down a conviction or an acquittal. Indeed, section 50 (5) specifically provides for the High Court's intervention in matters involving the wider category that comprises **findings** and **orders**. Neither is that power diminished by the DPP taking over proceedings in a magistrates court. It is a power that allows the court to supervise the performance of the magistrates courts and not to direct or restrain the DPP. It is this court's finding that read together with section 50 (1) (b), the scope of the court's supervisory powers is so broad as to cover those determinations that the magistrates court may make from time to time while hearing an ongoing case. Consequently, I overrule the Respondent's objections in this regard, and resolve issue one in the affirmative.

2. Whether the sanctioning of the charges was proper

The requirements that the court must consider when determining whether a magistrates court should have authorized a private prosecution are now settled. This court summarized them in **In the matter of Robert Kirunda Esq (Lawful Attorney of Vantage Mezzanine Fund II Partnership), High Court Revision Cause No. 024 of 2022** they are that:

(a) that the court must ascertain that it has jurisdiction;
(b) that there is a prima facie commission of an offence;
(c) That the complaint must not be frivolous or vexatious.

See also **Hassan Bassajjabalaba vs Kakande Benard,** High Court Criminal Revision No. 02 of 2013;

a) <u>The court must ascertain that it has jurisdiction</u>

Jurisdiction is such an indispensable requirement in adjudication that a judicial officer must carefully consider and establish the basis of her assuming jurisdiction in a matter before her. In the case of **Entec Electrical Equipment Company Limited v Uganda Criminal Revision cause No. 026 of 2022**, Justice Isaac Muwata defined jurisdiction to mean the power of court to hear and determine a cause to adjudicate and exercise any judicial power in relation to it. Jurisdiction further means the power conferred by law upon the court to try and hear the cases and give appropriate judgments and therefore jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. In this case, the judge further states 3 categories of jurisdiction which include a) subject matter jurisdiction, that is to say, whether the particular court in question has the jurisdiction to deal with the subject in question, b) territory jurisdiction - whether the court can decide upon matters within the territory or area where the cause of action arose, c) pecuniary jurisdiction -whether the court can hear a suit of the value of the suit in question and these three categories of jurisdiction are prerequisite to the assumption of a court's jurisdiction.

As was held by Hon. Justice Bart Katureebe, in **Ahmed Kawoza Kangu vs Bangu Aggrey Fred and Another, SCC Application N0.4 of 2007,** Jurisdiction of the court is not a matter for implication but must be prescribed by law. Furthermore, in the case of **Owners of Motor Vessel Lillian v Caltex Oil Kenya Limited [1989] KLR 1,** Court held that jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

The criminal jurisdiction of the Chief Magistrates Court is established under section 161 of the Magistrates Court Act. The court is required to look at the offenses alleged, and test them against that statutory jurisdiction. It must then satisfy itself that the offences are of the kind that it has the powers to preside. Looking only at this ingredient, I would resolve this requirement in the affirmative. The offences that the Respondent alleged were within the criminal jurisdiction of the Magistrates Court at Buganda Road.

b) Whether the Prosecutor established a prima facie case

Section 42(5) of the Magistrates Courts Act, Cap 16 is to the effect that, after satisfying himself or herself that prima facie the commission of an offence has been disclosed and that the complaint is not frivolous or vexatious, the magistrate shall draw up and shall sign a formal charge containing a statement of the offences alleged to have been committed by the accused.

Black's Law Dictionary 8th edition at page 1228 defines prima facie to mean at first sight; on first appearance but subject to further evidence or information.

As was stated in the case of **Rananlal T. Bhatt v. R. (1957) EA 332,** a *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, could convict the accused person if no evidence or explanation was set up by

the defense. The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to prove the case beyond reasonable doubt as that requirement is relevant only after the defense has made its case.

There are mainly two considerations justifying a finding that there is no prima facie case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] ALL E.R 448 and also applied in **Uganda v Alfred Ateu (1974] HCB 179** as follows:-

i). Where there has been no evidence to prove an essential ingredient in the alleged offence, or

ii). when the evidence adduce by prosecution has been so discredited as a result of cross examination or is manifestly unreliable that no reasonable court could safely convict on it.

The applicants submit therefore the evidence that the Respondent adduced before the learned trial Magistrate did not prove any of the fundamental ingredients of the offences alleged to have been committed. Accordingly, they submitted that the respondent did not establish a prima facie case warranting the charging of the applicants.

At the crux of this issue is whether the evidence that the private prosecutor placed before the court was sufficient to make out a prima facie case for any of the counts that the Applicants are charged with. The Applicants contend that it was not, while the Respondent contends it was. To resolve this question, the court needs to answer two principal issues, which go to the root of the controversies between the parties. Resolution of the issues will substantially address the matters in contention in this application.

Whether the 3rd Applicant was a partner or associated with Vantage in any way at the time the MTFA was extended to Simba.

The 3rd Applicant, Mr. Derek Alexander avers in Paragraph 12 of his affidavit in support of the notice of motion that he was neither an employee nor a partner at Vantage when Vantage entered into the MTFA that is the subject of the proceedings in Criminal Case No. 10 of 2024.

The respondent in his affidavit in reply avers in Paragraph 12 that the 3rd Applicant represented himself as an associate partner of Vantage during the execution of the MTFA and refers this court to a copy of the MTFA which was attached as annexure "A". The respondent did not highlight the specific portion of the MTFA where the 3rd Applicant is indicated as an associate partner of Vantage. He did not furnish any other evidence to support their allegation. I have gone through the MTFA with a fine-toothed comb, nowhere do I find any reference to the 3rd Applicant as an

associate partner of Vantage or as connected to Vantage in any other way. What I find however is that the 2nd applicant, Mokgome Mogoba executed the MTFA as associate partner of Vantage on 10th December 2014. The burden was upon the Respondent to adduce cogent evidence to contradict the 3rd Respondent's averment. He failed to discharge that burden.

I therefore find that the 3rd Applicant was neither a partner nor was he associated with Vantage in any way at the time the MTFA was extended to Simba Properties Investment Company Limited (hereinafter referred to as Simba) . To include him in any proceedings based on acts that are alleged to have been committed as a consequence of executing the MTFA is unjust.

The second critical question this court must address is whether or not for each of the charges a prima facie case was established.

(I) Transacting in money lending business in Uganda without a valid money lending license contrary to section 84 (1) (a) of the Tier 4 Microfinance Institutions and Money Lenders Act 2016

The Respondent accused the Applicants of conducting money lending business without a license contrary to the Tier 4 Microfinance Institutions and Money Lenders Act of 2016. He based this accusation on the single fact that the Applicants signed an MTFA pursuant to which they advanced credit to Simba Limited, in 2014. The Respondent attached this Agreement to his Affidavit and it is part of the record before the Trial Magistrate. In their submissions the Respondents very briefly mention the decision in **Chandi Jamwa v. Attorney General Constitutional Petition 26 of 2021** to argue that one can be charged with an offense based on a repealed statute.

The Applicants on the other hand contend that the law that the Respondent relied on was not in force at the time of the signing of the contract and consequently does not apply. Further, that even if it were to be found relevant, the question of lending without a license has been raised in several proceedings and adjudged accordingly, resulting in decisions that are binding on the learned Trial Magistrate. If she had considered these decisions, she would not have found that the Respondent made out a prima facie case. The Applicants provided before this court the decision of Hon Justice Stephen Mubiru, in **Simba Properties Investment Co. Limited and another-vs- Robert Kirunda and Others Miscellaneous Application 0671 of 2022.** They also relied on the decision in **Ham Enterprises Limited v. Diamond Trust Bank & Another, Supreme Court Civil Appeal 13 of 2021.**

To establish a prima facie case for the offense under Section 84 (1) (a) of the Tier 4 Microfinance Institutions and Money Lenders Act 2016, the Respondent had to show that the Applicants were:

(a) "Carrying on the business" as money lenders; and
(b) That they were doing so without a license.

The learned trial magistrate anchored her finding of a prima facie case on the misconception, basing on the one off MTFA, that Vantage Mezzanine Fund II Partnership has been carrying on business as a money lender without a money lending license contrary to section 84 (1) (a) of the Tier 4 Microfinance Institutions and Money Lenders Act 2016. All Vantage has been doing from 2014 when the loan was extended to date, has been to attempt to get Simba to pay back the loan and the interest, in vain. Interest accruing on a one off loan extended in 2014 cannot qualify to be "carrying on business."

Ordinarily, the phrase "carrying on business" denotes a series of actions regularly followed in furtherance of a profit-making activity. It indicates that there is continuous engagement of the party undertaking the profit-making activity. To be described as "carrying on business" the party must engage in a series of acts which collectively constitute a business. The party must pursue the activity on a continuous and sustained basis. The continuity of the acts must therefore be proved to legitimately fall within the ambit of the phrase "carrying on business." In **Dry Goods-vs- Lester, 60 Ark 120, 29 SW 34, 27, L.It. A. 505. 40. Am. St. Rep. 102,** which was quoted with approval by Hon Justice Stephen Mubiru, in **Simba Properties Investment Co.. Limited and another-vs- Robert Kirunda and Others,** it was found that the taking of a single mortgage by a foreign corporation to secure a past due debt, with no apparent intention to transact other business within the state was, held not to constitute "doing business" within the statutory prohibition.

A one off transaction such as the MTFA, where there is no evidence of intention to repeat it, does not therefore meet the regularity and continuous test required to classify the activity as "carrying on business." Nowhere is it stated or even suggested in the ruling of the learned trial magistrate that Vantage, save for the MTFA which is the subject of these proceedings, routinely/regularly extended loan facility agreements to Simba Limited or to any other people.

In the persuasive case of **H.M.B Holdings Ltd-vs- Antiqua and Barduda, the Supreme Court of Canada –2021 SCC 44 39130** – stated that in determining whether a defendant is carrying out business in a jurisdiction, the court must inquire into whether it has some direct or indirect presence in the jurisdiction accompanied by a degree of business activity that is sustained for a period of time.

The MTFA fails this test woefully. In the premises, I find that in the absence of evidence pointing to the fact that Vantage engaged in activities in Uganda to suggest that the partnership was carrying on business in Uganda, the one off loan facility agreement did not satisfy the test of "carrying on business" so as to bring it within the ambit of Section 84 (1) (a) of Tier 4 Microfinance Institutions and Money Lenders Act, 2016.

I am also alive to the decision of the Supreme Court in **Ham Enterprises Limited v. Diamond Trust Bank Limited Supreme Court Civil Appeal 13 of 2021, in which the Supreme Court** held that:

> "The issue of foreign lending in Uganda.
>
> will resolve a core point of law in this appeal; and also render clarity on the position of the law with regard to persons in Uganda carrying out financial transactions with foreign financial institutions or persons. This will enable the banking and other financial institutions transacting business in, or with institutions in, Uganda, carry out their businesses with certitude; in the knowledge that they are secure under the law.
>
> 'no law was brought to this Court's attention that forbids foreign financial institutions from extending credit facilities to any financial institution or person in Uganda. If anything, in furtherance of international trade and investment, financial institutions the world over are known to engage in global financial business transactions by dealing with, or through, financial institutions based in other jurisdictions. In the case of Uganda, such international financial business transactions are certainly neither governed by the Financial Institutions Act, 2004, as amended, nor the Financial Institutions (Agent Banking) Regulations, 2017, made pursuant thereto.'"

Most recently, in **African Rivers Fund v Kare Distributors Limited & Another, High Court Civil Suit No. 700 of 2019,** this Court dealt with a transaction similar to the one in issue before the learned Trial Magistrate in Miscellaneous Cause No. 10 of 2024. The Court cited the Supreme Court's holding in the **Ham Enterprises Ltd v Diamond Trust Bank** case above and further held that "In the present case and as seen above, the defendants not only failed to adduce any evidence to prove that the lending transactions in issue were illegal, but they also failed to demonstrate that the said transactions were governed by any of the laws they referred to as explained by counsel for the plaintiff in their submissions. In any case, the defendants did not bother to prove their contentions as they abandoned defending their case by contemptuously walking out of Court during the hearing and in the absence of any evidence to the contrary, I find that the lending agreements and the guarantee deed were legal."

It is not in dispute that the agreement in issue was signed before the law on which this particular charge is based. I find that the Tier 4 Money Lenders Act differs from the Money Lenders Act which it repealed in two critical ways. Firstly, it seems to me that the Act only anticipates that Applicants will be companies. It is silent on whether partnerships such as the one in issue in this case are covered. Secondly, it does not define what constitutes money lending business, the way its predecessor statute did. For these two reasons, I find that the decision **in Chandi Jamwa v.**

The Attorney General is distinguishable. In that decision, the Constitutional Court considered two statutes that were virtually identical, unlike the ones before this court. I therefore find that a prima facie case was not established in respect of count 1.

(II) Carrying on business and operating in Uganda under a business name which does not consist of the true surnames of all partners who are individuals and the corporate names of all partners which are corporations, without registration contrary to sections 4 (1) and (2) of the Partnership Act No. 2 of 2010.

In her Ruling delivered on 12th March 2024 in Criminal Case No. 10 of 2024, the learned Trial Magistrate found that the Respondent established a prima facie case of commission of an offence by the respondents/intended accused person.

At page 9 of the ruling, the learned Trial Magistrate stated that, "the applicant has adduced evidence which prima facie indicates, that since the year 2014 to date, Vantage has been carrying on business in Uganda without mandatory registration as stipulated under section 4 (1) and (2) of the Partnership Act No. 2 of 2010." She goes on to add that, " The applicant in paragraph 9 of his complaint on oath and the affidavit in support of the complaint on oath avers that on the 11th day of December 2014, at Kampala, Vantage entered into a loan facility agreement referred to as "USD 10,000,000" Mezzanine Term Facility Agreement" with Simba Ltd and advanced the said loan/credit facility to Simba Ltd (a Ugandan Company which loan facility is recoverable and has been accruing interest to date).

The learned Trial Magistrate further stated that, "the foregoing constitutes, "carrying on business in Uganda," within the meaning of the Partnership Act, 2010, for which "Vantage Mezzanine Fund II Partnership" a "business name which does not consist of the true surnames of all partners who are individuals and the corporate names of all partners which are corporations," was required to mandatorily register. Failure to carry out the said mandatory registration constitutes an offence under section 4 (1) and (2) of the Partnerships Act No. 2 of 2010 and disobedience of statutory duty c/s 116 of the Penal Code Act cap 120.

The learned Trial Magistrate went on to add that, the applicant brought to the attention of court a legal position that was further fortified by the decision of Hon. Justice Musa Ssekaana of the High Court in **Vantage Mezzanine Fund II Partnership-vs- URSB and 4 others, High Court Misc Cause No. 205 of 2021,** where it was held that without the said mandatory registration, Vantage was legally non-existent in Uganda and illegally carrying on business in Uganda.

On the reasoning above, the learned Trial Magistrate found that a prima facie was made out on the offences charged requiring the accused person to explain. She then held that failure to carry out the said mandatory registration constitutes an offence under section 4 (1) and (2) of the

Partnerships Act No. 2 of 2010 and disobedience of statutory duty c/s 116 of the Penal Code Act. Cap. 120.

I have very carefully read the decision of my Learned brother Hon. Justice Musa Ssekaana in the case of **Vantage Mezzanine Fund II Partnership-vs- URSB and 4 others, High Court Misc Cause No. 205 of 2021** particularly as it pertains to the application of the Partnership Act to Vantage in that matter. The matter in contention in that case was that of locus standi of the applicant as a non-registered partnership to sue in the name of the partnership and not whether or not the applicant as a non-registered partnership was carrying on business illegally in Uganda. The learned Judge according held that the applicant in that matter has no legal presence and locus to commence the application and accordingly, the application was dismissed.

I have not come across any part of that decision in which Justice Sekaana held that Vantage was legally non-existent in Uganda and illegally carrying on business in Uganda. In stating that Justice Ssekaana held that Vantage was illegally carrying on business in Uganda, the learned Trial Magistrate misinterpreted the decision in High Court Miscellaneous Cause No. 205 of 2021. The misinterpretation of the precedent in that case, resulted in the learned Trial Magistrate misdirecting herself on the issue of whether or not Vantage was illegally carrying on business in Uganda without the mandatory registration envisaged by Sections 4 (1) and (2) of the Partnership Act. Registration under Section 4 (1) and (2) of the Partnership Act is only mandatory for partnerships carrying on business in Uganda.

I am of the considered view that the learned trial magistrate erred in law and in fact in arriving at the conclusion that the loan facility agreement which is the subject of these proceedings constituted "carrying on business in Uganda "within the meaning of section 4 (1) and (2) of the Partnership Act.

Although the said legislation does not define the phrase "carrying on business" for the purposes of section 4 (1) and (2), I have recourse to the ordinary meaning of the phrase backed by case, law. As I have already held above, ordinarily, the phrase "carrying on business" denotes a series of actions regularly followed in furtherance of profit-making activity. It indicates that there is continuous engagement of the party undertaking the profit-making activity. To be described as "carrying on business" the party must engage in a series of acts which collectively constitute a business. The party must pursue the activity on a continuous and sustained basis. The continuity of the acts must therefore be proved, for the totality of the acts to legitimately fall within the ambit of the phrase "carrying on business". In **Dry Goods-vs- Lester, 60 Ark 120, 29 SW 34, 27, L.It. A. 505. 40. Am. St. Rep. 102,** which was quoted with approval by Hon Justice Stephen Mubiru, in **Simba Properties Investment Co. Limited and another-vs- Robert Kirunda and Others**, it was found that the taking of a single mortgage by a foreign corporation to secure a

past due debt, with no apparent intention to transact other business within the state was, held not to constitute " doing business" within the statutory prohibition.

A one off transaction such as the MTFA, where there is no evidence of intention to repeat it, does not therefore meet the regularity and continuous test required to classify the activity as "carrying on business." Nowhere is it stated or even suggested in the ruling of the learned trial magistrate that Vantage, save for the loan facility agreement, which is the subject of these proceedings, routinely/regularly extended loan facility agreements to Simba Limited or to any other people.

In the persuasive case of **H.M.B Holdings Ltd-vs- Antiqua and Barduda, the Supreme Court of Canada –2021 SCC 44 39130** – stated that in determining whether a defendant is carrying out business in a jurisdiction, the court must inquire into whether it has some direct or indirect presence in the jurisdiction accompanied by a degree of business activity that is sustained for a period of time. The loan facility agreement fails this test woefully.

I have also considered the Applicants' evidence to the effect that even after Justice Sekaana's decision, they did try to register with the Uganda Registration Services Bureau. The Bureau declined to register the partnership because it had no place of business in Uganda. The Applicants' evidence fortifies me in my view that section 4 was only intended for those partnerships that are "carrying on business" locally in the form that I have described above.

In the premises, I find that in the absence of evidence pointing to the fact that Vantage continuously engaged in activities in Uganda to suggest that the partnership was carrying on business in Uganda, the one off loan facility agreement did not satisfy the test of "carrying on business" so as to bring it within the ambit of Section 4 (1) and (2) of the Partnership Act.

I accordingly find that the applicants did not succeed in establishing a prima facie case in respect of count II.

(III) Disobedience of a Statutory duty contrary to Section 116 of the Penal Code Act.

These charges stem from Vantage's alleged willful disobedience to the Tier 4 Microfinance Institutions and Money Lenders Act, 2016, which provides that only companies that have licenced as money lenders under section 79 and Section 84 which make it an offence to carry on the business of a money lender without a money lending license. Having found that a prima facie case was not established in respect of Count II, there is accordingly no prima facie case established in respect of count III

(IV) Disobedience of a Statutory duty contrary to section 116 of the Penal Code Act

These charges stem from Vantage's alleged willful disobedience to the Partnership Act, which requires partnerships such as Vantage, a partnership whose business name does not consist of

the true surnames of all parties who are individuals and the corporate name of all parties who are corporations, to mandatorily register under the Partnership Act.

Having found that a prima facie case was not established in respect of Count II, there is accordingly no prima facie case established in respect of count IV.

(iv) Obtaining execution of a security by false pretences contrary to sections 306 of the Penal Code Act. (12 Counts)

Blacks Law Dictionary describes the term "false pretenses" as " the premeditated and calculated act that misrepresents the facts or a situation in order to defraud." Therefore in law, the term "false pretenses" denotes something more than untrue, it means something designedly untrue and deceitful and implies an intention to perpetrate some treachery or fraud.

In the case of **Uganda-vs- Hon. Engineer Abraham Byandala and 6 Others HCT Session Case No. 12 of 2015**, Justice Lawrence Gidudu stated that; in charges of Obtaining execution of a security by false pretence C/S 306 PCAthe prosecution is required to prove the following elements.

(a) that the accused by false pretense and with intent to defraud induced another to

(b) execute a valuable security.

Section 103 of the Evidence Act provides that "the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any particular person.

This count implies that an allegation of fraud has been made against the applicants, which as provided by Section 103 requires the person imputing fraud upon the applicants to adduce evidence to support that fact.

Fraud has been defined in the case of **Zaabwe-vs- Orient Bank Ltd and Others SCCA No.4 of 2006** to mean, "an intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender to him or her a legal right. A false representation of a matter of fact whether by works or conduct by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury." In **Kampala Bottlers Ltd v. Damanico (U) Ltd SCCA 22 of 1992,** Chief Justice Wambuzi (as he then was) defined fraud simply as "dishonest dealing."

There is no evidence adduced by the respondents to indicate that the act of executing security documents in favour of the applicants as security for the loan of USD 10,000,000 were procured by false pretences and with intent to defraud Simba Ltd, neither has the respondent produced

any evidence to show that the applicants acted dishonestly when they lent the borrowers the funds under the MTFA.

I hasten to add that no evidence has been adduced to point to the fact that any of the conditions enumerated in **Uganda-vs- Hon Engineer Abraham Byandala and 6 others** (supra) above existed in the execution of the securities pursuant to the MTFA.

In the case of **Golf View Inn (U) Ltd-vs- Barclays Bank (U) Ltd, HCCS No. 358 of 2009, citing the decisions in Pao On & Others -vs- LauYiu & Another (1979) 3 ALL ER 65 and Balton -vs- Armstrong (1976) AC 104,** Lady Justice Hellen Obura stated that;

" There is a criteria that is relevant in considering whether a plaintiff acted voluntarily or not in signing an instrument or entering into a contract... determining whether there was coercion of the will such that there was no consent, it is material whether the person alleged to have been coerced did or did not protest at the time, that at the time he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised and finally whether after entering the contract, he took steps to avoid it.

As was stated by my Learned brother Hon. Justice Boniface Wamala in the case of **Vantage Mezzanine Fund II Partnership-vs- Simba Properties Investment Company Limited and Simba Telecom Limited**, " this court has taken judicial notice of the fact that the Bitatures are one of the most polished and astute business personalities in Uganda. The respondents were well and independently advised by senior and prominent legal professionals in Uganda. Faced with such facts, my view is that a feeble claim of duress and/or undue influence of any nature as this one amounts to an insult of own intelligence on the part of the respondents and their advocates."

I associate myself with the above remarks of my learned brother Justice Boniface Wamala. Indeed, Simba retained one of the firms constituted of the brightest legal minds in this country to draw the MTFA. It beggars belief that any right thinking person let alone an advocate would turn around and suggest that the MTFA was executed on behalf of Simba as a consequence of false pretenses on the part of Vantage. It is plain to see that the MFTA was entered into voluntarily by the parties to it, the parties involved and the firm of lawyers that were retained to draw it appreciated the implications of executing the MTFAA. To suggest otherwise and to repeatedly attempt to advance in courts of law the narrative that the MFFA was not entered into voluntarily by the Bitatures is to make an absolute mockery of justice.

Courts of law in any jurisdiction, by virtue of the decisions they pass in investment disputes such as the one between Vantage and Simba , send a signal to investors, particularly foreign investors, about the level of confidence investors should accord that country as an investment destination. The efficiency and effectiveness of a country's judiciary is indispensable in enhancing the attractiveness of a country as an investment destination. The protracted battle over the payment

of a loan extended in December 2014, which by all indications was taken voluntarily in circumstances that were clearly voluntary, has undoubtedly dented Uganda's image as an investment destination and impacted negatively on its investment climate ratings. It is a travesty of justice that providers of capital for investment have now been dragged before courts of law and warrants of arrest issued against them in respect of a loan that was extended in December 2014 in respect of which not a single cent has been repaid to date. In an act of brazen abuse of court process, the injustice of refusal to repay the loan has been compounded by dragging the lenders (partners of vantage) to the courts pursuant to private criminal proceedings and as we speak there is an arrest warrant pending against the partners of Vantage. I can without fear of contradiction assert that, continued attacks against the enforceability of the MTFA on the basis that it was not executed voluntarily is an exercise in futility. This court will not fold its hands and perpetrate a travesty of justice.

I accordingly find that the respondents did not succeed in establishing a prima facie case in respect of the 12 counts of obtaining execution of a security by false pretenses.

(c)whether the charges were frivolous and vexatious.

Black's law dictionary 8th Edition defines the term 'frivolous' as
"...lacking a legal basis or legal merit; not serious and not reasonably purposeful."
Vexatious is defined to mean without reasonable or probable cause of excuse, harassing, annoying. (see Black's Law Dictionary, 7th Edition page 1235. It further defines a vexatious suit as a law suit instituted maliciously and without good cause.
In the case of **R vs Ajit Singh s/o Vir Singh (1957) EA 822** a vexatious suit is a law suit instituted maliciously and without good cause.
Frivolous connotes the absence of seriousness or the lack of validity or legitimacy. A frivolous pleading would also be vexatious in that its effect would be counterproductive. **See RE Singapore Souvenir Industry (Pte) Ltd (1985-1986) SLR ® 161.** Secondly to be vexatious, a case would be oppressive to the opposing party and it obstructs the court from gaining a full understanding of the issues and a party acts with an ulterior motive. The action is vexatious if the party bringing it is not acting bona fide and merely wishes to annoy or embarrass the opponent or when it is not calculated to lead to any practical result. **See Lehman Brothers Special Financing Inc v Hartadi Angkosubroto (1998) 3 SLR ®** 664.
Having found that the private prosecutor did not succeed in establishing a prima facie case in respect of each of the counts against the 1st and 2nd applicants, having found also that the 3rd applicant was neither a partner nor affiliated with Vantage in anyway at the time the MFTA was executed and therefore should not have been charged at all, I conclude that the charges were nothing else but frivolous and vexatious.
Whether the learned trial magistrate erred in not considering the precedents on the issues before her

When a decision is made by a judicial officer without taking into account a binding decision on the matters in controversy, such a decision is said to be per incuriam. According to the Black's law Dictionary 4th edition, per incuriam means something done with oversight without considering all the relevant factors, per incuriam literally translated as 'through lack of care' is a device within the common law system of judicial precedent. A finding of per incuriam means that a previous court judgment has failed to pay attention to relevant statutory provisions or precedents.

I note from my consideration of the two counts above, that the Learned Trial Magistrate did not at all consider any of the decisions that I have referred to above, even though they involved the same facility agreement she was considering. This offends the doctrine of precedent. The above decisions are binding on all courts subordinate to the High Court of Uganda.

The doctrine of precedent required the Trial Magistrate to consider the above decisions before establishing that the private prosecutor made out a prima facie case of the Applicants' commission of the offence. In **Continental Tobacco (U) Limited v Global Hardware Company Limited (Civil Appeal No. 0017 of 2013) 2016**, Justice Stephen Mubiru stated that the doctrine of binding precedent requires that the rule in a relevant previous decision must be followed 'because it is a previous decision and for no other reason." The learned Judge further held that "Through the acquisition of 'the accumulated experience of the past' and by binding later courts, precedents provide for uniformity to a large extent, which is one of the most basic demands of justice. It is for that reason that in **Smith v Allwright (1944) 321 US 644, at 669,** Roberts J. commented; it is of paramount importance that judicial decisions should not be like 'a restricted railroad ticket, good for this day and train only.' Failure to follow binding precedent creates "the inconvenience of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final court of appeal." By virtue of that doctrine, the Court of Appeal 'has a duty to apply (that is, is bound to follow) any decision of the House of Lords which ... actually settles or covers the particular dispute before the Court' (see C. Rickett, 'Precedent in the Court of Appeal', [1980] 43 Modern Law Review 136, at 137). In the hierarchical system of courts which exists in this country, "it is necessary for each lower tier... to accept loyally the decisions of the higher tiers.'

To avoid an inconvenient but otherwise binding precedent, a court below has several options available to it; to distinguish it by confining it to its narrow facts, thereby limiting the scope of its authority; to find that it was per incuriam, that is, the Court had overlooked an existing decision or statute relevant to the decision; where the reasons for the rule have ceased to exist (Cessante ratione legis cessat ipsa lex); refuse to follow any statement in the decision which is not the ratio dicendi; freely choose which of two clearly inconsistent binding decisions to follow. A court is

otherwise not justified to dismiss a binding precedent simply because it does not agree with ratio decidendi."

The Supreme court of Zambia in the case of **First Merchant Bank Zambia limited & AG vs Alshams Building materials limited & Jayesh Shah Appeal No. 50 of 2010** while citing the case of **Morelle limited v Wakeling (1955) 1 ALL ER 708**, court stated that, ' as a general rule, the only cases in which decisions should be held to have been given ' per incuriam ' are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found on that account, to be demonstrably wrong.'
I note from my consideration of the counts I and II above, that the Learned Trial Magistrate did not at all consider any of the decisions that I have referred to above, even though they involved the same facility agreement she was considering. This offends the doctrine of precedent. The above decisions are binding on all courts subordinate to the High Court of Uganda. The decisions of the learned Trial Magistrate on those matters are therefore per incuriam and accordingly irregular.

I further note with concern that the Respondent before me, who filed the proceedings in the lower court, has not disputed the averment that he is one of the lawyers of the borrowers who signed the agreement in issue in these proceedings. He owed the court a duty to not seek to relitigate matters he knows or ought to have known had been tried and determined by the High Court. This amounts to abuse of court process, which the Supreme Court defined in the case of **Attorney General & Anor v. James Mark Kamoga & Anor Civil Appeal No. 08 of 2004** as using the court for an improper purpose. The province of private prosecution is a critical one to the administration of criminal justice in this country. It is the duty of all courts exercising criminal jurisdiction to guard it jealously and ensure that it is not abused by ill motivated litigants.

Whether the trial magistrate properly issued an arrest warrant against the applicants.

The Applicants also faulted the magistrate for issuing an arrest warrant against them contrary to sections 31, 45 and 50 of the Magistrates Court Act. They argued that the magistrate made an erroneous finding when she determined that the service of summons upon the Applicants had been proper, and that she had the power to issue an arrest warrant against them, even though they do not reside in the Ugandan territory. The Applicants argue that the Magistrates Court can only cause to be brought before it a person who is either within its local limits or within the geographical limits of Uganda. It was the Applicant's case that the only other avenue through which the Applicants could have been summoned is through extradition proceedings under the Extradition Act. They therefore argued that the Magistrate acted improperly and illegally when

she issued an arrest warrant against the Applicants. The Respondent did not address this point in his submissions.

To address this grievance, it is pertinent to reproduce the provisions of the law.

Section 31 of the Magistrates Court Act provides that

31. General authority of magistrates courts

Every magistrate's court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within Uganda, or which according to law may be dealt with as if it had been committed within Uganda, and to deal with the accused person according to its jurisdiction.

Section 45 of the Magistrates Court Act then provides that

45. Service of summons

(1) Every summons shall be served by a police officer or by an officer of the court issuing it or by other public servant and shall, if practicable, be served personally on the person summoned by delivering or tendering to him or her the duplicate of the summons.

(2) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt for it on the back of the original summons.

Section 50 then provides that

50. Where summons may be served

A summons may be served at any place in Uganda.

The collective reading of these provisions leads to the following findings. A magistrates court has the power to cause a person to appear before it, whether by summons or warrant, if that person is charged with an offence committed within Uganda, and the person has committed an offence within the local limits of Uganda. It appears to me that having known that the Applicants were resident in South Africa, this section necessitated the trial magistrate to proceed with caution before issuing a warrant of arrest or determining that the service of summons had been effective.

Section 45 of the Magistrates Court Act requires that summons are served by a court annexed official. This provision is not without purpose. Criminal proceedings by their nature have a strong implication on the liberties of an accused person. The related processes must therefore be

guarded carefully. Read together with section 50, the requirements are even more stringent. Criminal summons issued by a Ugandan court have valid and binding effect within the geographical limits of Uganda. For them to gain similar legal effect, they must be served under the procedure provided for under the Extradition Act. That procedure requires that the responsible Minister, in this case the minister for justice issues an Instrument for those specific purposes. Moreover, under section 28 of the Extradition Act, the instrument, and consequently, the summons, can only relate to the offences listed in the schedule to the Extradition Act. Even then, under section 2 of the Extradition Act, there needs to be a reciprocal arrangement between Uganda and the country from which extradition is sought.

This court notes that the offences with which the Applicants are charged are not extraditable offences in so far as they are not listed in the first schedule to the Extradition Act. No evidence was placed before me to establish that the Respondent had sought to commence or taken out extradition proceedings, or that Uganda has an extradition arrangement with South Africa where the applicants are located. The learned trial magistrate did not address these additional considerations and consequently acted improperly and erred in law when she issued the arrest warrant against the Applicants.

Arrest warrants are in their nature court orders. I am persuaded by the Applicants' argument that court orders should not be issued in vain. **In Amrit Goyal vs Harichand Goyal & 3 Others – C.A.C.A. No.109 of 2004, the Court of Appeal stated that:** "A Court order is not a mere technical rule of procedure that can simply be ignored. Court orders must be respected and complied with. A Court order must be obeyed, as ordered, unless set aside or varied. Those who ignore them do so at their peril." Arrest warrants have a grave effect in law. They also impose great demands on accused persons. The criminal courts of this country must use that power only after carefully determining that the case warrants such action. Following my findings above,as the charges against the applicants did not constitute one of those cases.

Consequently, I find that the Trial Magistrate issued criminal summons and arrest warrants against the Applicants illegally, improperly and without the requisite authority, and hereby recall them.

On the face of their Motion, the applicants prayed for any further orders that may meet the ends of justice in the case, and for costs of the application. I have already found that the respondent failed to prove that the 3rd respondent was an employee of Vantage at the time of the signing of the MTFA. I have also already found that the proceedings before the Magistrates court were frivolous, vexatious and an abuse of process. What is even more disturbing is that they were brought by an advocate who not only should be alive to his duty to the court, but also ought to

have brought to the court's attention all the facts that were within his knowledge. When the applicants challenged him as much in their pleadings and submissions, he did not so much as respond to this critical fact. I am therefore constrained to find that he did not only abuse court process for the benefit of his client, but also failed in his professional duty to the courts, both the one below and in the proceedings before me. Regulation 17 of the Advocates Professional Conduct Regulations SI 267-2 which provides as follows:

17. Duty of an advocate to advise the court on matters within his or her special knowledge.

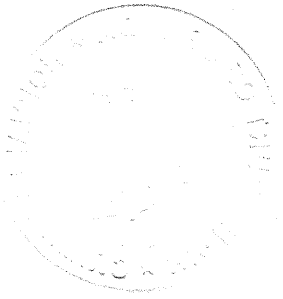
(1) An advocate conducting a case or matter shall not allow a court to be misled by remaining silent about a matter within his or her knowledge which a reasonable person would realize, if made known to the court, would affect its proceedings, decision or judgment.

The respondent in this case did not only remain silent to allow court to be misled into granting leave to commence private prosecution against the respondents. He actively participated in misleading the court when he relied on misconstruction of cases and deliberately pleading facts he knew were the subject of adjudication by the High court. I have labored in vain to think of a worse violation of the above rule. In doing so, he put the applicants not only to great cost but also to severe inconvenience since they had to retain counsel to protest his conduct and bring the instant proceedings. In addition, the grant of leave to commence private criminal prosecution against the respondents resulted in a number of applications before this court, needless applications on which this court has spent the greater part of the last forthnight poring over volumes of documents filed in support and in opposition of the applications. An exercise which was unwarranted considering the circumstances of the case, an exercise which took away valuable time that this court could have expended on more meritorious matters. Consequently, it is only fair that the respondent meets the costs of these proceedings.

Orders

Having found that the private prosecutor did not establish a prima facie case in respect of all the charges and that the charges were frivolous and vexatious, I make the following orders;

(a) That the Learned Trial Magistrate's decision in Criminal Miscellaneous Cause No. 10 of 2024 Uganda (Private Prosecution by Atuhairwe Wykckliffe) v Warren Van der Mwerwe, Mokgome Mogoba and Derek Alexander dated 12th March 2024 was improper and is hereby vacated.
(b) That the charge sheet and criminal summons the trial magistrate sanctioned and issued in Criminal Case No. 179 of 2024 pursuant to the decision in Miscellaneous Cause No. 10 of 2024 are set aside.



(c) That the arrest warrants against the Applicants are recalled for having been issued illegally, improperly and without the requisite authority.

(d) The costs of this application are awarded to the applicant.

Rosette Comfort Kania
Judge
19th April 2024