

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
CRIMINAL REVISION APPLICATION NO. 024 OF 2022
(ARISING FROM BUGANDA ROAD CHIEF MAGISTRATE COURT NO. 38 of 2022)
IN THE MATTER OF AN APPLICATION TO CONDUCT A PRIVATE PROSECUTION UNDER THE
MAGISTRATES COURTS ACT
AND
IN THE MATTER OF VANTAGE MEZZANINE FUND II PROPRIETARY LIMITED (IN ITS CAPACITY AS THE
ULTIMATE GENERAL PARTNER OF THE VANTAGE MEZZANINE FUND II PARTNERSHIP)
AND
IN THE MATTER OF ROBERT KIRUNDA ESQ (LAWFUL ATTORNEY OF VANTAGE AND FUND II
PROPRIETARY LIMITED)

BEFORE LADY JUSTICE ROSETTE COMFORT KANIA

RULING

Background

The applicant (intending private prosecutor) brought this application by way of notice of motion under Sections 48 and 50 of the Criminal Procedure Code Act Cap 111 and Rule 2 of the Judicature (Criminal Procedure) (Applications) (Rules) seeking orders that;

- (a) The Trial Magistrate's decision in Criminal Miscellaneous Application N0.38 of 2022 be revised and set aside.
- (b) This Honourable Court sanctions the charge sheet and any other document necessary for commencing private prosecution proceedings against Patrick Bitature and Carol Nzaro Bitature.
- (c) The file be remitted to the Chief Magistrates Court at Buganda Road for trial.

Brief Facts

It is alleged that; On or about the 11th day of December 2014, at Diamond Trust Building along Kampala Road, Simba Properties Investment Company Limited (Borrower) a company ultimately and beneficially owned by Patrick Bitature and Carol Nzaro Bitature, (hereinafter referred to as



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the suspects) borrowed and received US\$10,000,000 from Vantage Mezzanine Fund II Proprietary Limited, the Ultimate General Partner of Vantage Mezzanine Fund II Partnership (Complainant) pursuant to a written mezzanine facility agreement. As security for the obligations of the Borrower under the mezzanine facility agreement, the suspects offered their shares in Linda Properties Limited, Elgon Terrace Limited, Simba Properties Investment Company Limited and Simba Telecom Limited, collectively referred to as "Simba Companies", where they are shareholders directly or indirectly. It is further alleged that, company charges on shares were thus concluded between the complaint, suspects and other service providers which among other things, prohibited the transfer or alteration of the charged shareholding in the Simba Companies. These charges were executed at the offices of MMAKS Advocates, then located at Diamond Trust Building along Kampala Road. The suspects being directors and the ultimate shareholders of the Simba Companies then, with full knowledge and intent to defraud the complainants and other creditors altered the shareholding of the Simba Companies in contravention of among others, section 323 of the Penal Code Act Cap 120, made false statements contrary to section 324 of the Penal Code Act and conspired to defraud the complainant and the public contrary to section 309 of the Penal Code Act. They did this by executing various legal document at the law offices of MMAKS Advocates, located in Nakasero, at their company premises located in Kololo, and filing and registering various company documents with the Uganda Registration Services Bureau.

The applicant filed an application in the Chief Magistrates Court of Kampala at Kampala for orders that;

- (a) Private prosecution proceedings be commenced against the suspects upon such reasonable suspicion as maybe provided by the intending private prosecutor.
- (b) The Court sanctions any Charge Sheet and attendant documents necessary for the execution of the private prosecution of the suspects in so far as the said Charge Sheet shall be supported by the required documents under the law.

The application was duly supported by the applicant's affidavit which was read and relied upon at the hearing.

The Trial Magistrate disallowed the application hence this application.

Representation

The complainant was represented by Messrs Kirunda and Wasige Advocates. The Director of Public Prosecutions was duly served on 15th December 2023, pursuant to Section 50 (2) of the Criminal Procedure Code Act.

The Applicant's Submissions

The intending private prosecutor filed Criminal Miscellaneous Application NO. 38 of 2022 at the Chief Magistrate's Court of Uganda at Buganda Road seeking inter alia orders that the court sanctions the Charge Sheet and attendant documents necessary for commencing private prosecution of the suspects. Counsel states that the suspects committed fraud contrary to Section 323 of the Penal Code Act, issued false annual returns in respect of the companies contrary to Section 324 of the Penal Code Act, committed conspiracy to defraud contrary to Section 309 of the Penal Code Act. It is the applicant's contention that the suspects so conducted themselves with malice aforethought and with intent to defraud both the complainant and the public.

The intending private prosecutor also moved court to consult the area local chief to confirm that the suspects reside and conduct business within the jurisdiction of the court, which fact was confirmed by the local chief. However, the local chief denied knowledge of the alleged offences committed by the suspects. Counsel for the complainant contends that although Criminal Miscellaneous Application NO. 38 of 2022 was supported by evidence that was sufficient for the court to sanction the Charge Sheet and commence private prosecution of the suspects, the Trial Magistrate basing on the local chief's lack of Knowledge of the offences alleged to be committed by the suspects, found as follows;

- (a) The trial court had no jurisdiction to commence private prosecution against the suspects
- (b) The private prosecutor had not established a prima facie case of commission of an offence by the suspects
- (c) The private prosecutor's application and intending prosecution were frivolous and vexatious.

Counsel for the applicant contends that the Trial Magistrate's decision was erroneous both in fact and in law because;

- (i) Court did not consider the evidence on record pointing to the commission of the offences by the suspects
- (ii) The area Local Area's Chief's knowledge of the alleged offences is not a requirement for sanctioning a charge sheet and commencing private prosecutions
- (iii) The court misdirected itself on the scope and purpose of consultation of the Local chief.

Counsel for the applicant further contended that, the Trial Magistrate's decision in Criminal Miscellaneous Application NO. 38 of 2022 is illegal and or erroneous based on the following reasons;

- The Court refused to exercise the jurisdiction it is clothed with.



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- There is a manifest error on a point of law in respect to the requirements for instituting a criminal private prosecution.

Counsel for the applicant concluded by stating that; the Trial Magistrate's decision demonstrates an abuse of powers by court in declining to sanction the Charge Sheet to commence private prosecutions; the trial court's decision is a manifestation of miscarriage of justice occasioned not only to the intending private prosecutor but also the public which was and is still defrauded by the suspects; there is a dire need for this Honourable court to revise the Trial Court's decision and cure the irregularities, grave errors, illegalities, abuse of power and miscarriage of justice occasioned to both the intending private prosecutor and the public; and that it is just and equitable that this Honourable Court revises the Trial Court's decision in Criminal Miscellaneous Application NO.38 of 2022.

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

Issues

- (1) Whether the trial court had jurisdiction to entertain the Miscellaneous Application NO. 38 of 2022.
- (2) Whether the intending private prosecutor established a prima facie case of commission of an offence by the suspects.
- (3) Whether the aforementioned application and intended prosecution are frivolous and vexatious.
- (4) What are the remedies available.

The Law Applicable

The Constitution of the Republic of Uganda 1995, as amended

Article 126 (1) provides that, " judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people."

Article 126 (2) provides that in adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law apply the following principles-

- (a) Justice shall be done to all irrespective of their social or economic status
- (b) Justice shall not be delayed
- (e) Substantive justice shall be administered without undue regard to technicalities.



Magistrates Courts Act, Cap 16

Section 42 (1) (c) of the Magistrates Courts Act provides that criminal proceedings may be instituted by any person, other than a public prosecutor or a police officer, making a complaint as provided in subsection (3) and applying for the issue of a warrant or a summons in the matter hereafter mentioned.

Section 42 (3) provides that " any person other than a public prosecutor or a police officer who has reasonable and probable cause to believe that an offence has been committed by any person may make a complaint of the alleged offence to a magistrate who has jurisdiction to try or inquire into the alleged offence, or within the local limits of whose jurisdiction the accused person is alleged to reside or be. Every such complaint may be made orally in writing or signed by the complainant, but if made orally shall be reduced into writing by the magistrate and when so reduced shall be signed by the complainant.

Section 42 (4) provides that " upon receiving a complaint under subsection (3), the magistrate shall consult the local chief of the area in which the complaint arose and put on record the gist of that consultation, but where the complaint is supported by a letter from the local chief, the magistrate may dispense with the consultation and thereafter put that letter on record.

Section 42 (5) provides 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 offence or offences alleged to have been committed by the accused.

Section 50 (1) (b) of the Criminal Procedure Code Act provides 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 other order, other than an order of acquittal, alter or reverse the order.

Section 50 (2) no order under this section shall be made unless the Director of Public Prosecutions has had an opportunity of being heard.

Penal Code Act Cap, 120

Section 323 provided that Any person who-

a) being a director or officer of a corporation or company receives or possesses himself or herself as such of any of the property of the corporation or company otherwise than in payment of a just debt or demand, and with intent to defraud, omits either to make a full and true entry of the property in the



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books and accounts of the corporation or company, or to cause or direct such an entry to be made in them; or

b) being a director, officer or member of a corporation or company, does any of the following acts with intent to defraud-

i) destroys, alters, mutilates or falsifies any book, documents, valuable security or account, which belongs to the corporation or company, or any entry in any such books, document or account, or privy to any such act;

ii) makes or is privy to making, any false entry in any such books, document or account; or

iii) omits, or is privy to omitting, any material particular from any such books, document or account.

Section 324 is to the effect that any person who, being a promoted, director, officer or auditor of a corporation or company, either existing or intended to be formed, makes, circulates or publishes, or concurs in making circulating or publishing, any written statement or account which, in any material particular, is to his or her knowledge false, with intent thereby to effect any of the following purposes

a) to deceive or to defraud any member, shareholder or creditor of the corporation or company, whether a particular person or not;

b) to induce any person, whether a particular person or not, to become a member of, or to entrusted or advance any property to, the corporation or company, or to enter into any security for its benefit.

Section 309 Penal Code Act provides that any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, commits an offence.

Resolution of the Issues

The conditions for private prosecutions set out in Section 42 of the Magistrates Courts Act were ably interpreted in the case of **Hassan Bassajjabalaba vs Kakande Benard, High Court Criminal Revision NO. 02 of 2013**. Lord Justice Lameck Mukasa as he then was laid out the elements that must ensue for the process of a private criminal prosecution to take place;

(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.

I will now proceed to examine Miscellaneous Application 38 of 2022 against the issues raised;

(1) Whether the trial court had jurisdiction to try and inquire into the alleged offence.

The trial magistrate found that although the local chief (in this case the LCIII Chairperson) confirmed that the suspect are residents within his area he stated that he was not aware of any offences of crimes allegedly committed by the suspects to wit; Conspiracy to defraud contrary to Section 309 of the Penal Code Act, fraudulent alteration of shares by directors contrary to Section 323 (a) and (b) (i) of the Penal Code Act and false statements by directors of companies contrary to Section 324 of the Penal Code Act and . The Learned Trial Magistrate stated that the purpose of the consultation with the local chief of the area where the offences are alleged to have been committed is for the court to satisfy itself that it has the necessary jurisdiction to entertain the charges. She concluded that since the local chief informed court that he was ignorant of the commission of the alleged crimes by the suspects, his ignorance casts doubt as to whether the offences were committed within his local area, so as to confer upon the trial court , the necessary jurisdiction to try the offences.

Jurisdiction is such an indispensable requirement in adjudication that, it must be very carefully considered by any judicial officer before whom a matter is brought. As was held by Hon. Justice Bart Katureebe, in **Ahmed Kawoza Kangu vs Bangu Aggrey Fred and Another, SCC Application NO.4 of 2007**, Jurisdiction of the court is not a matter for implication but must be prescribed by law. The importance of jurisdiction was amplified by Hon. Justice Musoke Kibuuka in **Kasibante Moses vs Katongole Singh Marwaka & Anor- Kampala Election Petition No. 23 of 2011**, where it was stated; "The term jurisdiction is not a term of art. It is a term of law. It is a term of very extensive legal import. It confers upon the court the power to decide any matter in controversy. It presupposes the existence of a duly constituted court with full control over the subject matter under adjudication, it also presupposes full control by the court of the parties to the subject matter under investigation by it. Jurisdiction defines the power of a court to inquire into facts, to apply the relevant law, to make decisions and to declare the final outcome of the subject matter under its inquiry."

I am of the view that, the jurisdiction alluded to in that Section 42 (3), straddles two facets; territorial jurisdiction of the court and the subject matter jurisdiction of the Judicial officer.

The Magistrates Courts (Magisterial Areas) Instrument, S.I NO.11 of 2017 under item 7 confers upon Buganda Road Chief Magistrates Court jurisdiction of Central Division Kampala. On record there is a letter from the Local chief indicating that the suspects reside within the jurisdiction of the trial court, at Baskerville Village, Kololo 1 Parish on Malcom X Road in Kampala Central Division. In addition, Section 42 (3) of the Magistrates Courts Act, provides that" any person other



than a public prosecutor or a police officer who has reasonable and probable cause to believe that an offence has been committed by any person may make a complaint of the alleged offence to a magistrate who has jurisdiction to try or inquire into the alleged offence, or within the local limits of whose jurisdiction the accused person is alleged to reside or be. Every such complaint may be made orally in writing or signed by the complainant, but if made orally shall be reduced into writing by the magistrate and when so reduced shall be signed by the complainant. (the underlining, bolding and italicizing is mine for emphasis).

The letter from the local chief, which is on the record of proceedings of the lower court, clearly stated that the suspects reside at Baskerville Village, Kololo1 Parish on Malcom X Road in Kampala Central Division, which as per the underlined portions of Section 42 (3) of the Magistrates Court Act brings the matter within the territorial jurisdiction of the Chief Magistrates Court at Buganda Road.

Section- 161 (1) of the Magistrates Courts Act, provides that a magistrate's court presided over by a magistrate grade I may try any offence other than an offence in respect of which the maximum penalty is death or imprisonment for life. In the case of Ankawtsa Mary vs Uganda, HCT-))-CR-CV-004-2013, Justice Lameck N. Mukasa stated that, " With regard to criminal jurisdiction, section 161 (1) (a) of the Magistrates Court Act provides that a Chief Magistrate Court may try any offence other than an offence in respect of which the maximum penalty of death. Therefore the Chief Magistrate at Nakawa, like any other Chief Magistrate, had the jurisdiction to try the offence of forgery or uttering a false document which the Applicant was charged with."

The offences under sections 309, 323 and 324 of the Penal Code Act attract the maximum penalty of imprisonment for 7 (seven) years. The magistrate's court therefore has the subject matter jurisdiction to try the alleged offences.

Consequently, having determined that the complaint satisfied the jurisdictional conditions set out in Section 42 (3) of the Magistrates Courts Act, I find that the Trial Magistrate had jurisdiction to try the matter and that the matter fell squarely within the jurisdiction of the Chief Magistrates Court of Kampala at Buganda Road.

(2) Whether a prima facie case of commission of offences was disclosed.

Section 42 (4) of the Magistrates Court Act provides that, "Upon receiving a complaint under subsection (3), the magistrate shall consult the local chief of the area in which the complaint arose and put on record the gist of that consultation...."

The learned Trial Magistrate found that the purpose of consultation under Section 42 (4) of the Magistrates Courts Act is to satisfy court that it has the necessary jurisdiction to entertain the

charges and that the offences are neither frivolous nor vexatious. Based on the fact that the Local chief stated that he had no knowledge whatsoever of the commission of the alleged crimes, the learned Trial Magistrate found that there was no *prima facie* evidence of commission of the offences alleged by the complainant. The matter of jurisdiction has already been dispensed with, I am left with addressing the issue of whether or not a *prima facie* case of commission of an offence has been disclose.

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, would convict the accused person if no evidence or explanation was set up by the defence. 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 defence has made its case.

In the case of **Simba Properties Investment Company and others-vs- Vantage Mezzanine Fund II Partnership and others Miscellaneous 0414 of 2022** which was tangentially related to the application before the trial magistrate, Justice Stephen Mubiru stated that, " Private prosecutions can be brought by any person under 15 section 42 (1) (c) of The Magistrates Courts Act. The right of an individual to bring a private prosecution has often been defended as an important and historic constitutional right to safeguard "against the inaction of authorities." However, the Directorate of Public Prosecutions can take over a private prosecution at any time, either because it has been requested to do so by the accused or because it made its own decision to do so (see article 120 (3) (c) of The Constitution of the Republic of Uganda, 1995 and section 43 of The Magistrates Courts Act). In principle, there is nothing wrong in permitting a private prosecution to run its course to the logical conclusion. It is axiomatic that a prosecutor should have a reasonable opportunity to present his or her case at a trial, and that a court may only prevent the case being determined on its merits in exceptional circumstances, where the accused could not fairly be tried or to protect the integrity of the court's own processes. There is a strong public interest in having serious allegations of crime tried (see R (on the application of Asim and Raed Siddiqui) v. Westminster Magistrates' Court [2021] EWHC 1648 (Admin). There is no requirement that a private prosecutor be the victim of the crime, or connected to the crime that they wish to prosecute. Any person or entity having legal personality, including companies and charities, has the ability to pursue a private prosecution. In order for such a prosecution getting started, it is necessary to first persuade a magistrate by a statement on oath to issue a criminal summons. To do this, the magistrate must be satisfied, among other things, that: (i) an offence in law has been committed; (ii) there is sufficient evidence to proceed to trial; (iii) the prosecution is brought within an appropriate time of the alleged offence; (iv) the court has the necessary jurisdiction to proceed; and (v) the prosecution is not vexatious (i.e. brought solely to harass or subdue an adversary). The general rule is that litigants are not to be shut out from access to justice to pursue cases which they are otherwise on the face of it entitled to pursue,



unless such cases cannot reasonably hope to succeed. If there is evidence that a person has committed a criminal offence then they can be prosecuted, unless they benefit from immunity.

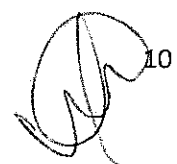
Before pronouncing myself on whether or not, in my view, the complainant established a prima facie case, I will devote a bit of time to the purpose of private prosecution.

In the case of **Gouriet vs Union of Post Office Workers 1978 AC 435** at page 498 the House of Lords, observed in relation to the right to private prosecution, that, "it is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of police forces and the office of Public Prosecutions to prosecute offenders against the criminal law." In the same case, Lord Wilberforce observed that, "The individual in such situations, (corruption, bias, neglect, failure, political interference, refusal to prosecute etc.) who wishes to see the law enforced has as remedy of his own," he said, "he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of authority." The House of Lords further stated that "the right of private prosecutions is considered as a valuable constitutional safeguard against inertia or partiality on the part of the prosecuting authority....."

It is also important to devote some time to interpretation of legislation. The Learned Trial Magistrate interpreted Section 42 (4) to mean that the consultation of with the Local chief was aimed at establishing whether the court had jurisdiction and whether the complaint established a prima facie case. Section 42 (4) requires the learned Trial Magistrate to consult the local chief of the area in which the complaint arose and put on record the gist of that consultation.

In the case of **Attorney General –vs-Uganda Law Society, Supreme Court Constitutional Appeal NO. 1 of 2006-** court upheld the principle that a constitutional provision which relates to a fundamental right must be given an interpretation that realizes the full benefit of the guaranteed right. Article 120 (3) (c) provides as one of the functions of the Director of Public Prosecutions, taking over and continuing any criminal proceedings instituted by any other person or authority. This provision, takes into account the right to private prosecutions, therefore the provisions relating to private prosecution ought to be interpreted in a way that gives full benefit of the right to conduct a private prosecution.

The learned Trial Magistrate interpreted the requirement for consultation with the local chief to mean that she was bound by the results of the consultation of the Local chief provision and was not required apply her mind to any of the information on record. It is important to note that there is no guidance in the provision on what specific matters to consult on and even the weight to be placed on the results of the consultation. I am of the considered view that, an inquiry on



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whether or not the suspects are in or reside in the area of his jurisdiction satisfies the requirement to consult. The provision only enjoins the Learned Trial Magistrate to put the gist of the consultation on record. Nowhere is it stated that the Learned Trial Magistrate is bound by the consultation, had that been the intention of the legislature, it would have been provided for expressly. The ambiguity in Section 42 (4) of the Magistrates Courts Act, has the potential, as in this case to result in an outcome which may render impotent the process of private prosecutions.

To take the position that, Section 42 (4) of the Magistrates Courts Act requires that the local chief to be consulted on the complaint to establish whether the alleged crime was committed, is to adjudicate in total disregard of Article 126 (2) (c) which provides that, in adjudicating cases of both a civil and criminal nature, substantive justice shall be administered without undue regard to technicalities.

It is my view that it was not envisaged that trial magistrates would be bound by the outcome of consultations with the local chief. The provision does not require the Learned Trial Magistrate to surrender her adjudicative mandate to the result of her consultation with the local chief or that the local chief must pronounce themselves on the merits or lack thereof in the alleged offences. To do so would be to confer a judicial mandate on the local chief which was never the intention of the legislation. The basic principle of legal policy is that law should serve public interest and therefore, the court should strive to avoid a construction that would be adverse to public policy. In the case of Uganda (Private Prosecution by Male H. Mabirizi Kiwanuka) vs Hon Mao Nobert and others, Lord Justice Paul Gadenya, stated that, "the correct position of the law is that even if a complainant files a complaint on oath without a letter from the local area chief to support the complaint, that fact does not render the complaint on oath incompetent. Presentation of a letter from the local area chief is discretionary on the part of a complainant, and they need not request that such be done by the magistrate. A complaint on oath can only be judged incompetent on the grounds of jurisdiction, non-establishment of a prima facie case, and the institution of frivolous and vexatious claims."

In any event, in construing legislation, the literal rule is first used. If this leads to absurdity, then the golden rule and finally the mischief rule may be used. Section 42 (3) is one of the provisions where the mischief rule best serves the interests of justice, it is important to ponder on the purpose of private prosecution in making a decision of this nature.

Lord Griffiths in the case of **Pepper V. Hart (1993) 1 All ER 42 at page 50** held that. "The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt a literal meaning of the language. The court must adopt a purposive approach which seeks to give effect to the true purpose of the legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted. "



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I am of the opinion that given the nature of the alleged crimes, white collar crimes or crimes of a nature that would not be appreciated by a lay man because in addition to requiring some level of sophistication to decipher, they are not crimes in the category of assault, theft, murder, threatening violence which are relatively easy to appreciate and which would have come to the attention of the local chief in the ordinary course of his business. For the Learned Trial Magistrate to base a finding of lack of establishment of a prima facie case on the fact that the local chief expressed ignorance knowledge of the alleged offences is tantamount to a miscarriage of justice.

To appreciate the intention of the legislation in drafting Section 42 (4) of the Magistrates Courts Act, it is important to cast one's mind back to the circumstances prevailing in 1971 when the provision was enacted particularly with regard to how society was organized and the kinds of offences likely to attract private prosecution. The local chief of that time had administrative responsibility over the subjects within his jurisdiction and often time cases of crimes committed would be reported to him. It therefore follows that, at that time a local chief would have been one of the first persons to learn of the commission of a crime in his area of jurisdiction. The crimes which the legislators of the days envisaged the Local chief being consulted on, in stark contrast with the crimes alleged committed by the suspects in the instant case, would have been crimes not requiring any specific expertise or laborious research to uncover and appreciate. Certainly not the nature of crimes alleged to have been committed by the suspects. In 1971, local chiefs were governed by The Local Administration Act of 1967 which set out in Section 40, the mandate of chiefs as follows;

Section 40(1) provides that' it shall be the duty of every chief,

- a) to obey and execute promptly all orders and warrants lawfully issued to him by any court or other competent authority responsible for law and order;*
- b) to collect and communicate intelligence affecting the public peace;*
- c) to prevent the commission of offences and public nuisance; and*
- d) to detect and bring offenders to justice and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exist; and for any of the purposes mentioned in this subsection, he may, without a warrant enter at any hour of the day or night any place in which he has reasonable grounds to suspect that illegal drinking or gambling is taking place, or to which dissolute or disorderly characters are resorting.*

3) Every chief receiving information that a person who has committed a cognisable offence or for whose arrest a warrant has been issued by a court within the local limits of his jurisdiction shall arrest or cause such person to be arrested.

Times have changed, the nature of crimes has changed with the times. In my view it defeats justice for the learned trial magistrate to anchor her decision on whether or not the complaint establishes a prima facie case on consultation with a local chief, who with all due respect is a lay

man, incapable of having access to the information required to have knowledge about the alleged crimes which are the subject of this application. The best course of action, in the interest of giving effect to the right of individuals to private prosecution set out in Section 42 (1), would have been for the Learned Trial Magistrate, following the consultation with the Local chief, have recourse to the documentation attached to the application, to establish whether or not an prima facie case had been established.

In support of the application, the applicant further submitted two bundles of documentary evidence to Buganda Road Court on 31st March 2022 which indicated among other things the following; that there was alleged alteration in the Simba Companies' shareholding as follows; on the 31st day of December 2018, A1 and A2 signed the annual returns of Simba Telecom Limited for 2018 and the annual return was registered with the Uganda Registration Services Bureau on the 13th day of June 2019, the returns indicate the particulars of indebtedness as "NIL" and the shareholding of Simba Telecom Limited as having changed again, with Simba Properties investment company holding 99 shares, Patrick Bitature holding 25,346 shares and Carol Bitature holding 14,555 shares and the total number of shares was altered to 40, 000 (Annual return attached and marked ST8). The applicant also attached charging agreements that contained provisions restricting these changes.

A perusal of the aforementioned documentary evidence also indicates that the suspect filed an annual return in respect of Elgon Terrace Hotel made up to 31st December 2016 indicated "Nil" indebtedness of the company in respect of all mortgages and charges which are registered with the registrar of companies; Annual Return of Simba Telecom filed on 10th October 2018 made up to 31st December 2017 indicates "Nil" on particulars of indebtedness of the company in respect of all mortgages and charges which are registered with the registrar of companies;; Annual Returns filed in respect of Simba Properties Limited on 9th February 2017 made up to December 31st 2015 and 2016 indicate particulars of indebtedness of the company in respect of all mortgages and charges which are registered with the registrar of companies; as "Nil"; and Annual Return of Linda Properties Limited made up to 31st December 2015 indicated particulars of indebtedness of the company in respect of all mortgages and charges which are registered with the registrar of companies; as "NIL".

It is my view that the alleged actions of the suspects in altering the shareholding of the Simba Companies, and preparing annual returns indicating "Nil" indebttness in respect of a) Annual returns of Elgon Terrace Hotel Limited made up on the 31st December 2016 with the particulars of indebtedness showing that the total amount of the company in respect of all mortgages and charges which are required to be registered with the registrar of companies was NIL, b) Annual returns of Simba Telecom Limited made up on the 31st December 2017 indicate the particulars of indebtedness as NIL, c) annual returns of Simba Properties investment company Limited made



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up on 31st December 20 15 and 2016 also indicate that the particulars of indebtedness as NIL and d) annual returns of Linda Properties Limited made up on 31st December 2015 indicate that the particulars of indebtedness are NIL, especially viewed against the background of the various mortgage deeds and the charging agreements in respect of the shares of all the respective companies, creates a situation where they are required to provide an explanation.

(3) Whether the intended prosecution is frivolous or vexatious.

Black's law dictionary 8th Edition 6. 629 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.**

In the case of **Simba Properties Investment Company Ltd and others-vs- Vantage Mezzanine Fund II Partnership, supra**, Justice Stephen Mubiru stated that " Section 323 of The Penal Code Act seeks to penalise directors or officers of a corporation or company, who receive or possess as such of any of the property of the corporation or company otherwise than in payment of a just debt or demand, engage in acts or omissions with intent to defraud. Section 324 of The Penal Code Act seeks to penalise any person who, being a promoter, director, officer or auditor of a corporation or company, either existing or intended to be formed, makes, circulates or publishes, or concurs in making, circulating or publishing, any written statement or account which, in any material particular, is to his or her knowledge false, with intent thereby to deceive or to defraud any member, shareholder or creditor of the corporation or company, whether a particular person or not; or to induce any person, whether a particular person or not, to become a member of, or to entrust or advance any property to, the corporation or company, or to enter into any security for its benefit. Lastly, section 309 of The Penal Code Act seeks to penalise any person who

conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person."

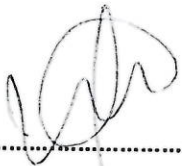
From a careful consideration of the action with which we are confronted in this application, the claim of the complainant cannot be described as one that was bound to fail or was frivolous or vexatious or one which the complainant cannot prove such as to have it summarily determined without a full scale trial. Having found that complainant establishes a prima facie case, I therefore find that the intended private prosecution is neither frivolous nor vexatious.

(4) What are the remedies available

In the premises, I set aside the Learned Trial Magistrate's decision in Criminal Miscellaneous Application NO.38 of 2022.

On perusal of this court and of the lower court, I find inordinate delay in concluding this matter. I find it necessary to remind lower court of the dictates of Article 126 (2) (b).... **Justice shall not be delayed.**

On the basis of Section 33 of the Judicature Act, which vests power in this Honourable Court to grant any remedy on such terms and conditions as it deems just, or to cause a matter to be completely and finally determined, I order the Chief Magistrate of Chief Magistrate's Court at Buganda to sanction the Charge Sheet and any attendant document within 5 (five) business days from the date of this decision.



ROSETTE COMFORT KANIA

Ag. JUDGE

8TH JANUARY 2024

