

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSTITUTIONAL APPLICATION NO. 35 OF 2013

(Arising from Constitutional Application No. 34 of 2016: Arising from Constitutional Petition No 51 of 2013)

1. Peter Ssajjabbi

2. Swift Commercial Establishment Limited.....Applicants

VERSUS

The Attorney General:..... Respondent

Coram: Hon. Justice Remmy Kasule, JA, sitting as a single Justice

RULING

The applicants seek an Interim Order of injunction to stay the application and enforcement of Section 34 of the Anti-Corruption Act, 2009. They also seek an order to stay the hearing and determination of High Court, Anti-Corruption Division, and Miscellaneous Application No. 0003 of 2016: Uganda vs Obey Christopher and 19 others. The Applicants pray that the Interim Order of injunction be operative until the hearing and determination of Constitutional Application No. 34 of 2016 in which the applicants pray for a permanent injunction to be issued; and Constitutional Petition No. 51 of 2013 whereby the constitutionality of Section 34 of the Anti-Corruption Act, 2009, is being questioned.

The application is supported by the affidavit of the first applicant who is also a director in the second applicant.

Both applicants move this Court through Rule 23(1) of the Constitutional Court (Petition and Reference) Rules, Sections 64(c) & (e) and 98 of the Civil Procedure Act, Cap. 71 and Rules 2(2), 40 43(1)(2) and 44 of the Judicature (Court of Appeal Rules) Directions.

At the hearing, learned Counsel Patrick Alunga appeared for the applicants while Principal State Attorney Odoi Jimmy was for the respondent.

By way of background, a sum of over Ug. Shs. 200 billion being money intended for payment of pension to retired Public Servants was lost through theft and embezzlement and the Uganda Police has over time since 2009 been and continues to carry out investigations as regards this theft and embezzlement. The first and second applicants are some of the subjects of the so investigations. The first applicant is a former Secretary of the East African Community Beneficiaries Association (EACOBAs) an organisation whose members are retired employees of the East Africa Community whose pension money, is also part of the amount that has been stolen and embezzled. The second applicant is a company registered with limited liability and is under the majority share ownership and control of the first applicant.

Through High Court Miscellaneous Application No. 0003 of 2016, Anti-Corruption Division, the Uganda Police as a result of information received and being received in the course of investigations of the theft and embezzlement of the

pension money, has found it necessary that the disposal of some properties of the applicants, both moveable and immoveable be restricted to avoid their dissipation while the Police investigations are still going on and there is also a possibility of the said properties being used as exhibits, just in case it is decided that a criminal trial be held against the applicants and, others not parties to this application, for the theft and embezzlement of the pension funds.

The applicants contend that they are entitled to be issued with an Interim Order of injunction because they have filed in this Court a substantial Constitutional Application No. 34 of 2016 for a temporary injunction order which is pending hearing and determination by this Court as regards the operation and application of Section 34 of the Anti-Corruption Act as well as the determination by the High Court of Miscellaneous Application No. 75 0003 of 2016. There is also pending in the Constitutional Court Constitutional Petition No. 51 of 2013 whereby the applicants are questioning the Constitutionality of Legal Notice No. 9 of 2009 which establishes the Anti-Corruption Division of the High Court, Section 34 of the Anti-Corruption Act as well as the Court Orders issued restricting the transfer of ownership of the applicants immovable and moveable properties as well as freezing bank accounts being operated by the applicants in a number of commercial banks.

For the respondent, through an affidavit in reply by Geoffrey Wangolo Madete, State Attorney in the Attorney General's Chambers, its contended that in accordance with the law, the Director to Public Prosecutions obtained a Court Order on 07.03.2013 to freeze the bank accounts of the applicants and to restrict the disposal of the applicants moveable and immoveable properties. The said orders were obtained because the applicants, together with others, are being among those accused of having caused loss of colossal sums of money in pension funds belonging to various pensioners in the Uganda Public Service and that the restriction and freeze was necessary pending criminal trial of the applicants and others.

The burden is on the applicant in an application for an Interim Order of stay, to show that a substantive application is pending and that there is a serious threat of executing that which is prayed to be stayed before the determination of the substantive application for stay. See: Hwang Sung Industries Ltd vs Tajdin Hussein & 2 Others: Civil Application No. 19 of 2008 (SC)

The applicants in this application have satisfied this Court that there is both Constitutional Petition No. 51 of 2013 and a substantive Constitutional Application No. 34 of 2016 pending determination of the constitutional interests of the applicants by the constitutional court.

The applicants have also to satisfy this Court that there is a serious threat of execution which will change the status quo and render the substantive application and the Constitutional Petition nugatory if no an interim order to stay is not issued.

The applicants do not dispute the fact that since 2013 a number of their moveable and immoveable properties as well as Bank accounts have been the subject of the orders of freeze and restrictions. The reason for these orders is because the applicants, together with others, as a result of investigations carried out and still ongoing, are suspected to have stolen and/or embezzled colossal sums of money of about Ug. Shs. 200 billion and it is suspected that the applicants' properties and bank accounts, the subject of the freeze and restriction, are proceeds of that suspected theft and embezzlement.

The Orders of freeze and restrictions of the bank accounts and properties of the applicants were obtained and are being enforced by the Director of Public Prosecutions and the Uganda Police in the course of carrying out Constitutional duties.

Article 120(3) (a) and (b) of the Constitution vests in the Director of Public Prosecutions powers to direct Police to investigate any information of a criminal nature; and also to institute criminal proceedings against any person or authority in any court of competent jurisdiction.

As regards Uganda Police, Article 212 (c) vests powers in the Police to prevent and detect crime.

The appreciation of the facts of this application leads to the conclusion that the Director of Public Prosecutions and the Uganda Police in carrying out the above stated Constitutional duties found it necessary that as they carry out those duties, it is necessary to freeze the bank accounts and restrict use of the properties of the applicants for purposes of preventing and detecting crime and carrying out necessary investigations with a view to determining whether or not criminal prosecution is to be undertaken.

The applicants have not lost ownership of any bank accounts or properties. The freeze and restrict orders are temporary and are intended to ensure that the truth is arrived at. If the innocence of the applicants is established by the investigations and possible criminal trial, then the orders will be lifted, or if it turns out that the bank accounts and the properties are the proceeds of a crime, appropriate orders will be made. Any damage suffered by the applicants can be atoned for by way of damages.

In paragraphs 7 and 9 of the first applicant's affidavit in support of this application, the 1st applicant asserts that the orders to freeze bank accounts and restriction of properties have been in place since November, 2012 to date. This application was filed in this Court on

10th February, 2016. For this Court to remove or interfere with the said orders now is not to preserve the status quo that was obtaining when this application was filed. It is rather to create a new status quo and that is not the purpose of an interim order of stay. An application for an interim order of stay is not to be entertained and allowed by Court as a matter of Course. It must be based on compelling reasons geared towards preventing a defeat of justice: See: HORIZON COACHES LIMITED VS FRANCIS MUTABAZI & OTHERS Civil Application No. 21 of 2001 (SC).

The facts of this application show that to grant the orders prayed for will amount to interfering with the process of investigating and /or prosecuting a crime of theft and embezzlement of a colossal sum of money being carried out by the Director of Public Prosecutions and the Uganda Police, which investigations and possible criminal prosecution have the applicants, amongst others, as suspects. The properties and accounts involved are also suspected to be proceeds of the crimes being investigated. It is only fair therefore that the fate of the freeze and restrict orders be determined by the criminal and/or Constitutional Justice System as to the innocence, or otherwise, of those involved and also as regards their constitutional validity.

Further, the interim order preserves the status quo. To allow this application will amount to changing the status quo that has obtained since November, 2012 to date as regards the bank accounts and properties of the applicants being subjected to the

orders of freeze and restriction. That is not the function and purpose of an interim order.

The applicants are better advised to pursue the determination to finality of Constitutional Petition No. 51 of 2013, other than pursuing and spending too much time and resources pursuing interim and temporary measures, like this application.

The application stands dismissed with costs to the respondent payable jointly and/or severally by the applicants.

Dated at Kampala this 24th day of March 2016.

Hon. Justice Remmy K. Kasule

Justice of Appeal