

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**  
**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION No. 0331 OF 2022**

5 (Arising from Miscellaneous Application No. 0201 of 2020)

- |    |  |   |                  |
|----|--|---|------------------|
|    | 1. SIMBA PROPERTIES INVESTMENT CO. LTD | } |                  |
|    | 2. SIMBA TELECOM LIMITED               | } |                  |
|    | 3. LINDA PROPERTIES LIMITED            | } | ..... APPLICANTS |
|    | 4. ELGON TERRACE HOTEL LIMITED         | } |                  |
| 10 | 5. PATRICK BITATURE                    | } |                  |
|    | 6. CAROL BITATURE                      | } |                  |

**VERSUS**

- |    |  |   |                   |
|----|--|---|-------------------|
|    | 1. VANTAGE MEZZANINE FUND II PARTNERSHIP | } |                   |
| 15 | 2. WARREN VAN DER MERWE                  | } |                   |
|    | 3. DEREK ALEXANDER                       | } | ..... RESPONDENTS |
|    | 4. SIYANDA KHUMALO                       | } |                   |
|    | 5. ROBERT KIRUNDA                        | } |                   |
|    | 6. DIANA KSABIITI                        | } |                   |
| 20 | 7. MOSES MUZIHIKI                        | } |                   |

**Before: Hon Justice Stephen Mubiru.**

**RULING**

a. Background.

25 The 3<sup>rd</sup> and 4<sup>th</sup> respondents are directors of the 1<sup>st</sup> respondent while the 2<sup>nd</sup> respondents is its  
Managing Partner. On or about 11<sup>th</sup> December, 2014 the 1<sup>st</sup> and 2<sup>nd</sup> applicants executed an  
agreement (the Mezzanine Term facility Agreement) with the 1<sup>st</sup> respondent by which the said  
applicants borrowed a sum of money, secured by property registered in the names of the applicants.  
Differences having arisen between the parties regarding the repayment of that loan, the applicants  
30 filed Civil Suit No. 988 of 2019 in this Court. The respondents filed a defence to the suit by which  
they indicated they would contest the propriety of the proceedings and the jurisdiction of the Court.  
The respondents thereafter filed Miscellaneous Application No. 201 of 2020 by which they sought  
a stay of the suit on account of the fact that the Mezzanine Term facility Agreement contained a  
valid, binding and enforceable arbitration agreement / clause between the parties, by virtue of  
35 which the dispute should be referred to and resolved through arbitration.

In a ruling delivered on 16<sup>th</sup> June 2021, the court decided that since there existed a “valid, operative arbitration clause capable of being performed, and that there [was] an arbitrable dispute between the parties herein, it [was] ordered that the matter be and [was] accordingly referred to arbitration” in accordance with Section 5 of *The Arbitration and Conciliation Act*. Accordingly, Civil Suit No. 5 988 of 2019 and all legal proceedings and orders thereunder were dismissed and / or vacated or set aside by the Court. The costs of the application, those of the suit and the proceedings thereunder were awarded to the current 1<sup>st</sup> respondent, as the then applicant therein.

The 1<sup>st</sup> respondent has since that decision commenced arbitral proceedings, but also filed 10 Miscellaneous Cause No. 205 of 2022 seeking orders of certiorari, mandamus and prohibition against the applicants and the Registrar of Companies in relation to documents submitted by it for registration of a transfer of shares in Simba Properties Investment Company Limited, Simba Properties Limited, Linda Properties Limited and Elgon Terrace Hotel Limited, which application was dismissed on 9<sup>th</sup> May, 2022 on account of the ongoing arbitration. The 4<sup>th</sup> respondent was 15 further granted powers of attorney authorising him to initiate private prosecution against the 5<sup>th</sup> and 6<sup>th</sup> applicants. With the aid of the 6<sup>th</sup> and 7<sup>th</sup> respondents, the 4<sup>th</sup> respondent has since filed a complaint on oath before the Chief Magistrate’s Court at Buganda Road. The applicants on their part claim to have filed Miscellaneous Application No. 408 of 2022 (it is not registered on 20 ECCMIS as at the time of writing this ruling) seeking orders holding the respondents in contempt of court, for having initiated that private prosecution in contravention of the order that referred the dispute between the parties to arbitration. It is on that basis that the current application was made.

b. The application;

25 The application is made under the provisions of section 33 of *The Judicature Act*, sections 64 (c), (e) 98 and 98 of *The Civil Procedure Act*, and Order 41 rules 2 and 9 of *The Civil Procedure Rules* seeking an order of a temporary injunction, restraining the respondents, their agents, servants or any other entity they represent from instituting and maintaining any private prosecution or legal action against any of the applicants until hearing and final determination of a pending contempt of 30 court application No. 408 of 2022 which is yet to be fixed for hearing by the court.

It is the applicants' case that they have filed an application seeking to have the respondents held in contempt of an order made in High Court Miscellaneous Application No. 201 of 2020. The application has a very high likelihood of success, yet the respondents by continuing to take steps towards initiating a private prosecution, are acting in defiance and contempt of that order. The  
5 applicants stand to suffer irreparable injury in the event that the respondents are not restrained from that conduct.

c. Affidavit in reply;

10 In their joint affidavit in reply sworn by the 6<sup>th</sup> respondent, the respondents contend that by initiating private prosecution against the 5<sup>th</sup> and 6<sup>th</sup> applicants, the respondents are exercising a constitutionally guaranteed right. By its nature as a civil court, this court does not have the powers to injunct criminal proceedings in a criminal court. Both proceedings may continue concurrently. The intended contempt of court proceedings are misconceived in so far as the respondents have  
15 already initiated arbitration proceedings over the dispute.

d. Affidavit in rejoinder;

In his affidavit in rejoinder, the 5<sup>th</sup> applicant avers that by the contempt proceedings, each of the  
20 respondents may be held liable individually. The 6<sup>th</sup> respondent does not have the capacity to answer on behalf of the rest of the respondents. The private prosecution, unless restrained, is an abuse of process and will irredeemably damage the reputation of the 5<sup>th</sup> and 6<sup>th</sup> applicants. That prosecution is intended to embarrass and coerce the applicants into accepting the 1<sup>st</sup> respondent's demand as well as to circumvent legal proceedings pending in the High Court and the International  
25 Chamber of Commerce over the same subject matter. The default notice and enforcement measures taken by the respondents too constitute contempt of the reference to arbitration.

e. Submissions of counsel for the applicants.

30 M/s Muwema and Co. Advocates and Solicitors on behalf of the applicant submitted that the relevant considerations are stated in *Basajja Balaba* and *Musumba Yahaya* cases. Severe prejudice

will occur if the application is not granted. The court referred the matter to arbitration. The disadvantage is that the applicants are being coerced, embarrassed and harassed, by the criminal proceedings to try and get a remedy. The company has creditors who are becoming jittery. The respondents tried to block a re-finance. Lenders can be scared. They are weakening the status of the directors who are also shareholders when prosecuted. It is an abuse of process that is designed to embarrass, coerce and force a compromise. They have filed a multiplicity of civil applications; bankruptcy, URSB to transfer shares, to stop pre-financing of the applicant company loans. The court found that the agreement had given rise to disputes. There was something positive in the ruling which was to refer the dispute to arbitration. Any failure to follow that order to do that positive act amounts to disobedience. Any disregard of any aspect of an order of court amounts to a contempt. The advocates facilitated the process. The court should not penalise the advocates in costs for performing the duty of bringing the application to protect the sanctity of the court order.

f. Submissions of counsel for 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> respondents.

M/s Simon Tendo Kabenge Advocates on behalf of the 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> respondents submitted that there was an application to refer the dispute to arbitration and the court made a decision that it did not have the jurisdiction to deal with the dispute.. The order dismissed the suit and ended the suit. The court found that the agreement was to refer the dispute to arbitration. There is no order of court capable of being defied for which contempt proceedings can be initiated. This court cannot stop an inferior court from proceeding except under the prerogative orders. Prosecution is a public function. There are no pending proceedings to justify an interlocutory injunction. Application No. 448 of 2022 is not filed yet. It is not signed by counsel not dated and there is no evidence of filing. It is not commissioned. They seek a temporary order but do not show what it should await. They get orders and they never follow them up. In no single paragraph do they allege any act or omission by the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents. They are joined to the application only because they are practicing law with a firm that has initiated a private prosecution.

g. Submissions of counsel for the 1<sup>st</sup> to 4<sup>th</sup> respondents.

M/s Kirunda and Wasige Advocates on behalf of the 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> respondents submitted that the court cannot hear an application based on drafts. The *Guadong Hao Case* and that of *Hussein Bada* regarded temporary injunctions. The application references Miscellaneous Application No. 201 of 2020 yet they claim to have filed Miscellaneous Application No. 408 of 2022. There is an abuse. Paragraph 18 is about transfer of shares. There is no order of court stopping the transfer. The interim order was struck out. The applications were for share transfers. There was need to compel URSB hence the application for prerogative orders. Notice of default was not stopped by court. It was intended to compel payment of debts. Appointment of a receiver is not an abuse of process as per the *Kulata Case*. The complaint in the Magistrates Court is about a fraud. The beneficiaries will be other creditors and the general public. There is no likelihood of success. The arbitration is proceeding.

15 The decision.

It has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now, well settled. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (see *E.A. Industries v. Trufoods*, [1972] E.A. 420). The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have been well laid out as the following:-

1. The Applicant has shown a *prima facie* case with a probability of success.
2. The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.

3. Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (see *Fellowes and Son v. Fisher* [1976] 1 QB 122).

These principles can be found in such cases as *American Cyanamid Co v. Ethicon Limited* [1975] AC 396; *Geilla v Cassman Brown Co. Ltd* [1973] E.A. 358 and *GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013*.

- i. Whether the applicant has a *prima facie* case against the respondents.

First, a preliminary assessment must be made of the merits of the underlying suit that has been filed against the respondents, to ensure that there is a “serious question to be tried.” One of the criteria to be applied when considering whether or not to grant a temporary injunction is disclosure by the applicant’s pleadings, of a “serious triable issue,” with a possibility of success, not necessarily one that has a probability of success (see *American Cyanamid v. Ethicon* [1975] AC 396; [1975] ALL ER 504; *Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others*, [2001–2005] HCB 80 and *Nsubuga and another v. Mutawe* [1974] E.A 487). There is no need to be satisfied that a permanent injunction is probable at trial; the court only needs be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. A serious question is thus any question that is not frivolous or vexatious. As long as the claim is not frivolous or vexatious, the requirement of a *prima facie* case is met.

The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried, and that there is at least a reasonable chance that the applicant will succeed at trial. The applicant needs to show only a reasonable likelihood of success on the merits. The applicant’s burden on this part of the test is relatively low, and in most cases an applicant will be able to show that there is a serious question to be tried. The applicant is required to provide reasonably available evidence to satisfy the court with a sufficient degree of certainty that the applicant is the rights-holder and that his or her rights are being infringed, or that such infringement is imminent. The applicant must show a strong probability that the feared conduct and resulting damage will occur.

An interlocutory injunction is a court order to compel or prevent a party from doing certain acts pending the final determination of the case. It is an equitable remedy which aims to preserve the status quo by preventing one party from committing, repeating or continuing a wrongful act prior to the trial. It is an order made at an interim stage during the trial, and is usually issued to maintain the status quo until judgment can be made. For that reason, there must be a subsisting suit pending before the court, from which the application is sought, that forms the basis from which the interlocutory application arises (see *In the matter of C. Kasozi Ddamba [1980] HCB 115* and *M/S Muwayire Nakana & Co. Advocates v. Departed Asians Property Custodian Board and another [1987] HCB 91*). It is only then that an application for interlocutory relief can be considered.

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In the instant case, the application in its heading references High Court Miscellaneous Application No. 201 of 2020. A ruling in that application was delivered on 16<sup>th</sup> June, 2021 whereupon the court became *functus officio*. There is nothing pending determination in that application. The affidavit in support of the application cites Miscellaneous Application No. 408 of 2022 as the pending application for contempt of court order to issue against the respondents. Examination of the Electronic Court Case Management Information System (ECCMIS) of this court reveals that both at the time of hearing and at the time of writing this ruling, no such application has been registered. In short, there are no pending proceedings in this court out of which this application arises. The application is therefore fundamentally misconceived from the outset.

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That aside, this court can only exercise a jurisdiction that is vested in it by law. When the High Court exercises jurisdiction to pass any order, the power exercised therein is either power vested by a statute or a Constitutional power. The practices governing both civil and criminal procedure of this court have been codified in procedural rules. These codifications of procedure are the primary source for those seeking to identify both the authority of, and constraints upon, judicial control of legal procedure. Unconstrained exercise of inherent power is not acceptable in a legal system that confers precedence to written rules. Courts turn to their inherent power only in circumstances where there is no written guidance. Inherent power is relied upon by courts as a last resort to exercise procedural control over litigation in circumstances where no written procedure guides the course of action being taken.

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Furthermore, the judicial independence of every Court in passing orders in cases filed before it is well settled by article 128 of *The Constitution of the Republic of Uganda, 1995* and Principle 1 of *The Uganda Code of Judicial Conduct, 2003*. This independence cannot be interfered with by any Court, including a superior Court. However, by express statutory provisions, this court's authority over proceedings pending in Magistrates court is either of a prerogative or a supervisory nature. Both powers are prescribed by law and therefore a party seeking this court's intervention in proceedings that are ongoing in a Magistrate's Court, is expected to invoke either power, and not otherwise. Judicial independence being the hallmark of justice delivery in this country, to issue directions outside these powers is constitutionally and procedurally improper. The supervisory jurisdiction of the Court is not a forum for appealing a case in dispute. The court does not exercise either power as a means of further adjudication. Supervisory power is invoked in order to establish standards of fairness in the administration of justice by preventing an injustice being done through a mistake of law or a wilful disregard of the law where there is no appeal or the remedy by appeal is inadequate, and to protect the integrity and the harmonious working of our judicial system.

As regards this Court's prerogative powers, section 36 (1) of *The Judicature Act* provides that this Court may make an order, as the case may be, of; (a) mandamus, requiring any act to be done; (b) prohibition, prohibiting any proceedings or matter; or (c) certiorari, removing any proceedings or matter to the High Court. Applications for prerogative orders have a special public aspect to them. Differing from appellate jurisdiction, these supervisory powers enable the High court to direct the progress of litigation in inferior courts and tribunals, to correct errors when necessary, and to confine the lower courts within the bounds of their proper jurisdiction. The powers of this court to control the course of litigation in the inferior courts and tribunals is a power which must be exercised with caution since its abuse would nullify the ordinary appellate procedure. These powers are not designed to secure the review of judgments in connection with ordinary appellate jurisdiction and, in so far as the rights of litigants in particular causes may be affected, the effect is incidental purely.

In relation to proceedings in inferior courts and tribunals, these powers are discretionary and invoked in situations of exigency which will render the ordinary remedy by appeal inadequate. Situations occurring suddenly out of the current of events or an event or combination of



circumstances calling for immediate action or remedy, where something helpful needs to be done at once yet not so pressing as an emergency to regulate certain procedural matters of significance, or to promote the administration of justice by promoting fairness, rationality and protection of citizens against an arbitrary use of judicial power or processes.

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In this context, the prerogative orders of this court operate only upon inferior courts and tribunals, not upon persons. Therefore the prerogative orders ordinarily cannot extend to or affect any other body or any individual or individuals. It is for that reason that the proceedings at hand must be shown to be amenable to judicial review. The proceedings intended to be restrained are a private prosecution, which is a prosecution commenced by a private individual, other than the Directorate of Public Prosecution, the Inspector General of Government, or any other licensed prosecuting entity. It is the exception to the general rule that an offence has to be instituted or prosecuted by a public prosecutor. It is therefore a criminal prosecution pursued by a private person or body and not by a statutory prosecuting authority. Private prosecutions can be brought by any person under section 42 (1) (c) of *The Magistrates Courts Act*.

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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.” In the case of *Gouriet v. Union of Post Office Workers [1978] A.C. 435*, Lord Wilberforce described the right to bring a private prosecution in the following terms:

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The individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system... remains a valuable constitutional safeguard against inertia or partiality on the part of authority.

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In the same case, Lord Diplock said that private prosecutions are “a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.” 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

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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.

5 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  
10 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  
15 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  
20 prosecuted, unless they benefit from immunity. The background dispute between the parties, and the related civil proceedings, do not prohibit the complainant from accessing the criminal courts where the matters alleged amount to criminal offences as well. Where the elements of the offences are *prima facie* present and the threshold test has been met, in the absence of compelling reasons, summons ought to be issued (see *R. (on the application of Smith-Allison) v. Westminster  
25 Magistrates' court (No.2)* [2021] EWHC 2361).

The question then is whether a decision by a private person to commence a private prosecution, being a decision made in relation to prospective criminal proceedings, can be challenged by judicial review in the High Court. It could sensibly be argued that the decision being solely made  
30 by a private person, it cannot be challenged on public law grounds.

In *R v. Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815; [1986] 2 All ER 257; [1986] 1 WLR 763 it was held that the issue of amenability to judicial review often requires an examination of the nature of the power under challenge as well as its source: In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction [of judicial review], but  
5 it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.’ Where the source of the power did not clearly provide the answer, then the nature of the power fell to be examined. Lloyd LJ said:

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If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Mr Lever submitted, be sufficient to bring the body within the reach of judicial review. It may be said that to refer to ‘public law’ in this context is to beg the question. But I do not think it does.  
15 The essential distinction, which runs through all the cases to which we were referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. An unincorporated association may be amenable to judicial review, where it would otherwise be ‘without legal personality.

20 Therefore the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. In that light, a person initiating private prosecution takes over a public function. A private prosecution retains a sufficient element of the exercise of a public function to make it  
25 susceptible to judicial review.

In all prosecutions, proceedings must be initiated in the name of the republic of Uganda (see article 250 (4) of *The Constitution of the Republic of Uganda, 1995* and *Uganda v. Byaruhanga Alikanjeru* [1978] HCB 82). Article 120 (5) of *The Constitution of the Republic of Uganda, 1995*  
30 provides that in exercising his or her powers, the Director of Public Prosecutions must have regard to the public interest, the interest of the administration of justice, and the need to prevent abuse of the legal process. Therefore once a prosecution reaches court, it is treated exactly the same whether brought by a public body or by a private person. In that regard, a private citizen’s decision to

prosecute may be subject to judicial review. In such proceedings, the High Court must decide whether the decision made by a private person to commence a private prosecution was so unreasonable or irrational that no reasonable person would have arrived at the same decision.

5 In cases where the accused fails to have a private prosecution terminated via a judicial review, there are a number of other ways in which the case can be challenged. It is sometimes possible to persuade the Director of Public Prosecutions to take over the prosecution and discontinue it with the consent of the court, for example: if on review of the case papers, either the evidential sufficiency or the public interest considerations are not met (see article 120 (5) of *The Constitution*  
10 *of the Republic of Uganda, 1995*), or if there are factors which would be damaging to the interests of justice if the prosecution was not discontinued, including where the prosecution would interfere with the investigation or prosecution of another offence; where the accused has been promised immunity from prosecution; or where the accused has already (and appropriately) been given a simple caution or a conditional caution for the offence.

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The other option is to invoke the supervisory powers of the High Court. Should the accused fail in all the above challenges, it is still possible to file an application for revision of final decisions made in a private prosecution. The supervisory powers of the High Court cast upon it the duty to keep the inferior courts and tribunals within the limits of their authority so that they do not cross the  
20 limits, ensuring the performance of duties by such courts and tribunals in accordance with the law conferring such powers, and within the ambit of the enactments creating such courts and tribunals.

Section 48 of *The Criminal Procedure Code Act* provides that;

25 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.

Section 50 (b) of the same Act provides for powers of the High Court on Revision and that in the case of any proceedings in a magistrate's court, the record of which has been called for or which  
30 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 “in the case of any other order other than an order of acquittal, alter or reverse the order.”

Similarly, Section 17 (2) of *The Judicature Act* is to the effect that the High Court shall exercise  
5 general powers of supervision over the magistrates’ courts’;

(2) With regard to its own procedures and those of the Magistrates’ Court, the High Court shall exercise its inherent powers:-

- 10 a. To prevent abuse of process of the Court by curtailing delays of judgment including the power to limit and discontinue delayed prosecutions.
- b. To make orders for expeditious trial and
- c. To ensure that substantive justice shall be administered without undue regard to technicalities.

15 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 alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. The error of law must be one on which the decision depends. A minor,  
20 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.

It is the applicants’ case that commencement of a private persecution alongside arbitral  
25 proceedings is an abuse of court process. Examination of the available authorities will show that there is no single rule applicable to cases which may arise under different sets of facts, but one clear principle that emerges out of it is that there is no hard and fast rule that a criminal case, pending decision in a civil suit, covering the same point, should necessarily be stayed or should not be stayed, and that each case has got to be approached on its own facts. The general principle  
30 is that no hard and fast rule can be laid down as to the circumstances in which a stay in the criminal case has to be ordered. Every case has to be judged on its own merits.

However, it is too well known to need elaboration that criminal proceedings lend themselves to the unscrupulous application of improper pressure with a view to influencing the course of the civil proceedings. Therefore, where the prosecution is at the instance of a private person and it is in the nature of improper pressure sought to be exercised by the complainant against his opponent  
5 by a criminal proceeding, when identical questions are involved between the same parties in a civil suit, it is generally desirable that the criminal proceeding should be stayed (see *Gopal Chandra Chakravarti and another v. Suresh Chandra Sanyal and others AIR 1929 Cal 563*). The criminal justice system cannot be used for collateral purposes. Accordingly, criminal proceedings will be stayed where the private prosecution has all the hallmarks of a party in the civil courts continuing  
10 the battle in the criminal courts (see *R (on the application of Deripaska) v. the DPP [2020] EWHC 2918 (Admin)* or where the sole aim of litigation is to recover damages (see *Asif v. Ditta and Riaz [2021] EWCA Crim 1091*).

Parties should not be encouraged to resort to the criminal courts in cases in which the point at issue  
15 between them is one which can more appropriately be decided by a civil Court. In exercise of its prerogative or supervisory powers therefore, the High court may stay criminal proceedings in a Magistrates Court, if it appears that the criminal case was only in the nature of exerting undue pressure upon the accused to succumb to the complainant and allow him unfair advantage in the Civil Court by way of a compromise and otherwise. However in this case, the manner in which  
20 the applicants have gone about their attempt to secure that outcome is fundamentally flawed; they have not sought to invoke the prerogative or supervisory power of the court but rather sought an interlocutory injunction when there is no substantive suit pending before this court. In the result, there are no serious questions of law and fact to be tried by this court to justify the grant of an interlocutory injunction. Accordingly, a *prima facie* case has not been established. The applicants  
25 therefore have not discharged their onus of proof in this respect.

- ii. Whether the applicants will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue.

30 Second, the applicants must show that they will suffer irreparable harm if the court refused to grant the injunction and the respondents were allowed to continue in their course of conduct.

“Irreparable” in this context refers not to the size of the harm that would be suffered, but its nature. If the harm could not be quantified by payment of money, or if the harm is not readily calculated or estimated, this part of the test will usually be satisfied. In some cases, the availability of damages often precludes such a finding.

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Irreparable damage has been defined by *Black’s Law Dictionary*, 9<sup>th</sup> Edition page 447 to mean; “damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement.” It has also been defined as “loss that cannot be compensated for with money” (see

10 purpose of granting a temporary injunction is for preservation of the parties, legal rights pending litigation. The court doesn’t determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants’ ability to assert their claimed rights over the land, for example when intervening adverse claims by third parties are created, there is a very  
15 high likelihood of occasioning a loss that cannot be compensated for with money.

The Court may grant a temporary injunction if it is apparent that the respondent is about to embark on a course of action that would infringe an applicant’s rights. The court will particularly be inclined to grant the injunction where there appears to be a *prima facie* breach of rights, or where  
20 the potential harm that could flow should a court order not be granted is difficult or impossible to calculate and quantify at a later stage in the suit.

As an injunction is an equitable and discretionary remedy, it is a general rule that an injunction will not be granted where damages are an adequate remedy. Before an injunction is ordered, it  
25 must be established that an award of damages is not an adequate remedy. That type of claim can be made in exceptional cases involving breach of contract, akin to a breach of fiduciary duty, where the normal remedies are inadequate and where deterrence of others is an important factor. In order to establish that damages are not adequate, the innocent party will generally have to evidence either that a) the subject matter is rare or unique or b) damages would be financially ineffective.

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Examples of rare or unique subject matters might be the sale of an interest in land (as no two pieces of land are the same) or a one-off antique vase. In both scenarios, damages may not be an adequate remedy because no market substitute exists, and the innocent party would therefore be unable to secure equivalent performance (no matter what the price). Examples of circumstances where damages may be financially ineffective might be where the defaulting party is insolvent and unable to pay; if damages would be difficult to quantify (e.g. a contract to indemnify); if an order for the payment of damages would be difficult to enforce (e.g. because any enforcement would need to be in a foreign country); or if an express term of the contract restricts or limits the damages recoverable for that particular breach.

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The biggest concern criminal defence advocates tend to have with a parallel civil process is that their client, the alleged offender, is compellable. Indeed, as part of the civil pre-trial discovery process, an alleged offender will have to produce all relevant, non-privileged documents in his or her possession, power or control and to submit to an oral examination under oath (see Order 10 rule 12 (1) of *The Civil Procedure Rules*). There is inherently in civil litigation, a lack of some of the more fundamental procedural and evidential protections afforded to an accused in criminal trials, such as the right against self-incrimination and inadmissibility of bad character evidence.

15

However, a Criminal Court must be deemed to be as competent as a Civil Court to decide the matter before it and since the policy of law is that civil and criminal proceedings may arise out of the same matter, one giving a civil right to the person aggrieved and the other giving a right to the State to vindicate the right of the public to be protected against a public wrong, criminal proceedings cannot be stayed. Public interest demands that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. It should therefore be demonstrated for the purpose of this application that it is against public interest to allow two competing proceedings in the civil Court and the Criminal Court to proceed simultaneously in respect of the same subject-matter and that on the facts of the case, where there are two such competing proceedings pending, the criminal complaint should be stayed pending determination of the civil suit.

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In any event, a conviction in a criminal case is not by itself proof in a civil suit based on the same facts that the convicted person is liable (see *Owiti Andrew v. Opio John* [1977] HCB 124 and *Nzabona M. v. Bigirishaka and another* [1981] HCB 72). A conviction only gives rise to a legal presumption of wrongdoing which, unless rebutted with evidence, is conclusive against all affected parties in a civil suit. This is because we cannot have a legal system that implies that re-litigation will yield a better, more accurate result, or that allows scarce resources of courts, litigants and witnesses to be wasted on a second proceeding that may reach the same conclusion as the first, or that tolerates inconsistencies between decisions and lack of finality, except where to do so advances the administration of justice. A litigant will be permitted to challenge a prior conviction: (i) if it can be shown the first proceeding was tainted by fraud or dishonesty, (ii) if fresh evidence not previously available conclusively impeaches the original result, (iii) if the issues in the two proceedings are sufficiently different, and (iv) if “fairness” dictates that the criminal result should not be taken into account in the subsequent civil case, e.g. where there was a lack of effective legal representation in the criminal proceeding.

On the other hand, acquittals have no beneficial legal effect on liability in a subsequent civil proceeding that is based on the same alleged wrongdoing that resulted in the acquittal. An acquittal is a statement not of innocence or that no offence was committed, but rather of reasonable doubt as to whether that offence was committed. Secondly, the standard of proof in a civil case is lower than in a criminal case; proof on a balance of probabilities can often be established where proof beyond a reasonable doubt cannot. Therefore a finding in the civil suit that the defendant probably committed the criminal act of which he or she was acquitted does not undermine the credibility of a system that found there was a reasonable doubt. Thus, it is not a question of whether re-litigation has led to a more accurate result; the system contemplates that different results are possible because of the different standards of proof.

In light of the fact that civil courts have generally taken a hard line on the legal effect of findings in criminal trials, holding that they are generally irrelevant to a civil suit for damages based on the same alleged misconduct, there is no automatic suspension or deferral of the civil in favour of the criminal, or vice versa. In *Semakula Fenekansi v. Musoke J., F. Musoke and East African General Insurance Co. Ltd* [1981] HCB 46 it was held that a civil suit need not be stayed pending the

hearing of a criminal charge where both arise from the same facts. The converse is true. Similarly in India, the principle has been laid down that a criminal case should not ordinarily be stayed pending disposal of a civil suit, when the questions involved are not identical. So far as this principle is concerned, it is settled beyond doubt that any question of stay cannot arise unless the points involved in both the proceedings are identical (see *Ramnarain Singh v. Mahatam Singh* 1962 CriLJ 661; *Jagannath Acharya v. Rajagopalachari*, AIR (18) 1931 Pat 411 and *Bhagwat Prasad v. Ramkisun Ram Sonar* AIR 1930 Pat 351).

Nonetheless, civil courts do retain the discretion to stay a civil suit pending disposition of an ongoing parallel criminal proceeding, and will do so in exceptional or extraordinary circumstances where there is a real risk that the right to a fair criminal trial will be seriously prejudiced by the continuation of the civil suit. Courts have taken a dim view of a criminal trial impeding in any way the progress of a civil suit, and will do so only in the rarest of circumstances. This is because a stay of a criminal proceeding is an extraordinary remedy amounting to an injunction. While potential prejudice to the accused person will obviously feature large given that liberty is at stake, the prejudice to the alleged victim who has a right to seek compensation through the civil courts will not be lightly discounted.

However, if the civil suit is instituted after the commencement of the criminal case, and if it appears to the Court that a civil suit has been filed with the object of postponing the criminal trial, the latter should not be stayed. Similarly, if a civil suit has been instituted prior to the criminal proceeding, and if it appears that the criminal case was instituted with the object of prejudicing the trial of the civil suit, the trial of the criminal case might well be postponed.

Generally, it is not proper for a court sitting in a civil matter to bar proceedings in a criminal trial because the circumstances under which a person is brought before a criminal court and the defences available for the accused before that court should be handled by the same court which can ably investigate them and determine them in one way or the other rather asking another Court to bar the proceedings (see *ACP Bakaleeke Siraji v. Attorney General*, H. C. Misc. Cause No. 212 of 2018 and *Sarah Kulata Basangwa v. Inspectorate of Government*, H. C. Misc. Application No. 465 of 2011). It cannot be a correct proposition of the law that where a civil suit is pending between

two parties, no criminal proceedings may be instituted against one of the parties arising from the same facts (see *Sarah Kulata Basangwa v. Uganda, C. A. Criminal Appeal No. 3 of 2018*).

That notwithstanding, a decision to stay a criminal case pending trial of the civil suit may be justified, for example, in a case of criminal trespass, where a question of bona fide claim may legitimately arise (see for example *Musumba Yahaya and another v. Uganda, H. C. Crim. Revision Cause No. 4 of 2019* and *Sebulime Baker v. Uganda, H. C. Criminal Appeal No. 21 of 2018*). In such cases, while both Courts are equally competent it is well-settled that the decision of the Civil Court is considered to be more thorough apart from the fact that it is conclusive and, in that context, it is desirable to stay criminal proceedings pending decision of the civil suit. Similarly, in the case of a prosecution for defamation if a civil suit has been filed for damages for a tortious wrong on identical allegations, the prosecution should, as a rule be stayed, in view of the chance of a more searching investigation by a Civil Court.

Consequently, if a civil suit has been filed before the criminal proceeding has been started, it may be advisable to stay the Criminal proceeding and the result of the civil trial may be conclusive in the matter. Except for such class of cases where the decision of the Civil Court will be conclusive, the Court trying the criminal case may have to decide on the facts of each case whether it would be conducive to justice to stay the criminal proceedings pending the decision of the Civil Court and no hard and fast rule can be laid down in the matter.

The Canadian case of *Belanger v. Caughell (1995), 22 O.R. (3d) 741 (Gen. Div.)* illustrates how reluctant the courts are to stay a civil suit in favour of a criminal proceeding. There, a doctor had been charged with aggravated sexual assault based on the same facts in contention in the ongoing civil proceeding. The doctor moved for a stay of the civil process on the basis that being compelled to answer questions in the civil discovery process would make his defence known to his accuser before she had to give her evidence in the criminal proceeding. The doctor further argued that as credibility would be the fundamental issue at his criminal trial, his right to a fair criminal trial would be compromised. The court hearing the stay motion was not swayed by these arguments, noting that the Charter did not entitle an accused person to the most favourable procedures, but only to ones that are consistent with the principles of the fundamental justice. The court concluded

that the protections afforded to the doctor under the Charter were sufficient, and declined to order a stay.

I have examined the proposed charges in the intended private criminal prosecution. The complaint  
5 on oath states the following to be the intended charges;

10 On the 11<sup>th</sup> day of December, 2014 at Kampala within the jurisdiction of this court, Simba Properties Investments Co. Limited (Borrower), a company ultimately and beneficially owned by the suspects, that is Patrick Bitature and Carol Bitature, borrowed and received US \$ 10,000,000 from the complainant pursuant to a written mezzanine facility agreement concluded between them (among others) on or about 11<sup>th</sup> December, 2014. As security for the obligations of the borrower, under the above mentioned mezzanine facility agreement, the suspects offered their shares in Linda Properties Limited, Elgon Terrace Limited, Simba Properties Investments Co. Limited  
15 and Simba Telecom Limited (Simba Companies) where they are shareholders (or ultimate shareholders). Company charges on shares were thus concluded between the complainant, the suspects and other security providers, which among other things, prohibited the transfer or alteration of the charged shareholding in the Simba Companies. The suspects being directors and the ultimate shareholders of the Simba Companies then, with full knowledge and intent to defraud the complainant and other  
20 creditors, altered the shareholding of the Simba Companies in contravention of among others; sections 323 of *The Penal Code Act*, Chapter 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*, Chapter  
25 120.

Section 323 of *The Penal Code Act* seeks to penalise directors or officers of a corporation or company, who receive or possess as such any of the property of the corporation or company otherwise than in payment of a just debt or demand, but engage in acts or omissions with intent to  
30 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  
35 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.

5

In contrast, the submission to arbitration in clause 43.1 of the loan agreement signed between the parties on 11<sup>th</sup> December, 2014 provides as follows;

10 Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (for the purpose of this clause, a Dispute) shall be referred to and finally resolved by arbitration under the International Chamber of Commerce (ICC)  
15 Arbitration Rules (for the purpose of this clause, the Rules).

It is evident upon comparison of the two processes that the points involved in both proceedings are not identical. The two processes have distinct impetus and objective. While the arbitral proceedings relate to disputes arising between the corporate parties to the agreement concerning  
20 its existence, validity, interpretation, performance, breach or termination and non-contractual obligations arising out of or in connection with it or the consequences of its nullity, the intended private prosecution seeks to penalise the directors of the borrower for what the lender considers to be fraudulent conduct subsequent to the agreement. It is not manifestly clear that the two processes cannot go on at the same time.

25

It is contended by the 5<sup>th</sup> and 6<sup>th</sup> applicants that their prosecution will damage their reputation irretrievably. All criminal prosecutions by their nature may have the inevitable effect of tarnishing the public image of an accused. However, that of itself is not a basis for staying them. Where there is a *prima facie* case disclosed in the complaint on oath, a complaint of a loss of reputation which  
30 is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence, cannot avail. An attack on a person's reputation through litigation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life, for the court to intervene by way of an award of damages for malicious

prosecution. The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. This can only be determined after hearing evidence.

This therefore essentially is a case in which, if the applicants succeed in a suit for malicious prosecution, the court will be required to make an award of damages to compensate for their rights for injury to reputation suffered through malicious prosecution, if proved, and this is not such a daunting task. I therefore do not find this to be a case in which the applicants are likely to suffer loss or injury that cannot be quantified by payment of money, or that is not readily calculated or estimated. The applicants therefore have not discharged the onus of proof in this respect.

10  
iii. Balance of convenience (whether the threatened injury to the applicant outweighs the threatened harm the injunction might inflict on the respondents).

When the court is in doubt considering the outcome of its consideration of the first two factors, the third part of the test involves the court assessing which of the parties would suffer greater harm from the granting or refusal of the injunction pending trial. Unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the applicant has any real prospect of succeeding in his or her claim at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

This part of the test is referred to as the “balance of convenience.” Balance of convenience means comparative mischief or inconvenience that may be caused to the either party in the event of refusal or grant of injunction. It is necessary to assess the harm to the applicant if there is no injunction, and the prejudice or harm to the respondent if an injunction is imposed. The courts examine a variety of factors, including the harm likely to be suffered by both parties from the granting or refusal of the injunction, and the current *status quo* as at the time of the injunction.

The Court has the duty to balance or weigh the scales of justice by ensuring that the suit is not rendered nugatory while at the same time ensuring that a respondent is not impeded from the pursuit of his or her rights. No doubt it would be wrong to grant a temporary injunction order

pending disposal of the suit where the suit is frivolous or where such order would inflict greater hardship than it would avoid. Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application, some disadvantages which his or her ultimate success at the trial may show he or she ought to have been  
5 spared and the disadvantages may be such that the recovery of damages to which he or she would then be entitled would not be sufficient to compensate him or her fully for all of them.

The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his or her succeeding at the trial is always a significant factor in assessing  
10 where the balance of convenience lies. The governing principle is that the court should first consider whether if the applicant were to succeed at the trial in establishing his or her right to a permanent injunction, he or she would be adequately compensated by an award of damages for the loss he or she would have sustained as a result of the respondent's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in  
15 the measure recoverable at common law would be adequate remedy and the respondent would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the applicant's claim appears to be at this stage.

If, on the other hand, damages would not provide an adequate remedy for the applicant in the event  
20 of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the respondent were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated by the applicant for the loss he or she would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages would be an adequate remedy and the applicant would be in a financial  
25 position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is of significance that the 6<sup>th</sup> and 7<sup>th</sup> respondents were joined to these proceedings simply because counsel for the applicants considers them as having facilitated the private prosecution, a process  
30 that counsel considers to be contemptuous of the reference to arbitration. Unfortunately, this is an affront to the right to legal representation. It is a constitutional guarantee that every accused person

is entitled to be defended by a lawyer of his own choosing, regardless of how heinous the alleged crime may be.

5 The right to be represented by counsel is a fundamental component of our justice system. The advocate's function, consequently, is to present the case at law, and to leave to the judicial officers of the system the ultimate responsibility of determining whether the client has acted consistently or inconsistently with our system of justice. If parties are not represented, the foundation of the judicial system is eroded and the advocates become the judges by their very decision to accept or reject clients. Advocates should be able to practice independently and in freedom. The United Nations *Basic Principles on the Role of Lawyers, 1990* define the fundamental requirements to guarantee that everyone has access to independent legal counsel. Principle 18 thereof provides that “Lawyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions” however popular or unpopular it may be (see also Principle G (3) (e) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003*).  
10 Therefore advocates should not suffer, or be threatened with, suits, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics. Advocates therefore should be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference.

20 Adopted in 1990 (unanimously adopted by the United Nations Member States gathered at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders. The Principles were subsequently welcomed by the UN General Assembly in 1990), *The Basic Principles on the Role of Lawyers* constitute a landmark instrument recognising the principle of independence of the legal profession as an essential component of a democratic society and the rule of law, and a necessary prerequisite for the effective enforcement of human rights. Identifying lawyers with their clients or their clients’ causes amounts to nothing less than intimidation and harassment prohibited by Principle 18 thereof. It is a bedrock principle of the rule of law that lawyers should not be identified with their clients or their clients’ causes as a result of discharging their function. Such vexatious suits set a precedent that endangers the ability of advocates to effectively represent their  
25 clients. An advocate must at all times be allowed to advance a client's rights without obstruction or impediment, or fear of suits or prosecution for carrying out his or her duties as an officer of the



court. Any unwarranted interference with the discharge of such duties is a serious violation of the independence of the legal profession. To grant an injunction against the 6<sup>th</sup> and 7<sup>th</sup> respondents, restraining them from performing their role as advocates representing a litigant, would be an affront to the administration of justice.

5

In conclusion, the applicants seek the interlocutory injunction so as to protect themselves against injury by violation of their rights for which I have already found they could be adequately compensated for in damages if the uncertainty were resolved in their favour at the trial. The applicants' need for such protection must be weighed against the corresponding need of the respondents to be protected against injury resulting from being prevented from exercising their own legal rights for which it may not be adequately compensated in damages if the uncertainty were resolved in its favour at the trial. Having done so, I find that the balance of convenience is in favour of the respondents.

15 Before taking leave of this matter, it is noteworthy that it is a well-established principle that courts have inherent power to maintain respect for their authority and to punish conduct that threatens the proper administration of justice. This includes awarding costs against advocates personally. An advocate who initiates proceedings unreasonably and vexatiously, may be required by the court to satisfy personally the costs of the litigation. An advocate may be ordered to pay costs where he or she has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence, egregious misconduct or other default that rises to a "rare and exceptional" level (see *Weinberg v. Dickson-Weinberg*, 229 P.3d 1133, 1142 (Haw. 2010) and *Quebec (Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26). Examples include filing a pleading containing allegations that lack a proper basis; applying for an adjournment of a trial on the day it is listed to commence without sufficient justification; failure to comply with a court order resulting in the dismissal of a proceeding, knowingly misrepresenting facts and misleading the court, undermining the authority of the court, severely interfering with the administration of justice, when costs have been wasted by the failure to conduct proceedings with reasonable competence and expedition, where the advocate advances a wholly disingenuous case or files utterly ill-conceived applications even though the advocate ought to have known better, and so on.

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While the expressions “improperly, unreasonably or negligently” are not amenable to precise definition, in *Ridehalgh v. Horsefield* [1994] Ch 205 Sir Thomas Bingham MR said:

5            [‘improper’] covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. ... [It also includes] [c]onduct which would be regarded as improper according to the consensus of professional (including judicial) opinion ... whether or not it violates the letter of a professional code.... [‘unreasonable’] aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of  
10            excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation....[‘negligent’] should be understood in an untechnical way to denote failure to act with the competence  
15            reasonably to be expected of ordinary members of the profession.

Costs will be ordered against counsel personally where counsel has acted improperly, unreasonably or negligently, thereby causing the other party to incur unnecessary costs, and if in all the circumstances it is just to make such order. For example in *Kamurasi Charles v. Accord Properties Ltd. and another*, S. C. Civil Appeal No. 3 of 1996, the Supreme Court dismissed an  
20            appeal against an order striking out the plaint between the applicant and the respondents for abuse of the process of the Court and ordered Counsel for the appellant in that case, to personally pay the costs in the suit. Counsel for the appellant had filed two suits in the High Court, each naming two different sets of defendants. The advocate was found to have indulged in deception and abuse  
25            of court process.

However, an advocate should not be condemned to pay costs personally without being given opportunity to be heard (see *Halsbury’s Laws of England*, 3<sup>rd</sup> Edition, Vol.36 page 198; *Abraham v. Justin*, [1963] 2 ALL.E.R.402, and *J.B. Kohli and others v. Bachulal Popallac* [1964] E.A 219).  
30            Although counsel’s conduct in the instant case appears to be blame-worthy, justice demands that he should not have been condemned without being heard. The threshold for exercising the power is a high one, reserved for serious misconduct because Courts must always take into account the duties lawyers owe to their clients (see *Ridehalgh v. Horsefield* [1994] Ch 205). A court should generally confine its analysis of the issue to the facts directly before it. The court should not go

beyond these facts to consider, for example, the advocate’s prior disciplinary record. The advocate’s career is not to be put on trial, nor should the proceeding evolve into some sort of “ethics investigation.” In general, only the facts leading to the issue of costs being raised should be considered.

5

Generally, the court is slow to penalise counsel with the burden of having to pay the costs of litigation out of his or her own pocket, unless the circumstances of the case are such that justice demands that it be done. An advocate should not be held to have acted unreasonably simply because he or she acted for a client who has a bad case, but it would be quite different if the advocate gives his or her assistance to proceedings which are an abuse of process. I find that in filing this application, the advocates’ default rises to a “rare and exceptional” level. Basic professional competence demands that an advocate seeking interlocutory relief should first establish that there is a substantive matter pending before the court, which they did not. Basic professional competence further demands that an advocate seeking intervention of this court in proceedings pending before a magistrate’s court should do so by invoking its prerogative or supervisory powers, and not otherwise. In the same proceeding, they join as respondents advocates whose only role was to facilitate their client’s cause, thereby seeking to restrain professional colleagues from carrying out their duties as officers of the court. It is an advocate’s professional responsibility to ensure that all suits and applications filed possess a proper legal basis, yet this application is entirely misconceived and devoid of legal foundation.

20

This application catastrophically lacks a legal basis. The legal costs and time wasted in this litigation could have been avoided entirely if the applicants’ advocates had discharged their duties to the expected minimum standards of professional competence. It qualifies as a “rare and exceptional” case where it would not be fair for the applicants to bear the costs. The costs must be met by the applicants’ advocates in person. Consequently, the application is hereby dismissed. The costs of this application will be met personally by counsel on record for the applicants.

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Delivered electronically this 24<sup>th</sup> day of May, 2022

30

.....Stephen Mubiru.....  
Stephen Mubiru  
Judge,  
24<sup>th</sup> May, 2022.