

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CRIMINAL REVISION CASE NO. 2 OF 2009

(From Crim. Case No. 58 of 2009)

REV. FRANCIS MPAMIZO ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

UGANDA::: RESPONDENT

BEFORE HON. MR. JUSTICE J.W. KWESIGA

REVISION ORDER

This Application was brought by Notice of Motion made under Section 50 of Criminal Procedure Code and Section 33 of The Judicature Act. The Applicant seeks to move this Honourable Court to revise the decision of the learned Chief Magistrate of Kabale, His Worship Mr. Rutakirwa Praff made authorizing Criminal Prosecution for alleged disobedience of his orders in a Civil Suit. The Accused/Applicant avers that the Learned Chief

Magistrate exercised his Jurisdiction illegally with irregularity in authorising the prosecution he wishes to contest.

The Applicant was sued in a case involving a land dispute. In the absence of the Defendant now the applicant, upon a complaint of Plaintiff, The Chief Magistrate issued an Interim Order prohibiting further use of the land, the subject of the Suit pending final disposal of the suit. It would appear the Applicant after the order was made used the disputed land. He was arrested and charged with disobedience of Lawful orders C/S 117 of the Penal Code Act. The particulars of the offence in the charge sheet preferred by The Resident State Attorney and approved by the Chief Magistrate states:-

“Rev. Mpamizo Francis since 4th April, 2008 at Bubaale trading Centre, Bubaale Parish, Bubaale Sub-county in Kabale District disobeyed an Interim order given by the Chief Magistrate Court restraining him from using/tampering with the suit land in Miscellaneous Application No. 42 of 2008.”

At this stage and in this court it is not the duty of the court to inquire into the merits of the alleged disobedience. This court's concern is to consider whether the disobedience alleged qualifies being a subject of Criminal Prosecution under Section 117 of the Penal Code Act. Section 117 of the Penal Code provides:

*“S.117 Any person who disobeys any order, warrant or commander duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf commits a misdemeanour and is liable, unless any other penalty or **mode of proceedings is expressly prescribed in respect of such***

disobedience, to imprisonment for two years.” (The underlining is mine).

The Applicants’ affidavit in support of this application dated 18th December, 2009 paragraph 2 and 4 thereof depict a prima facie case of lack of Criminal mind which would suffice for the Civil Court to revisit its orders either by setting aside, varying or restating depending on the circumstances of the case to promote final disposal of the suit without indulging in criminal prosecution whose outcome would lack such flexibility suitable for a civil dispute resolution.

As reflected by the last part of the provision of Section 117 of the Penal Code which I have underlined above, the civil procedure rules prescribe the mode of proceedings applicable in similar circumstances. It is my considered view that consequential remedies available for disobedience of injunctions are also applicable to disobedience of interim orders in civil matters.

Order XLI rule 2 (3) of The Civil Procedures Rules provides as follows:-

“In case of disobedience or of breach of any such terms

..... the person guilty of the disobedience or breach to be

attached, and may also order the person to be detained in a civil prison for a

period not exceeding six months unless in the meantime the court directs his or

her release”

There is no doubt that above civil procedure rule provided flexibility that would be absent in event of a conviction under The Penal Code provisions. The prescribed term of

imprisonment under S. 117 of the Penal Code is imprisonment of 2 years. While under 0.XLI rule 2 (3) of CPR ranges from 1 day to 6 months. The punishment analysis shows that the Applicant would be prejudiced under the proceedings under the Penal Code when there is appropriate or alternative civil remedies. While considering prosecution under section 111 of the Penal Code under similar circumstances in KIGOROGORO VS RUSHEREKA (1969) EA 426. Phadhe Ag. J. (as he then was) held that when, in a Civil Suit, an order has been made against a person and that person defaults in complying with the order, such default can not be made the subject of proceedings under the Penal Code. This holding made while considering section 111 of The Penal Code is also valid in respect of and applicable to Section 117 of the Penal Code.

The test is, when a remedy is elsewhere provided and available to a person to enforce an order of a Civil Court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the Criminal Law for such enforcement. Civil Proceedings are rich with discretionary remedies and indulgences once good reasons are advanced. This Justifies the desire that Civil disputes be confined to Civil Procedure Rules and to do otherwise would amount to acting illegally and irregularly. The Supreme Court settled the position in **MAKULA INTERNATIONAL LIMITED VS HIS EMINENCE CARDINAL NSUBUGA AND ANOTHER (1982) HCB** That a Court of Law cannot sanction what is illegal and illegality once brought to the court, overrides all questions of pleadings, including any admissions made therein.

Section 17 of the Judicature Act (Cap 13) empowers this court powers to terminate any

proceedings before itself or the Magistrate to prevent abuse of process of court. By virtue of the provisions of this section the criminal proceedings against the Applicant shall cease.

In view of the above, it is hereby;

- a) That proceedings under Kabale Criminal case No. 58 of 2009 be and are hereby terminated.
- b) The orders of the Learned Chief Magistrate made of 9th September, 2009 authorising prosecution are hereby set aside.
- c) The original Civil Suit No. 25 of 2008 shall resumed and be heard in the normal court schedules available to the presiding Chief Magistrate.
- d) Each party shall meet his/her costs arising from this application.

Dated this 1st day of March, 2011.

J.W. KWESIGA

JUDGE

18-3-2011