

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**HCT-00-CR-CM- 003 OF 2011**

**JOSEPH ZAGYENDA:::APPLICANT**

**VERSUS**

**UGANDA:::RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE LAMECK N. MUKASA**

**Representation:**

Mr. Zagyenda Joseph – applicant (unrepresented)

Mr. Muwonge Emmanuel – Senior State Attorney

**Court clerk:**

Ms. Rose Akullu Obote

**RULING:**

This is an application for declarations that:-

1. While the trial or disposal of Civil suit No. 89 of 2009 is still pending opinion being or to be expressed by any subordinate court on the same issues would offend the principles of the doctrine of RES SUBJUDICE.
2. The issues in Criminal Case No. 1005/09 Buganda Road Court will necessarily be substantially the same as or similar to those in High Court Civil Suit no. 89 of 2009.

And for orders that:-

Criminal Case No. 1005/09 Buganda Road Court be stayed pending disposal of Civil suit No. 89 of 2009 of this Court.

The grounds for the Application are briefly that;-

1. The central issue in each of the two cases is whether the sale of land at block 194 plot 144 Kungu was lawful.
2. The alleged victim in Criminal Case no. 1005/09 once swore an affidavit contrary to allegations contained in the charge sheet in the two courts.
3. The alleged victim has not made Police Statements and is not a prosecution witness in the submitted Police Statements.
4. The trial of the Civil Suit No. 89/09 will emaciate finally the rights of the plaintiff and apparent complainant.
5. A subordinate court is bound by the rules of SUBJUDICE once a suit filed prior to the complaint is pending hearing a fortiori it arises from malicious and vexatious complaints.
6. The charge sheet is defective or actually false.
7. It is in the interest of justice that the stay orders be made.

The application is supported by an affidavit deposed to by the Applicant, Mr. Joseph Zagyenda. Annexed thereto and marked "S" is the charge sheet in Buganda Road Court Criminal Case No. 1005/09 where the Applicant is charged with, Count I obtaining Money by False Pretence and Count II fraud on sale or mortgage of property. The particulars of the offence in Count I are:-

***"Zagyenda Joseph on the 27<sup>th</sup> day of October 2008 ...with intent to defraud, obtained cash 100,000,000/=.....from Mr. KATO PATRICK by falsely pretending that he was selling to him 4 acres of land on Plot 144, Block 194 situate at Kungu .....whereas not"***

In count II are:

***" Zagyenda Joseph.....being a seller of plot 144 Block 194 or being the Advocate or Agent of any such seller, with intent to***

***induce the purchaser to accept title offered or produced to him and with intent to defraud concealed from purchaser any instrument material to the title or any encumbrance; made a false statement to wit that plot 144 block 194 was for sale or concealed any fact material to the said Title”.***

Also annexed thereto and marked “PL” is the plaint in Civil suit No. 89 of 2009. The parties thereto are Farida Atabua (plaintiff) and Joseph Zagyenda and 2 others (defendants). The plaintiff’s claim therein is for declaration that the purported sale of the land comprised in Kyadondo Block 194 Plot 144 at Kungu on 27<sup>th</sup> October, 2008 was unlawful and for an order that the said sale be set aside.

Before I consider the merits of the application I want to consider the law under which the application is brought. It was brought under section 206(3) of the Magistrate Courts Act, Sections 17, 33 and 39 of the Judicature Act.

Section 17 of the Judicature Act provides:-

***“1. The High Court shall exercise general powers of supervision over magistrate’s Courts.***

***2. With regard to its own procedures and those of the magistrates’ Court, the High Court shall exercise its inherent powers –***

***(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.”***

The inherent powers of Court in the above section are intended to curtail delays, to ensure expeditious trial and to ensure that technicalities are not used to defeat substantive justice.

I have carefully studied the Applicant's Affidavit in support and I have found no allegations of delay of trial of the criminal case or any allegations of technicalities employed to defeat substantive justice. The Applicant has not managed to bring the application in the ambit of the section. In fact he avers, in paragraph 20, that the case is under hearing. It is the application, if granted, which will delay the hearing.

Section 34 of the Judicature Act is as to the practice and procedure to be followed by the High Court in the exercise of the jurisdiction vested in it.

Section 206(3) of the Magistrate Courts' Act provides:

***“(3) The High Court shall consider and determine the question reserved and shall remit the case to the magistrate's court with the opinion of the High Court upon that question and the magistrate shall dispose of the case in accordance with that opinion.”***

This is in respect of a question of law reserved by a magistrate's Court under subsection (1) and transmitted to the Chief Registrar under sub-section (2) of the section for the High Court's opinion.

I accordingly find that the application is wrongly brought under the above provisions. However the application is also brought under section 33 of the Judicature Act which

gives the High Court wide powers to grant all such remedies as any of the parties is entitled to so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of these matters avoided. Both the Criminal and Civil suits concern the validity of a sale of land at Plot 144 block 194 Kungu allegedly, conducted by the Applicant.

The criminal proceedings and the civil proceedings concern the sale of the land at Plot 144 block 194 Kungu by the Applicant, Joseph Zagyenda. They involve the question of validity of the sale. The same witnesses are likely to be called to testify in both cases. Mr. Zagyenda's contention is that the prosecution of the criminal case before the disposal of the Civil Suit will be prejudicial to him and contends that the criminal proceedings were maliciously initiated by the plaintiff in the Civil suit and thus an abuse of court process. He therefore sought a stay of the Criminal proceedings. He cited **Esso Standard (U) Ltd vs Mike N. Nabudere – HCCS NO. 594 of 1990** where Justice A.N. Karokora (as he then was) allowed civil proceedings to proceed in the High Court against the Defendant when Criminal proceedings were in progress against him in the Chief Magistrate Court.

Mr. Emmanuel Muwonge, Senior State Attorney, was of the view that the Civil Suit should proceed before the Criminal case. He conceded to the application and sought to rely on the American case of **Neal M Douglas and Christine Douglas vs USA Case No. CV-03-451 JW(RS)**. Court is not bound by his stand.

There is a clear distinction between Civil and Criminal actions. The Civil proceedings determine the civil litigants' civil claims or liabilities and the standard of proof is on the balance of probabilities. There is a public interest in the criminal proceedings and the

required standard of proof is beyond reasonable doubt. The Civil proceedings are individualistic in nature. While the criminal proceedings are public in nature. A number of authorities were considered by Hon. Justice Karokora in **Esso Standard (U) Ltd vs Nabudere (supra)**. Administrative policy gives priority to the public interest in law enforcement and all the earlier authorities considered by his Lordship were to the effect that if there is a criminal charge pending in Court, the Civil Suit which is based on the same facts should be stayed.

In the instant case the Applicant is seeking a stay of the Criminal case pending the disposal of a Civil Suit based on the same facts. In the **Esso Standard (U) Ltd vs Nabudere (supra)** the learned Judge took into account the delays in Criminal investigations and prosecutions. He stated:

*“ Why should plaintiff’s legal rights be pegged on the speed with which the police carry on their inquiries when the plaintiff is the person that was hurt most, and more especially, when the judgment in the Civil suit has no weight to be attached to by the court sitting in a Criminal trial? That judgment in a civil suit cannot influence the judgment in the Criminal Case as the prosecution in a Criminal trial must pursue its case, against the accused beyond reasonable doubt..... . Whilst in Civil Case the proof by the plaintiff is on preponderance of probabilities.....”*

The judgment in the above suit is a departure from the old common law principle. It is authority for the proposition that both Criminal proceedings and civil proceedings based on the same facts can be conducted concurrently.

I have carefully considered the applicant's affidavit in support and I find no compelling reason for interfering with the Criminal proceedings. A summary of the reasons given is that:

- The Applicant had a minor role to play in the sale as agent of the Court Bailiff.
- The sale was in execution of a court judgment.
- Patrick Kato, the purchaser and would be complainant is not the complainant in the criminal case.

These are matters which can be raised or considered in the Applicant's defence to either of the two cases. He also raises the possibility of bias against him by the trial magistrate. For that he could seek disqualification of the trial magistrate from the case. As to the alleged defects in the charge sheet, this can be raised and resolved by the trial court.

In the circumstance, judicial efficiency will be best promoted by the expeditious disposal of both the Criminal and Civil proceedings. The applicant should be given a fair hearing and it is in the interest of justice that the Criminal case proceeds expeditiously. The Application accordingly fails. Let hearing of Buganda Road Court Criminal Case No. 1005 of 2009 proceed expeditiously.

**LAMECK N.MUKASA**  
**JUDGE**  
**11/05/2011**