

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**MISCELLANEOUS CAUSE NO. 020 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**BERNARD DAVIS WAMBI WANDERA ::::::::::::::: APPLICANT**

*Versus*

**ATTORNEY GENERAL ::::::::::::::: RESPONDENT**

**BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA**

**RULING**

The applicant brought this application by way of Notice of Motion under Article 28, 42, 44, 50, 223 and 230 of the Constitution of the Republic of Uganda, Ss 14 and 33 of the Judicature Act, S. 98 of the Civil Procedure Act and order 52 of the Civil Procedure rules for orders that:

1. A declaration be made that the investigation and prosecution of the applicant in the Anti Corruption Court by the IGG in HCT-00-CSC-0114 of 2012 and HCT-00-CSC-0034 of 2014 when it was not duly constituted is illegal and contrary to Article 230 of the Constitution and the orders and directives of the Constitutional Court in Constitutional Petition No. 46 of 2011 and Constitutional Reference No. 54 of 2011.
2. A declaration be made that the continued prosecution of the applicant by the Inspectorate of Government in HCT-00-CSC-0114 of 2012 and HCT-00-CSC-0034 of 2014 on the basis of the illegally obtained evidence is in violation of the applicant's right to a fair hearing and the orders and directives of the Constitutional Court in Constitutional Petition No. 46 of 2011 and Constitutional Reference No. 54 of 2011.

3. A permanent injunctive order be issued restraining the respondent and the Inspectorate of Government from prosecuting the applicant on the basis of the investigations and evidence gathered during the time the Inspectorate of Government was not duly and lawfully constituted.
4. Costs be provided for.

The application is supported by the affidavit of the applicant which contains the grounds for the application as follows:

- (i) The applicant was the Ag. Director of Soroti Flying School.
- (ii) The applicant was investigated by the office of the Inspectorate of Government for embezzlement and abuse of office in May 2012.
- (iii) The applicant was later charged and prosecuted for embezzlement and abuse of office on 24<sup>th</sup> August 2012 in HCT-00-CSC-0114 of 2012 in the High Court Anti Corruption Court.
- (iv) The applicant was again in 2014 charged with the offence of embezzlement and diversion of public resources together with a one Opiding Francis in HCT-00-CSC-0034 of 2014.
- (v) The applicant is aware that the investigation and partial prosecution was conducted between May 2012 and July 2013 when the office of the IGG was not fully constituted.
- (vi) The applicant is aware of the directives and order of the Constitutional Court in Constitutional Petition No. 46 of 2011 and Constitutional Reference No. 54 of 2011; Hon. Sam Kutesa & Ors Vs Attorney General that declared all investigations and prosecutions by the Inspectorate of Government when it was not duly constituted null and void.

- (vii) The applicant believes that the decision to investigate and prosecute him is illegal and ultravires and in breach of his right to a fair hearing guaranteed under the Constitution.
- (viii) It is just and equitable for this Court to grant the orders prayed for to stop abuse of the Court process.

The respondent filed an affidavit in reply sworn by one Daizy Acio, a Senior Inspectorate Officer in the Inspectorate of Government. She opposed all the averments and grounds of the applicant's application.

At the hearing of this application, the applicant was represented by Mr. Mujurizi of Mujurizi, Arinaitwe & Byamukama Advocates and the respondent was represented by Ms. Charity Nabaasa.

Both respective Counsel were allowed to file written submissions in support of their respective cases.

I have considered the application and the respective affidavit evidence, as well as the respective submissions. From the pleadings and evidence on record, the following only issue emerge for determination.

***1. Whether the IGG investigations and prosecution of the applicant was illegal?***

From the evidence and submissions on record, it is apparent that the investigations against the applicant by the Inspectorate of Government vide HQT 72/05/2012 alleged fraud in purchase of fuel by the applicant. These investigations commenced on 04/06/2012. Thereafter, the applicant

was charged in Criminal Case 114/2012 before the Anti Corruption Court with the offences of Embezzlement, Causing Financial Loss and abuse of Office contrary to Section 19 (a)(d) iii, 20 (1) and 11 (1) respectively of the Anti Corruption Act 2009. The charges were instituted by Ms. Daizy Acio in Criminal Case No. 114 of 2012 as a Public Prosecutor after she was appointed by the DPP as a Public Prosecutor in the Inspectorate of Government. (See Annexure “B<sub>1</sub>”, “C<sub>1</sub>”, D). The decision to prosecute the applicant was made by the DPP who consented to the charges as per annexure “E”.

I agree with Learned Counsel for the respondent that the declarations and orders made in Constitutional Petition No. 46 of 2011 and Constitutional Reference No. 54 of 2011 (consolidated into one) affected only the powers of the Inspectorate of Government to prosecute or cause prosecution. The said orders do not therefore apply to the circumstances of this case which is being prosecuted by the DPP and whose charges were sanctioned by the DPP.

Even if that were not to be the case, the declarations by the Constitutional Court were to act prospectively after the date of delivery of judgment on 5<sup>th</sup> April 2012. The prosecution of the applicant began in 2014 after the full Constitution of the Inspectorate of Government. This Constitution would not bar the DPP from prosecuting the applicant.

This court takes cognisance of the submissions by the applicant that Criminal Cases in HCT-00-CSC-0114 of 2012 and HCT-00-CSC-0034 of 2014 were already in a competent Court pending hearing and judgment by the time of filing this application. In fact the applicant raised the matter of legality of this prosecution before the Anti Corruption Division of the High Court in MA 004 and 005 – consolidated arising out of Criminal Case No. HCT-00-CSC-0034 of 2014 and HCT-00-CSC-0114 of 2012 respectively and the High Court made a ruling marked “F” attached to the affidavit in reply. The High Court held *inter alia* that the remedies sought by the applicant were untenable since if granted they would have the effect of the High Court interfering with the Magistrate’s Court exercise of jurisdiction at the trial stage. That would be an assault on Criminal Practice and Procedure. Therefore the issue of whether the Inspectorate of Government

was not fully constituted when part of the investigations were conducted and whether the evidence gathered at that time should be expunged from the record was addressed by the High Court Anti Corruption Division. Bringing the same issue to the Civil Division tantamount to forum shopping which is not proper.

A Court sitting in a Civil matter cannot bar proceedings in a competent Criminal Court. I agree with the observation by My brother Justice V.T. Zehurikize while quoting from Muwangusya J (as he then was), in *Hussein Bada Vs Iganga District Land Board & 4 Ors MA 479 of 2011* that:

***“In my view 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 and the legality of the charges brought against the accused (emphasis mine) should be handled by the same Court which can ably investigate them and determine them one way or the other rather than asking another Court to bar the proceedings.....”***

There is no way this Court sitting in a Civil matter can start issuing orders to stop any process for Criminal Proceedings to be put in motion. It cannot delve into the merits or demerits of the intended Criminal Proceedings.

For the reasons I have given herein above, I will find that this court will not issue the declarations sought. The revelation by learned counsel for the respondent that in fact the applicant is already serving sentence in a case arising out of the accusations confirms my position. In case of conviction any issues can be raised on appeal.

This application is dismissed with costs.

I so order.

**Stephen Musota**

**J U D G E**

**13.06.2017**

**R U L I N G**