

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

MISC. CAUSE NO. 313 OF 2017

5 **HON. ROBERT KYAGULANYI SENTAMU T/A BOBI WINE.....**
APPLICANT

V

**1. KAMPALA METROPOLITAN POLICE COMMANDER FRANK
MWESIGWA**

10 **2. ATTORNEY GENERAL..... RESPONDENTS**

BEFORE HON. LADY JUSTICE H. WOLAYO

RULING

15 **Introduction**

The Applicant moved the court under Article 50 of the **Constitution of the Republic of Uganda of 1995 (as amended in 2005)** to enforce his rights under the Constitution that he alleged had been violated by the Respondents. The Applicant claimed the following Constitutional rights were threatened or violated:

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1. Right to protection (*sic*) of the law under Article 21 (1);
2. Right to a fair hearing under Article 28(1);
3. Freedom of expression, assembly, association and conscience under Article 29; and
4. Right to work under Article 40(2).

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He sought declaratory orders, a permanent injunction, compensatory and punitive damages and costs.

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The motion was opposed by the Respondents who rely on the affidavit in reply of Frank Mwesigwa. The evidence of the Applicant is contained in his affidavit in support.

The Dispute

An examination of the affidavits in support and in reply reveal that the bone of contention revolves around the Directives by police officers stopping or cancelling music shows where the Applicant was to perform, scheduled between September 2017 and October 2017 in Kasese District, Kamuli District and at Colline Hotel in Mukono District respectively. The
5 cancellation of these shows is not disputed by the Respondents although their response is that they were executing their mandate under the Constitution and Public Order Management Act based on previous conduct of the Applicant who incited violence at a music show held at One Love Beach on 15th October 2017. In addition, the Respondents contend that their objective in
10 cancelling these shows is to stop the Applicant from making consultations with members of the public who are not his constituents.

Within the context of Constitutional law, the dispute is whether constitutionally guaranteed rights of the Applicant were infringed by the Respondents' agents and if so whether the infringement was within the limitations stipulated in Article 43 of the Constitution, i.e.,
15 whether the infringement, if established, either was in the public interest or was meant to protect the human rights and freedoms of others.

Issues Framed for Adjudication

20 The following issues were agreed for determination:

1. Whether the Applicant's right to [equal] protection of the law under Article 21(1) of the Constitution was violated;
2. Whether the Applicant's right to a fair hearing was violated;
- 25 3. Whether the Applicant's right to freedom of speech, expression, association and conscience was violated;
4. Whether the Applicant's right to work was violated;
5. Whether the Respondents are liable for violation of the Applicant's Constitutional guarantees of the right to [equal] protection under Article 21(1), right to a fair
30 hearing, right to freedom of speech, expression, association and conscience and right to work; and
6. Remedies.

Both counsels made written submissions that I have carefully considered.

Issue No. 1: Whether the Applicant’s Right to Freedom of Speech, Expression, Association and Conscience was Violated

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The Law

In human rights law, each of these freedoms has been defined by our Constitution, international and regional legal instruments, case law and scholars.

10 Although the Applicant claimed violation of all aspects of this freedom, counsel for the Applicant focused only on the freedom of expression and I will do the same.

Article 29(1) (a) of the Constitution provides that every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media.

15 The **International Covenant on Civil and Political Rights (1976)**, in Article 19(2), confers on everyone the right to freedom of expression, which entails freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice. The **African Charter on Human and Peoples’ Rights (1981)**, in Article 9(2), proclaims the right to express and
20 disseminate opinions within the law.

Thus, the freedom of expression is recognised not only in the Constitution but also in regional and international instruments.

25 Prof. Alastair Mowbray, in his book **Cases, Materials and Commentary on the European Convention on Human Rights** (3rd edn, OUP, 2012, p. 627) states that there are three categories of expression. The first is political expression which includes media comment on political figures, criticism of the government and its institutions, political advertising and academic opinion. The second category is artistic expression which includes paintings, poetry
30 and other varieties of art. The third category is commercial expression which especially includes advertising by companies. I find this characterisation particularly useful understanding the different aspects of freedom of expression.

I also agree with the definition of freedom of expression in **Rangarajan v Ram 1990 LRC (Const) 412**, an authority cited by counsel for the Applicant in his submissions. In that case, the Supreme Court of India described freedom of expression as:

5 *‘The right to express one’s opinion by word of mouth, writing, printing, pictures or in any other manner. It includes the freedom of communication and the right to propagate or publish opinions. Communication could be made through any medium, newspaper or movie.’*

10 A similar perspective can be discerned from the judgment of Mulenga JSC (RIP) in **Onyango Obbo v Attorney General SCCA NO. 2 of 2002**, where His Lordship agreed that the freedom of expression is concerned with expressing new ideas and putting forward opinions about functioning of public institutions.

15 However, the Constitution in Article 43 places a general limitation on the enjoyment of freedoms by essentially requiring that no person shall prejudice the rights of others or the public interest, in the enjoyment of rights. Article 19(3) of the **International Covenant on Civil and Political Rights (1976)** recognises that the freedom of expression may be subject to certain restrictions as are necessary and provided by law for respect of the rights or
20 reputations of others and for the protection of national security, public order, public health or public morals. Article 27(2) of the **African Charter on Human and Peoples’ Rights (1981)** places a duty on each individual to exercise rights with due regard to collective security, morality and common interest.

25 Therefore, the Constitution, regional and international instruments recognise that the freedom of expression may be restricted.

Burden of Proof

30 Rule 7 of the Enforcement of Fundamental Rights and Freedoms Rules 2008 imports the application of the Civil Procedure Act and Rules in proceedings under Article 50 of the Constitution. Even if evidence in these proceedings is principally by affidavit, the rules of evidence apply to these proceedings in the same way as they apply to all civil proceedings. This means that the burden of proof is on the Applicant who alleges violations and the standard of proof is on a balance of probabilities. Equally, any party who asserts the existence

of a fact bears the burden to prove that fact on a balance of probabilities. Section 101 of the Evidence Act refers.

Resolution of the Issue

- 5 The Applicant had the burden to demonstrate that his freedom of expression was violated because that is what he alleges in the motion. He does not allege that there was an attempt to violate his right to freedom of expression but claims that a violation actually occurred through the cancellation of his music shows.
- 10 In the instant case, the Applicant has established that a show organised by Balunywa Promotions Ltd in Colline Hotel Mukono was stopped by the 1st Respondent; that a show planned for Kasese was stopped on 8th October 2017 by ASP Echaga and that a show planned for Kamuli on 20th October 2017 was stopped by the District Police Commander for Kamuli. The Respondent does not challenge the averments in the affidavit in support.
- 15 According to Frank Mwesigwa, the music shows were cancelled because the applicant had earlier on 15th October 2017 held a show at One Love Beach Busabala where he uttered political statements , consulted members of the public who were not his constituents and incited violence . He was subsequently summoned to Police headquarters to record a statement with the CID. Therefore, the Applicant has proved that in fact his music shows
- 20 were stopped by the Respondents.

However, despite the fact that the cancellations meant the Applicant could not go ahead to perform at the shows, what is material at this point is the absence of a nexus between the failure to perform at a music show and a violation of the freedom of expression. At any music

25 show properly so called, revellers are entertained by the performers through music, dance and drama. If a cancelled music show had been planned for purposes of entertainment only, its cancellation cannot be construed as a violation of the freedom of expression of the performing artists who planned to perform at the show.

- 30 The Applicant in his affidavit did not claim that he had organised the music shows to articulate his views whether through song or otherwise, for which he now seeks court's protection. For a person to claim a violation of his or her freedom of expression, it must be clear that the person had uttered words for which he was now being persecuted or planned to

make certain utterances but was stopped. This can be illustrated by **Onyango Obbo and Anor v Attorney General SCCA NO. 2 of 2002** where criminal proceedings before Buganda Road Court in which journalists had been charged with publication of false news contrary to section 50 of the Penal Code Act were successfully challenged before the
5 Supreme Court of Uganda. The journalists had expressed certain views through a newspaper article which the State deemed false news and prosecuted them for the publication. They were able to seek court's protection of their freedom of expression.

That case illustrates the context in which a claim for contravention of freedom of expression
10 can be brought, i.e., where a person has expressed particular views for which he is being prosecuted by the State or where he intends to express particular views but is arbitrarily prevented by the State.

In **Dehal v Crown Prosecution Services [2005] ALL E.R (D) 152**, an English Court
15 adjudicated a dispute that tested the freedom of expression. The Appellant had been convicted under the U.K Public Order Act for placing a notice in a Temple that called the Temple President a liar and a hypocrite. On appeal, it was held the Appellant had a right to freedom of expression under Article 10 of the European Convention on Human Rights and the conviction contravened this right. It was held there was no evidence of threat to public
20 order and the criminal prosecution was unlawful unless it could be established that it was necessary to prevent public disorder.

The point I am emphasizing is that the Applicant had the burden to prove that he had specific views which he wished to express at the music shows and that by stopping those shows his
25 right to freedom of expression had been violated. In the instant case, there is no evidence that the music shows were to express specific views. I find that the Applicant has not established a nexus between the exercise of the freedom of expression and the music shows which would have provided a basis for a finding that his right to freedom of expression had been violated.

30 I find that the legal and evidential burden of proof for a violation of the freedom of expression under Article 29 of the Constitution has not been discharged by the applicant. Issue No.1 is answered in the negative.

Issue No. 2: Whether the Applicant's Right to Work was Violated

The Law

Article 40(2) of the Constitution stipulates that:

5 *'Every person in Uganda has the right to practice his or her profession and to carry on any lawful occupation, trade or business.'*

Article 6 of the **International Covenant on Economic, Social and Cultural Rights (1976)** affirms the international recognition of the right to work in the following terms:

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'States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.'

15 Under Article 15 of the **African Charter on Human and Peoples' Rights (1981)**, every individual shall have the right to work under equitable and satisfactory conditions and receive equal pay for equal work.

20 Thus, the Constitutional provision on the right to work is in tandem with regional and international instruments.

On the other hand, Article 43 of the Constitution limits the enjoyment of this right if such enjoyment prejudices the rights and freedoms of others or if it is in the public interest to limit enjoyment. Article 4 of the **International Covenant on Economic, Social and Cultural**
25 **Rights (1976)** recognises that States may subject economic rights to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purposes of promoting the general welfare in a democratic society. Article 27(2) of the **African Charter on Human and Peoples Rights (1981)** places a duty on individuals to exercise rights with due regard to the rights of others, collective security,
30 morality and common interest.

Thus, the Constitution as well as regional and international instruments recognise potential limitations to the right to work.

Resolution of the Issue

The Colline Hotel and Kamuli shows were to be held on 20th and 21st October, respectively. The Directive by the Police to stop the music show of 21st October 2017 at Colline Hotel
5 must be placed in the context of the Police inquiries that were being conducted around the same time. The evidence on record shows the Applicant was invited to CID by letter dated 18th October 2017 to record a statement regarding allegations of incitement of violence contrary to section 83 of the Penal Code Act. The Applicant responded to the Police
10 Summons on 19th October 2017, the same date the show of 21st October 2017 was cancelled by the 1st Respondent. The show at Kamuli had been planned for 20th October 2017, close to the same time the show of 21st October was cancelled.

Counsel for the Applicant submitted that the Applicant's right to work was violated under Article 40(2) of the Constitution, as a result of Police Directives. Counsel for the Respondent
15 submitted that the Applicant's right was subject to the law and to the rights of others. Counsel further submitted that the Applicant continues to carry out his business of music shows and therefore the claim he has been prevented from practicing his profession is not justified and that the cancellation of the music shows was lawful.

20 I have examined the affidavit evidence of the Applicant. With respect to the Colline Hotel and Kamuli shows, the Applicant states that he anticipated to earn 30,000,000 UGshs from them but that is about the only 'evidence' he provides. No document showing there was a business contract between the promoter and the Applicant to do a show was tendered in
25 evidence and no evidence of receipts, invoices, payment vouchers, posters, or other document showing the Applicant was going to work was tendered. The burden of proof is both legal and evidential – and the court cannot adduce its own evidence to support a claim. It is for the Applicant to prove what he has alleged.

With respect to the Kasese show , the Applicant states that on 29th September 2017, Hon.
30 Mbaju, MP Busongoro South County Kasese, invited him to stage a concert as part of events to launch Hon. Mbaju's constituency development programme. According to the applicant, the show was cleared on 4th October 2017 by AIGP Mugenyi but later cancelled by ASP

Echega on 8th October 2017. The date when the show was scheduled to take place is not given.

Worthy of note is that Commissioner of Police Frank Mwesigwa did not respond specifically to the affidavit evidence regarding cancellation of the Kasese show.

It is the Applicant's evidence that Hon. Mbaju had paid him 20,000,000 UGshs for the show but that he was 'morally obliged' to refund this money upon cancellation of the show. Once again, the Applicant has not provided evidence of such payment and such refund. Apart from the Applicant's word, he did not provide any other evidence, whether through documents or affidavits of other witnesses, to show there was a business arrangement between the two and that he had missed out on income by the cancellation of the show. The Applicant had a burden to prove his statements with supporting evidence which he failed to do. It was not enough to say cancellation of the shows as evidence per se his right to work was violated without providing any other evidence. This is very material in view of the dual position of the applicant who is both a Member of Parliament and a musician. The court needs to be satisfied the applicant was going to earn a living at the Kasese show and not for any other purpose.

By way of obiter, I will comment on the defence by the Respondent that the cancellation of the shows was in exercise of their powers under the Public Order Management Act 2013, and that it was justifiable under Article 43 of the Constitution.

Public Order Management Act, 2013

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Section 2(1) of the POM Act stipulates the underlying principle of the Act which is to:

'Regulate the exercise of the freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition in accordance with Article 29(1) (d) and 43 of the Constitution.'

Section 2(2) provides that 'regulate' means to ensure that conduct or behaviour conforms to the requirements of the Constitution.

Section 4(1) defines a ‘public meeting’ as:

5 ‘A gathering, assembly, procession, or demonstration in a public place or premises held for the purposes of discussing, acting upon, petitioning or expressing views on matters of public interest’

Such a meeting or assembly requires the organiser to **notify** the Police between three to fifteen days in advance under section 5 of the POM Act.

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Other gatherings where people are simply revelling and are not engaged in a demonstration or presenting a petition or discussing and expressing views on matters of public interest, are not public meetings for which such notice is required and do not fall under the POM Act. Therefore, music shows organized strictly for purposes of entertainment are not public meetings that require police notification under the POM Act and such shows and other
15 gatherings are managed under the guidance provided by **Muwanga Kivumbi v AG** unless they are held to express views on matters of public interest in which case regulation under the POM Act kicks in. This is clearly stated in section 4(2) (d) POM Act:

20 ‘A public meeting does not include ... a meeting for a social ... commercial or industrial purpose ...’

However, section 7 of POM Act envisages such meetings ‘spontaneously’ turning into public meetings so that they come under the regulation of the POM Act.

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In Muwanga Kivumbi v Attorney General of Uganda Constitutional Petition No. 9 of 2005, the Constitutional Court discussed provisions of section 32(2) of the Police Act that permitted the Police to prohibit an assembly or procession on suspicion that it was likely to cause a breach of the peace. The court held that such suspicion as a sole basis for stopping an
30 assembly was not justifiable in a free and democratic society and declared section 32(2) of the Police Act unconstitutional. Any suspicion, the court emphasized, should be based on reasonable belief and even then, the duty of the police is to provide security rather than cancel the event.

Hon. Justice Alice Mpagi-Bahigeine, JA, as she then was had this to say:

5 *‘Where individuals assemble, if the police entertain a “reasonable belief” that some disturbances might occur during the assembly, all that can be done is to provide security and supervision in anticipation of disturbances. It is the paramount duty of the police to maintain law and order but not to curtail people's enshrined freedoms and liberties on mere anticipatory grounds which might turn out to be false’*
[Emphasis added]

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This authority is still good law and it offers good guidance to police on how to deal with public gatherings.

Article 43 of the Constitution

15 Article 43 provides that:

1. *In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights of others or the public interest.*

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2. *Public interest under this article shall not permit:*

a. *political persecution;*

b. *detention without trial;*

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c. *any limitation on the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.*

Had the applicant proved a breach of his right of expression or his right to work, the Respondent's defence of justified breach under Article 43(2) of the Constitution would have had to be considered within the context of Article 43(2) that sets the parameters under which freedoms and rights might be curtailed, as reproduced above. The Respondents would have had a burden to demonstrate that their reliance on this limitation was not for purposes of

political persecution, detention without trial, and not beyond what is acceptable in a free and democratic society.

Case law from the Supreme Court of Canada, although of persuasive authority, provides further insights in what is permissible in a free and democratic society. In **R v Oakes** 5 (1986) 1 SCR 103, the court held that the limitation on enjoyment of rights must not be for political persecution; the objective must be of sufficient importance to warrant overriding a constitutional right; and the means chosen must be reasonable and proportionate; and the objective and must impair as little as possible the rights or freedoms in question.

In **Amnesty International and Ors v Sudan [2000] AHRL 297**, the African Commission on Human and Peoples' Rights, while determining a dispute involving the freedom of expression under the **African Charter on Human and Peoples' Rights**, held that:

'where it is necessary to restrict rights, the restriction should be as minimal as possible and not undermine fundamental rights guaranteed under international law ... Any restrictions on rights should be the exception.' Para. 80.

15

Regarding the limitation under article 43(1) that no person shall prejudice the fundamental rights and freedoms of others in the enjoyment of rights, the respondent would have had to prove that the rights and freedoms of others were under threat. The European Court of Human Rights has described this limitation available to the State as *'a wide margin of appreciation'* for determining what constitutes a breach of others' rights and freedoms (see 20 **Otto-Preminger Institute v Austria (1995)**¹⁹ EHRR 34 but that any State action taken under this limitation must be reasonable and proportionate.

Having said that, the applicant has not discharged the legal and evidential burden of proof 25 that shows his right to work was violated. Issue No. 2 is answered in the negative.

Issue No. 3: Whether the Applicant's Right to a Fair Hearing was Violated

As submitted by counsel for the Respondent, the right to a fair hearing does not arise in this case because it is a right that is actualized in the formal dispute resolution forum. The Police 30 in carrying out investigations are not adjudicating a dispute but simply looking for evidence. The right to a fair hearing does not arise under such circumstances. This issue was therefore misplaced.

Therefore, Issue No. 3 is answered in the negative.

Issue No. 4: Whether the Applicant’s Right to a Protection of the Law (sic) under Article 21(1) of the Constitution was Violated

5 I note the word ‘equal’ was erroneously left out in the formulation of the issue which means the issue is meaningless as it stands but nevertheless the alleged violations of rights to equal protection of the law have not been substantiated with evidence of discriminatory treatment in similar situations. The Applicant had the duty to prove that he had been treated differently under the law as compared to others in a similar situation but no evidence was adduced in
10 that regard.

Issue No. 4 is answered in the negative.

**Issue No. 5: Whether the Respondents are Liable for Violation of the Applicant’s Constitutional Guarantees of the Right to Protection under Article 21(1) (sic), Right to a
15 Fair Hearing, Right to Freedom of Speech, Expression, Association and Conscience and Right to Work.**

As issues 1,2, 3, and 4 have been answered in the negative, this issue is also answered in the negative.

20 **Findings**

In conclusion, these are my findings:

1. The Applicant has failed to show that by cancelling his shows, he was denied the opportunity to express his opinions or views. Therefore, the Applicant has not discharged his burden to prove that the Respondents violated his right to freedom of
25 expression.
2. The Applicant has failed to meet the legal and evidential burden of proof that his right to work was violated.
- 30 3. Music shows organised for the sole purpose of entertainment and revelling do not fall under the regulation of the POM Act unless they are organized for the purpose of expressing views on matters of public interest, or spontaneously become such.

Costs

The practice of this court is not to award costs for cases brought under Article 50 of the Constitution. In the premises, this motion is dismissed with no order as to costs.

5 **DATED AT KAMPALA THIS 10TH DAY OF MAY 2019.**

HON. LADY JUSTICE H. WOLAYO

Legal Representation

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Nalukoola, Kakeeto Advocates and Rwakafuuzi & Co. Advocates for the Applicant.

Attorney General's Chambers for the Respondents.