THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 238 OF 2019

MALE H. MABIRIZI K. KIWANUKA---------- APPLICANT

VERSUS

ATTORNEY GENERAL…….. RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application brought under Paragraph I, XXIX(a)&(f) of National Objectives and Directive Principles of State Policy, Art. 8A, 17(1)(i), 139(1), 208(4), 209, 212, 218(2) of The Constitution, S. 33, 36(1), 38(1) & (2) & 39 of The Judicature Act, Rules 3 & 6, Judicial Review Rules, 2009, as amended.

In the interest of time court directed the Applicant and counsel for the defendant to file written submissions.

The applicant brought this application seeking the following orders;

a. A declaration that the appointment and secondment of Uganda People's **Defence Forces Brigadier Sam Bakasumba, Brigadier Godfrey Golooba, Colonel Jese Kamunannwire** and **Colonel Sserunjogi Ddamulira** by the President of The Republic of Uganda to serve in **Uganda Police Force** as **Chief of Joint Staff, Director Human Resource Development and Training, Director Human Resource Administration** and **Director Crime Intelligence,** respectively all assigned a rank of **Assistant Inspector**

General of Police was illegal, procedurally improper and *ultra vires* the powers of The President of The Republic of Uganda,

b. An order of Certiorari quashing the appointment and secondment of Uganda People's Defence Forces Brigadier Sam Bakasumba, Brigadier Godfrey Golooba, Colonel Jese Kamunannwire and Colonel Sserunjogi Ddamulira by the President of The Republic of Uganda to serve in Uganda Police Force as Chief of Joint Staff, Director Human Resource Development and Training, Director Human Resource Administration and Director Crime Intelligence, respectively all assigned a rank of Assistant Inspector General of Police,

c. An order of prohibition prohibiting Uganda People's Defence Forces Brigadier Sam Bakasumba, Brigadier Godfrey Golooba, Colonel Jese Kamunannwire and Colonel Sserunjogi Ddamulira by the President of The Republic of Uganda to serve in Uganda Police Force as Chief of Joint Staff, Director Human Resource Development and Training, Director Human Resource Administration and Director Crime Intelligence, respectively or holding out as having a police rank of Assistant Inspector General of Police, a declaration that the positions of **Uganda Police Force Chief of Joint Staff, Director Human Resource Development and Training, Director Human Resource Administration** and **Director Crime Intelligence** are **vacant**,

d. A declaration that the **recruitment, training, deployment and maintaining** of an armed force/militia named **Local Defence Unit (LDU)** is **illegal,**

e. A permanent injunction restraining the President of The Republic of Uganda, Cabinet and/or Uganda People's Defence Forces and Uganda Police Force from recruiting, training, deploying and maintaining of an armed force/militia named Local Defence Unit (LDU) and costs for the application.
f. General damages to be paid to the applicant for inconveniences.
g. Costs for the application.

The main ground upon which this application is premised on;

The appointment and secondment of Uganda People's Defence Forces Brigadier Sam Bakasumba, Brigadier Godfrey Golooba, Colonel Jese Kamunannwire and Colonel Sserunjogi Ddamulira by the President of The Republic of Uganda to serve in Uganda Police Force as Chief of Joint Staff, Director Human Resource Development and Training, Director Human Resource Administration and Director Crime Intelligence, respectively all assigned a rank of Assistant Inspector General of Police was illegal, procedurally improper and *ultra vires* the powers of The President of The Republic of Uganda and the recruitment, training, deployment and maintaining of an armed force/militia named Local Defence Unit (LDU) is illegal,

This application was supported by the affidavit of **MALE H. MABIRIZI K. KIWANUKA,** the applicant which sets out the grounds which briefly are;

- That by Police message dated 02nd July 2019, The Inspector General of Police communicated that the President of The Republic of Uganda had appointed Uganda People's Defence Forces Brigadier Sam Bakasumba, Brigadier Godfrey Golooba, Colonel Jese Kamunannwire and Colonel Sserunjogi Ddamulira by the President of The Republic of Uganda to serve in Uganda Police Force as Chief of Joint Staff, Director Human Resource Development and Training, Director Human Resource Administration and

Director Crime Intelligence, respectively all assigned a rank of Assistant Inspector General of Police.

- The President of The Republic of Uganda neither has powers to appoint Uganda People's Defence Forces officers men/women as Uganda Police Force Officers nor assign Uganda Police Force Ranks to such officers and men/women.
- The Uganda People's Defence Forces under the command of The President of The Republic of Uganda and guidance of the Cabinet have recruited, trained and maintained an armed force/militia called Local Defence Unit (LDU) whose members are not members of the Uganda People's Defence Forces, Uganda Police Force or Uganda Prisons Service.
- The President of The Republic of Uganda, The Uganda People's Defence Forces or Cabinet have no powers to raise an armed force not provided for under the law.

The Respondent in reply or opposition to this application filed an affidavit by Erasmus Twaruhukwa, the Assistant Inspector General of Police and Director Legal in the Uganda Police Force. The response of the Respondent is that; the President of The Republic of Uganda is clothed and/ or vested with authority to appoint the aforementioned officers to the designated Public Offices in the Uganda Police Force, that the law permits Uganda People's Defence Force to recruit a reserve force under the UPDF and that the application is without merit, an abuse of Court process and ought to be dismissed with costs.

That the President of The Republic of Uganda His Excellency Yoweri Kaguta Museveni on 12th August 2019 appointed Brig. Bakasumba Agonza Jack, Brig. Godfrey Golooba, Col. Jese Kamunanwire Musenene and Colonel Sserunjogi Ddamulira Christopher to the Rank of Assistant Inspector General of Police.

The Minister of Internal Affairs wrote to the Chief of the Defence Forces on 15th August 2019 seeking the release of the said officers to immediately take up their new appointments.

The said officers were seconded by the UPDF to the Uganda Police Force on 16th August 2019 for a period of Three years effective 1st July 2019.

The said officers were issued appointment letters by the Permanent Secretary Ministry of Public Service on 30th August 2019.

The President and the Cabinet have not recruited any militia force in Uganda under the Uganda People's Defence Forces, Uganda Police Force or Uganda Prisons Services.

I have considered the respective submissions and the Applicant raised a preliminary objection in the Affidavit in rejoinder;

Issue one:

Whether the Respondent's affidavit in reply is properly before this Court?

The gist of the preliminary objection is that the Respondent's affidavit in reply was filed 15 days out of time. He submitted that Order 8 Rule 1(2) provides that;

"Where a defendant has been served with a summons… he or she shall… file his or her defence within fifteen days after service of the summons."

That in the instant suit service was effected upon the respondent on 19th August 2019 and that the respondent filed the reply without leave of court on 30th September 2019 hence making the Reply incompetent.

He further submitted that the application was left unchallenged and cited the case of ***KAYE v ATTORNEY GENERAL, Constitutional Application No. 25 of 2012*** where it was held that;

"*It is settled law that where certain facts are sworn to in an affidavit, the burden to deny them is on the other party. Failure to do that, they are presumed to have been accepted.*"

And ***AKANKWASA V. REGISTRAR OF TITLES, HCMC No. 33 of 2008,*** where it was held that;

"On the issue of not filing a defence, in this case, an affidavit in reply to the application and its supporting affidavit… there are court decisions to the effect that in such circumstances, the defendant will not be allowed to participate in the proceedings though he or she may be present in court…."

The Respondent submitted that the Civil Procedure (Government proceedings) Rules S.I 77-1 Regulation 11 provides;

> *"In the case of civil proceedings against the Government, rule 1 order VIII of the Principal Rules shall have the effect as of the words, "Thirty days" were substituted for the words "fifteen days" which shall occur in that rule."*

He further submitted that the Applicant was served with the Application on 12th August 2019 and immediately sought for instructions in the matter from the Uganda Police Force and the Principal Private Secretary to the President and the response was favoured on 29th September 2019 which was after the 30 days of filing thereafter filed the reply on the 30th September 2019. The Respondent sought leave of court to have the affidavit filed out of time validated.

The Respondent submitted that it is a matter of great public importance that seeks to challenge the powers of the Head of State to appoint military service men into Uganda Police Force, if the Applicant is true to his word and is seeking adjudication of the matter before the court.

The Applicant in his submission in rejoinder, submitted that Regulation 11 of The Civil Procedure (Government Proceedings) Rules S. 177-1 is inconsequential in light of the clear provisions of Article 21(1) of The Constitution which guarantees equality before the law. Therefore should be construed as inconsistent with the Constitution hence null and void.

He further re-joined that in absence of an application for leave to extend time, there is no way court can exercise that discretion and that the matter being of great public importance gives more credence to the objection since the respondent ought to have been more vigilant.

I agree with the submission of counsel for Respondent given the fact that he had to seek instructions from various concerned persons and the fact that the matter is one of great public importance. **Section 96 of the Civil Procedure Act Cap 71** provides that;

"Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge that period, even though the period originally fixed or granted may have expired "

I therefore determine issue no. 1 in the affirmative.

Issue two:

Whether the appointment of four officers of the Uganda Peoples' Defence Forces (UPDF) into Uganda Police Force is lawful?

The Applicant submitted that ***Rule 1A(b) of The Judicial Review Rules*** as amended provides that,

"The objectives of these Rules are to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality…"

He further cited cases in light with the purpose of Judicial Review which included, ***Attorney General v. Tinkasiimire & 12 Ors at page 49 and Barugahare v. The Board of Directors of Uganda Printing & Publishing Corporation & Anor at page 58***.

The Applicant also cited ***Articles 99(1) & 213 of The Constitution,*** which provide that,

"*The executive authority of Uganda is vested in the President and shall be exercised in accordance with this Constitution and the laws of Uganda.*"

"*In the performance of the functions under clause (3) of this Article, the Inspector General of Police shall be subject to and act in accordance with the laws of Uganda; except that on matters of policy, the President may give directions to the Inspector General.*"

Respectively.

The Applicant cited ***Section 14(2) & 9(1)(b) of the Police Act*** and submitted that the President has no power to send names of people to occupy police command positions without the advise of the police authority. Other authorities were cited ***see, Karuhanga v. Attorney General Constitutional Petition No. 39 of 2013 at page 83 & Section 20 of the Police Act.***

Counsel for the Respondent submitted that according to ***ACP BAKALEKE SIRAJ v ATTONEY GENERAL MISCELLENEOUS APPLICATION NO. 212 OF 2018*** it was held that:

"A public authority will be found to have acted unlawfully if it has made a decision without the legal powers to do so (unlawful on the ground of illegality); or so unreasonable that no reasonable maker could have come to the same decision or done the same thing (unlawful on grounds of unreasonableness); or without observing the rules of national justice (unlawful on grounds of procedural impropriety or fairness)."

Counsel for the Respondent submitted that the application is misconceived because the applicant contends that the president has no powers to appoint serving members of the UPDF into the Uganda police force and assign ranks and deploy them subsequently. The power to appoint any one into public service is derived from the Constitution of the Republic of Uganda under ***Article 172(1) (a)*** which provides:

"Subject to the provisions of this constitution-(a) the president may, acting in accordance with the advice of the public service commission, the education service commission or the health service commission, as the case may be, appoint persons to hold or act in any office in the public service of Uganda of the rank of head of department or above other than those referred to in article 200 of this constitution, including confirmation of appointments, the exercise of disciplinary control over such persons and their removal from office."

Section 13 of the ***Police Act*** also spells out that the President has powers to appoint offices into the police force.

According to Annexure "A" to the affidavit in Reply of Mr. Erasmus, the President rightly exercised his power and appointment the above named officer of the UPDF and assigned them the Rank 'AIGP' as prescribed by law.

Subsequently as indicated by Annexure "B" to the affidavit in reply, the Minister of Internal Affairs wrote a letter asking the chief of Defence forces to release the above mentioned officers were then offered appointment letters by Public service.

The Respondent submitted that the appointment of the above Uganda Peoples Defence Force personnel into the Police force was in line with the laws of Uganda and thus lawful.

Counsel for the Respondent submitted that the submission of the Applicant that the President should have sought advice from the Police Authority before making the above appointments is misconceived in the Respondent opinion. The Applicant seems to question why the President exercised his powers under the Constitution and not delegate; since the powers exercised by the Police authority on appointment and promotions is delegated powers ceded from the President as provided under section 13 of the Police Act cap 303 which states, ***Delegation by the President of power of appointment under the constitution.***

For the purposes of ***Article 172 of the Constitution,***

"the President may under clause (3) of that article, delegate to authorities specified in subsection (2) of this section the powers of the president necessary to enable those authorities to exercise the powers of appointment conferred on them by this Act. The authorities referred to in subsection (1) are the following- the police council; and the inspector general."

Similarly, the submission of the Applicant that the President can only appoint a serving officer to posts in the police force is baseless and without merit because Article 172 of the Constitution does not in any way fetter the powers of the President to appoint any one to head a department or any superior position in the public service position on the public service. In fact ***Section 38(3) of the UPDF Act***

provides that ***any officer or Militant of the UPDF may be attached and public or private institution, private industry or any other body.***

And such an officer according to ***section 87 of the UPDF Act*** is facilitated by the agency where one was seconded to.

The Respondent submitted that the actions of the President in as far as appointment of the officers to the police force was concerned is in conformity with the law and that the case of ***Karuhanga vs Attorney General; Constitutional petition No. 39 of 2013*** is quoted out of context and not applicable to the fact this applicant. The Respondent therefore invites this court to disregard the same.

The Applicant in his rejoinder reiterated his earlier submission and maintained the position that the issue should be answered in the negative.

In civil matters, the general principle is to the effect that, ***"He who alleges, must prove,"*** in the instant case the Applicant alleged that the President did not follow a clear procedure in appointing the four officers, however the Applicant failed to adduce evidence to rebut the various documents adduced by Counsel for the Respondent that were clarifying on the procedure that was followed in the appointment. In the submission of the Applicant it's evident enough that the Applicant relied on authorities to resolve the issue yet the application requires evidence that supports the allegations that there was no clear and proper procedure followed.

It is clear from the Constitutional provisions that the President has power to appoint as derived from Article 172 of the Constitution.

I therefore determine issue 2 in the affirmative.

Issue 3:

Whether the recruitment of Local Defence Unit (LDU) personnel is lawful?

The Applicant submitted that ***Article 208(4) of The Constitution*** provides that ***"No person shall raise an armed force except in accordance with this***

constitution.*"** The term armed is defined at page 330 of ***BLACKS LAW DICTIONARY 8th Edition as ***"ARMED...Equipped with a weapon…2.Involving the use of a weapon"*** FORCE is defined at pg 191 as ***"Force, Power, violence, or Pressure directed against a person or thing."*** What was created is therefore an armed force. Establishment of armed forces outside the law is a matter of international law concern. In **THE PROSECUTOR V. PAULINE NYIRAMASUHUKO & ORS,** International criminal tribunal for Rwanda case No. ICTR-98-42-A, Interahamwe, an illegal but armed militia was pointed out as one of the tools in genocide. It was noted that

"….The trial chamber convicted Ntahobali…it further found that he could bear superior responsibility pursuant to Article 6(3) of the statute for the conduct of Interahamwe who killed Ruvurajaho and considered this as an aggravating factor in sentencing (page 20)….***the Appeals chamber concludes that Ntahobali has failed to demonstrate that the Trial chamber erred in finding that he was liable for ordering Interahabwe to rape witness TA during the attack 11 days after mid-may Attack*** (page 117)…."

The Applicant further submitted that, failure to comply with procedures of establishing an armed force is a serious matter hence the need to answer this issue in the negative.

The Respondent's counsel denies this allegation and contends that ***Section 4 of the UPDF Act*** provides that the Force shall consist of a regular Force and a reserve Force.

It further states at ***Section 5*** that sources and organisation of reserve forces, there sources of reserve forces shall include:

"a)……

b)……

c) Auxiliary forces, state security organisations and such other citizens of Uganda who have undergone military training under Article 17(2) of the

Constitution it is the duty of all able-bodied citizens to undergo military training for the defence of this constitution and the protection of the territorial integrity of Uganda whenever called upon to do so; and the state shall ensure that facilities are available for such training."

Counsel for the Respondent further submitted that Local Defence Unit personal are citizens with military training exercising their civic duty enshrined under Article 17(2) of the Constitution of the Republic of Uganda and thus a lawful unit. And on the recruitment of the personnel, the members of Local Defence Unit are drawn from the general public of Uganda without discrimination and thus in conformity with the laws of Uganda.

The law is specific and clear in regards to the reserve force as seen in the submission of Counsel for the Respondent. The Applicant submitted that it was an armed force that was created but considering the name and duties given to the Local Defence Unit it does not signify in anyway an armed force. I am forced to agree with the submission of Counsel for the Respondent that LDU fall in the category of a reserve force and the law supports the recruitment as submitted.

I therefore rule that the recruitment of Local Defence Unit (LDU) personnel is lawful.

Issue 4:

Whether the Applicant is entitled to any remedies?

The Applicant sought judicial review remedies which are discretionary.

In **Amiran Enterprises Ltd vs Uganda Revenue Authority HCMA 06 of 2010** *Justice Kiryabwire* held that it must be born in mind that prerogative orders are discretionary in nature and the court must act judicially and according to well settled principles. Such principles may include common sense and justice; whether the application is meritorious; whether there is reasonableness; vigilance and not any waiver of rights by the applicant.

Considering the evidence adduced by the Respondent, the President followed the required procedure while carrying on the appointment and the Applicant has failed to adduce evidence that rebuts the evidence of the Respondent. I therefore deny all the prerogative orders sought by the Applicant.

In the result, this application is dismissed with costs against the Applicant.

I so order

SSEKAANA MUSA
JUDGE
20th December 2019