THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF KAMPALA AT KAMPALA
(CRIMINAL DIVISION)

CRIMINAL MISC. APPL. No. 5 of 2019
(Arising From Nakaseke Criminal Court Case No 125 of 2018)

1. DDIBA MOSES
2. NABULIME SYLVIA :::::::::::::::: APPLICANT

Versus

UGANDA :::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

RULING

This application is commenced under Article 139 (1) of **the Constitution of the Republic of Uganda;** Sections 14 and 33 of **the Judicature Act**; Sections 48 and 50 (5) of **The Criminal Procedure Act;** and Rules 2 and 3 of **The Judicature (Criminal Procedure) (Applications) Rules SI 13 – 8.**

The applicants are **Dbiba Moses** and **Nabulime Sylvia** who seek orders that:

1. Criminal Proceedings pertaining to Nakaseke Criminal Case No 125 of 1028 handled by HW Nankya Winnie Jatiko be revised for being irregular and that they be set aside or terminated against the applicants for being unconstitutional, illegal, arbitrary and brought mala fides by the respondent in abuse of due process of the court and have occasioned the applicants a great miscarriage of justice.

2. That the Court be pleased to revise the order of the trial magistrate ordering the 1st applicant to deposit in court, without jurisdiction, the certificate of title to land comprised in Bulemeezi Block 239 Plot 199 and to reinstate the bail which the trial magistrate had arbitrarily cancelled in respect of the 2nd applicant which certificate of title had nothing to do with the applicants before the Court.
3. This Court be pleased to revise the order of the trial magistrate to arbitrarily cancel the 2nd applicants bail even when a thorough explanation was given to court and openly showing bias against the applicants.
4. An order that the certificate of title to land comprised in Bulemeezi Block 239 Plot 199 registered in the names of the applicants be returned to them.
5. Consequential orders are issued.

The grounds on which this application is based are stated in the Notice of Motion and particularised in the affidavit affirmed by the 1st applicant. He states that both applicants are jointly charged in the Nakaseke Court with the offence of Fraudulent Procurement of Certificates of Title c/s 190 (1) of **the Registration of Titles Act**. The complainant is one Balemeezi Fred, a brother of the 1st applicant. That the 2nd applicant who is a wife of the 1st applicant fell sick and did not attend court on the 13th of August 2018. That a warrant for her arrest was issued against the 2nd applicant. That on arrest, despite proof of sickness, the trial magistrate remanded the 2nd applicant. That the trial magistrate set a condition that the disputed certificates of title be produced in court before the 2nd applicant could be released on bail. That the 2nd applicant was only re-admitted to bail when the certificates of title were produced in court. The applicant states that he perused the court file and found that the Certificates of title were not on the court record. That the trial magistrate unlawfully and without jurisdiction handed the title deed to the complainant who is currently in possession of those certificates of title. That the applicants claim an interest in land comprised in Bulemeezi Block 239 Plot 199, 201 and 202 and the charges are merely the criminalisation of a land dispute. That there is an going civil suit in The Luwero Chief Magistrates Court vide CS No. 171 of 2017 arising out of a dispute over the land. That in

light of the ongoing civil suit which is between the complainant and the applicants, it was unlawful for the trial magistrate to proceed with this criminal case and also to make orders for the production of the certificate of title. That the criminal case is an abuse of the court process. That it was unconstitutional and irregular for the trial magistrate to impose as a condition for reinstatement of bail that the certificate of title be produced in court considering that the bail had been cancelled arbitrarily. That the deposit of the certificate of title deprives the applicant of his defence of a claim of right in the disputed property. The criminal case is therefore unconstitutional, illegal, arbitrary and brought mala fides by the respondent in abuse of due process of the court and has occasioned the applicants a great miscarriage of justice. It is prayed that the court grant the order for the Revision of Nakaseke Criminal case No 125 of 2018 and set aside it aside or terminate proceedings.

The Respondent opposes this application. Through an affidavit deposed by Kyomuhendo Joseph it was stated that the respondent denies the allegations set forth in the application. That the applicants have been charged with the procuration of a certificate of title which is a rampant offence. That it was not illegal for the trial magistrate to retain the title deed in order to reinstate bail. Additionally that it is not unlawful to hear a criminal case, between the same parties and arising out of the same subject, alongside a civil one. In the premises it would be in the interest of justice that the application is dismissed.

Appearance

Mr Serunkuma Bruno appeared for the applicant. The respondent was not present at the hearing.

Determination

Before anything else, it is imperative for a determination to be made whether the application is properly before this Court. I also note that none of the parties filed submissions.

The background is that the applicants are charged with Fraudulent Procurement of Certificates of Title c/s 190 (1) of **the Registration of Titles Act**.

From the court record, when the matter came up for hearing on the 13th of August 2018, the 2nd applicant was absent. The prosecution stated that they had 11 witnesses and prayed for a warrant of arrest for the 2nd applicant. The 2nd applicant was arrested and produced on the 20th of August 2018. She informed the court that she had been sick suffering from High blood pressure and asthma. The court record shows that that the demeanour of the 2nd applicant indicated that she had no respect for Court and cancelled her bail.

On the 19th of November 2018, the date the order to deposit the title was made, the court stated,

> 'title comprised in Bulemezi Block 239 Plot 199 in the names of Sylvia Nabulime and Ddiba availed to court'

The applicant states in paragraph 14 of the affidavit in support that bail was only reinstated because the title deed earlier demanded by court was produced.

I have perused the entire court record. It is not stated anywhere on the record of proceedings that reinstatement of bail was conditional on the applicant producing the title deed. Secondly, the trial magistrate who heard the application for bail, and saw the demeanour of the applicant when she made the order for cancellation, exercised her discretion to cancel the bail. I can find no evidence to support the contention that it was because the applicants failed to produce the title that the bail was cancelled.

In view of the court record not reflecting anywhere that bail was cancelled for failure to produce the title deed, then it is not clear what the exact order the applicant seeks to revise is. It is instructive that the applicant has not pointed this court to any particular date or page of the record where such order was made (The proceedings are annexed to the applicants affidavit in support).

The above notwithstanding, even if the order was on the record, the court must determine whether this application is competent. It has been filed pursuant to the powers of the High Court in sections 48 and 50 (5) of **the Criminal Procedure Code Act (CPCA)**.

Section 48 stipulates that,

> The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court.

On the other hand Section 50 (5) states,

> Any person aggrieved by any finding, sentence or order made or imposed by a magistrate's court may petition the High Court to exercise its powers of revision under this section; but no such petition shall be entertained where the petitioner could have appealed against the finding, sentence or order and has not appealed.

If indeed there was an order for bail premised on depositing the certificate of title, can a party can seek the reversal of such an interlocutory ruling of a trial Magistrates Court through an application for revision by the High Court?

Firstly such an order would be an interlocutory in nature. The 9th Edition of **Black's Law Dictionary** defines interlocutory as,

> **'**(Of an order, judgment, appeal, etc.) interim or temporary; not constituting a final resolution of the whole controversy'.

This definition is relevant in the instant case. Any ruling on bail does not constitute resolution of the guilt of the applicant in a criminal case. For that reason the ruling fits the definition of an interim or interlocutory order.

A look at Section 50 of the **CPCA** shows that the court is meant to examine the record of proceedings where final orders have been made. It may reverse conviction or acquittal or

other order of that nature. A Revision is only meant for final orders. That position of the law has been properly stated and followed by Courts before.

In a **Guide To Criminal Procedure In Uganda** by B.J. Odoki 3rd Edition *Law Africa* pg 270 it was observed that,

> Like appeals, revision can only be founded on a final order or judgement of the court. It cannot be made against a preliminary or interlocutory order or ruling which does not determine the case.

I will cite two decisions of the High Court that highlight this position.

In **Uganda v Dalal [1970] 1 EA 355**

> It is obvious, as Jones, J., remarked in Cr. Rev. 81/63, *Geresomu Musoke v. Uganda* (unreported), on reading ss. 339 to 341 of the Criminal Procedure Code only a final order can be the subject of a revisional order of this court. At the moment no such order is on the lower court's record. If this were not the case all sorts of magistrates' rulings would be finding their way to this court and I can well imagine a clever accused who likes to avoid a prosecution to conviction delaying such prosecution by making a series of objections, on which a trial magistrate would be compelled to rule and thereafter appeal to this court time and again.

The other decision is **Semuyaga v Uganda [1975] 1 EA 186** where the court held,

> *Uganda v. Dalal*, [1970] E.A. 355 and *Hassan Yusufu v. Uganda* Cr. App. 36/74 (unreported). In those cases it was held that interlocutory decisions made in the course of a trial in a magistrate's court could not be challenged in revisional proceedings; only a final order can be the subject of such proceedings. We do not doubt the validity of those authorities…

In light of the above, this application for revision, challenging the trials court's decision on bail cannot be the subject of a revision under Section 50 of the CPCA. Indeed as court noted in **Dalal** (supra) if the contrary were the case it is possible no case would ever be concluded as any decision of the trial court would be up for challenge. For that reason bail

applications can be renewed before the trial court any stage of hearing but are not revised under Section 50 of the CPCA.

Secondly, it is the contention of the applicants that they intended to set up a defence of a claim of right. That the trial court ought to have stayed his trial pending resolution of the Civil Suit that had been filed in Luwero Chief Magistrates Court. For that reason the criminal proceedings were unconstitutional, illegal and arbitrary. They prayed for them to be terminated.

Firstly, a claim of right is a defence that should be established by presentation of evidence.

Secondly it is not the position as stated that where there is a pending civil suit then criminal proceedings must be stayed. Criminal cases do not determine private rights such as the proof of ownership asserted in this case. A civil claim is a matter initiated by a plaintiff where he proceeds on his own behalf and bears the burden of proof (on a balance of probabilities). Criminal cases on the hand are initiated on behalf of the public to maintain law and order. Conviction ends in a sentence which is a punishment. The burden there is higher and stands at proof beyond all reasonable doubt.

The Constitutional Court considered a matter of this nature in **Nestor Machumbi Gasasira vs Uganda** *Constitutional Petition No 17 of 2011* where the Court held that,

> We find that it is fairly settled law that criminal and civil proceedings are distinct from one another. They are not in the alternative and/or necessarily parallel. In the case of **Joseph Zagyenda V Uganda, Criminal Application No. 11 of 2011, Hon Justice Lameck Mukasa** held that:
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> *"Civil proceedings are individualistic in nature while the criminal proceedings are public in nature."*
>
> We are persuaded with these findings. In general, the remedies offered to victims of crimes through criminal proceedings do nothing to get them back to the state in which they were in, before the crime was committed against them. Similarly, civil proceedings do nothing to prevent future crimes from being committed by a person.

> In the **Zagyenda case *(supra),*** the Learned Judge allowed both a criminal case and a civil case regarding the same matter to go forward without either being stayed until the completion of the other. This approach we find is not inconsistent with **Article 28 (9)** …

In the same way the criminal proceedings against the applicants cannot be stayed simply because there is a civil suit. The matters can proceed concurrently.

Consequently, I find that this application has no merit. These points dispose of the application without having to delve any farther into it. In the result it is dismissed and the case remitted back to the trial court which is directed to conclude it expeditiously.

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Michael Elubu

Judge

4.10.2021