

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
(CORAM: ODOKI CJ, TSEKOOKO, KATUREEBE, KITUMBA AND
KISAAKYE JJ. SC)
CONSTITUTIONAL APPLICATION NO 07 OF 2011 &
CONSTITUTIONAL APPLICATION NO 09 OF 2011
BETWEEN

AKANKWASA DAMIAN:.....APPELLANT

AND

UGANDA:.....RESPONDENT

[Application for stay of proceedings arising from rulings of the Constitutional Court at Kampala (Mpagi-Bahigeine DCJ, Byamugisha, Kavuma, Nshimye & Arach-Amoko J.J.A) in Constitutional Petition No 04 of 2011 (Reference) and Constitutional Petition No 05 of 2011, dated 21 April 2011]

The applicant filed two Constitutional applications for stay of execution of orders of the Constitutional Court in Constitutional Petitions No 04 of 2011 and No. 05 of 2011 (References).

We consolidated the hearing of both applications as they related to the same subject matter. After hearing the applications, we dismissed them with no order as to costs. We reserved the reasons for our decision to be given later. We now give the reasons.

The background to the applications is that the applicant, formerly the Executive Director of the National Forest Authority was separately charged in the first case with the offence of illicit enrichment contrary to Section 31 (1)(b) and Section 31 (2) of the Anti-Corruption Act. In the second case, he was charged with the offence of causing financial loss contrary to the provisions of Section 31 (2) of the Anti-Corruption Act.

When the applicant appeared before the trial Magistrate, he did not take any plea. Instead he made applications for Constitutional reference before the presiding Magistrate who granted the applications and framed several questions for determination by the Constitutional Court, under Article 137(5) of the Constitution and the Constitutional Court (Petitions and References) Rules, 81 No. 91 of 2005.

In the first case, Constitutional Petition No. 04 of 2011 (Reference) the question framed by the trial Magistrate was as follows:

"Whether the charging and prosecution of the accused under Section 20(1) of the Anti-Corruption Act No. 6/09 for the offences committed between August 2007 and February 2008 is inconsistent with Articles 28(7) and (12) of the Constitution"

In the second case, Constitutional Petition No. 05 of 2011, the trial Magistrate framed the following questions for determination by the Constitutional Court.

"(1) whether Section 31 of the Anti Corruption Act No. 6 of 2009 is inconsistent with Article 26(1) of the Constitution.

(2) Whether the charging and prosecution of the accused under Section 32(2) of the Anti-Corruption Act for offences allegedly committed between August 2007 and February 2008 is inconsistent with Articles 26(1) and 28(7) and (12) of the Constitution"

The Constitutional Court heard both petitions separately and dismissed both of them, and directed that the trials against the: applicant should proceed. The

applicant filed notices of appeal against the decisions of the Constitutional Court. He then filed two applications for stay of execution of the orders of the Constitutional Court.

Subsequently, the applicant filed two applications for interim orders for stay of execution pending the determination of the substantive application before this Court. The applications were based on the grounds that:

- (a) The applicant's appeal has a high likelihood of success because the Constitutional Court erred in law and failed to interpret the Constitution.
- (b) If an order for stay of execution is not granted, he will suffer irreparable damage as his appeal will be rendered nugatory.

The applicant swore two affidavits in support of the above grounds as the basis for the applications.

In his arguments before us, counsel for the applicant, Mr. Okello Oryem, submitted that the applicant will suffer irreparable loss of his liberty if he is convicted and sentenced to jail. He contended that the appeal is likely to succeed because Article 28 is absolute, and the trial of the applicant will be a derogation of this Article. Counsel argued that once an offence is repealed, no person can be charged under that law. He relied on the decision of this Court in National Housing & Construction Vs. Kampala District Land Board and Another, Civil Application NO.6 of 2002 to support his submissions.

Mr. Adrole Richard, learned counsel for the respondent, opposed the application. In the first place, he raised an objection that the application for stay of execution should have been filed in the Constitutional Court, citing Rule 40(1) of the Rules of this Court. Secondly, counsel submitted that the applicant had failed to show a prima facie case of success. It was his contention that Article 28(7) and (12) did not apply to this case because the offences charged were for causing

financial loss and illicit enrichment. He submitted that Article 28(8) solved the complaint about the penalty.

Learned counsel for the respondent contended that the Anti Corruption Act was a modification of the Prevention of Corruption Act, the Penal Code and other similar penal laws. Under Article 28(8) of the Constitution, the applicant can only face the penalty provided under the old law and therefore, he would not be prejudiced by the prosecution under the Anti Corruption Act.

Counsel cited Civil Procedure (5th Edition) by C.K Takwani page 38-39 to support his arguments. In particular, he referred to the need to prove three elements before a temporary injunction is granted namely:

- (a) Proof of prima facie success
- (b) Irreparable injury if appeal succeeds and
- (c) Where the balance of inconvenience lies

It is the submission of counsel that these three elements had not been proved

We shall first deal with the preliminary objection raised by the respondent that the application is incompetent as it should have been lodged in the Constitutional Court. Rule 40 of the Rules of this Court provides:

- “(1) when an application may be made either to the Court or the Court Appeal, it shall be made to the Court of Appeal first.***
- (2) Notwithstanding sub-rule (1) in any civil or criminal matter, the Court may in its discretion, on application or of its own motion, give leave to appeal and make any consequential order to extend the time for the doing of any act, as the justice of the case requires, or entertain an application under paragraph (b) of sub-rule (2) rule 5 of these Rules to safeguard the right of appeal,***

notwithstanding the fact that no application has first been made to the Court of Appeal" (emphasis added).

Clearly, this Court has wide discretion to entertain an application which is required by the Rules to be brought to the Court of Appeal first, in order to safeguard the right of appeal. However, this discretion must be exercised only in exceptional circumstances which will depend on each individual case. One of those circumstances could be the need to expedite the hearing of the application so that the substantive matter can be resolved expeditiously. In the present case, the applicant was facing criminal charges which needed to be determined expeditiously.

Secondly, the respondent raised the objection to the application belatedly in his reply to the submissions raised by counsel for the applicant, nor did the respondent file any affidavit raising this objection. It was for these reasons that we found no merit in the preliminary objection raised by the respondent.

The principles governing grant of stay of execution are well settled and there is no need to restate them in this application. Suffice it to point out that they are based on Rule 5(2) of the Rules of this Court which provided that the Court may in any civil proceedings where a notice of appeal has been lodged in accordance with Rule 75, order stay of execution, an injunction or a stay of proceedings on such terms as the Court may think just.

These principles have been explained in a number of decisions of this Court which include National Enterprise Corporation Vs. Mukisa Foods Ltd. Miscellaneous Application No. 7 of 1998 (unreported) Somali Democratic Republic Vs. Anoop S. Sunderlal Trean Civil Application No. 11 of 1988 (unreported) and National Housing & Construction Corporation Vs. Kampala District Land Board and Another, Civil Application No.6 of 2002. The latter decision cited the above authorities including Somali Democratic Republic Vs. Anoop S. Sunderlal Trean (supra) where this Court said,

“Where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the Court to make such orders for staying proceedings under the judgment appealed from as will prevent the appeal if successful from being nugatory. But the Court will not interfere if the appeal appears not to be bonafide or there are other sufficient exceptional circumstances. ”

As the learned counsel for the applicant submitted, the principles governing grant of temporary injunctions are also applicable with necessary modifications. These principles are stated in the book on Civil Procedure by C K Takwani (supra). They can be stated as follows:

- (i) The applicant must establish that the appeal has a likelihood of success or a prima facie case of his right.
- (ii) The applicant will suffer irreparable damage or the appeal will be rendered nugatory if the stay is not granted.
- (iii) The Court must consider where the balance of convenience lies if the applicant fails to establish the first and second conditions.

In the present case, the applicant argues that the appeal is likely to succeed because he was charged with offences which had been repealed; and the new offences with which he was charged imposed higher penalties than the previous ones contrary to the provisions of the Constitution. Article 28(7) and (12) of the Constitution provides:

“(7) No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.

(12) Except for contempt of Court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed.”

In one of the cases, the applicant was charged with causing financial loss. The repealed Section 269 of the Penal Code Act provided as follows:

“causing financial loss

(1) *Any person employed by the Government, a bank, a credit institution, an insurance company or a public body, who in the performance of his or her duties, does any act knowing or having reason to believe that the act or omission will cause financial loss to the Government, bank, credit institution, insurance company, public body or customer of a bank or credit institution, is liable on conviction to a term of imprisonment of not less than three years and not more than fourteen years.*

(2) *In this section-*

a) ***"bank" and "credit institution" have a meaning assigned to them by the Financial Institutions Act;***

b) ***“insurance company” means an insurance company within the meaning of Section 4 of the Insurance Act; and***

c) ***“public body” has the meaning assigned to it by Section 1 of the Prevention of Corruption Act. ”***

The current section 20 under the Ant Corruption Act states:

(1) *Any person employed by the Government, bank, a credit institution, an insurance company or a public body, who in the performance of his or her duties, does any act knowing or having reason to believe that the act or omission will cause financial loss to the Government, bank, credit institution commits an offence and is liable on conviction to a term of imprisonment not exceeding fourteen years or to a fine not exceeding three hundred and thirty six currency points or to both.*

(2) *In this section-*

a) ***"bank" or “credit institution” have the meaning assigned to them by the Financial Institutions Act; and***

b) *"insurance company" means an insurance company within the meaning of Section 4 of the Insurance Act."*

In considering these sections the constitutional court stated:

"The requirement of Article 28(7) as we understand it is that for a person to be charged with a criminal offence under any legislation the facts or omissions allegedly committed must have constituted a criminal offence which is defined under the law and there has to be a sentence prescribed for it. The test to be applied is whether the acts or omissions allegedly committed by an accused person constituted a criminal offence at the time they were committed. The acts which the applicant is alleged to have committed and which it is alleged caused financial loss to National Forest Authority occurred between 13th August 2007 and 29th February 2008. During this period there was a criminal offence of causing financial loss defined under Section 269 of the Penal Code Act which has been repealed by the Anti Corruption Act. There was also a punishment prescribed for it.

Section 20 of the Anti Corruption Act in our view is a reenactment of Section 269 of the Penal Code Act. The only difference between the two Sections as counsel for the applicant submitted, the sentence in the latter Act was enhanced. We do not consider the difference in the sentence material. The facts constituting the offence meet the criteria of Article 28(7). Causing financial loss was a criminal offence between 13th August 2007 and 29th February 2008. The applicant/petitioner was properly charged in our view. "

We were not satisfied that the holding of the Constitutional Court had no merit and that the appeal was likely to succeed.

In the second case, the applicant was charged with the offence of illicit enrichment contrary to Section 31(1)(b) and (2) of the Anti Corruption Act. Section 31 of the Act provides;

"(1) The Inspector General of Government or the Director of Public Prosecutions or an authorised officer may investigate or cause an investigation of any person where there is reasonable ground to suspect that the person-

- (a) *maintains a standard of living above that which is commensurate with his or her current or past known sources of income and assets; or*
 - (b) *is in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources of income or assets.*
- (2) *A person found in possession of illicitly acquired pecuniary resources or property commits an offence and is liable on conviction to a term of imprisonment not exceeding ten years or fine not exceeding two hundred and forty currency points or both.*
- (3) *Where a Court is satisfied in any proceedings for an offence under sub-Section (2) having regard to the closeness of his or her relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such resources or property as a gift or a loan without consideration, from the accused, those resources or property shall, until the contrary is provided, be deemed to have been under the control or in possession of the accused.*
- (4) *In any prosecution for corruption or proceedings under this Act, a certificate of Government Valuer or a valuation expert appointed by the Inspector General of Government or the Director of Public Prosecutions as to the value of the asset or benefit or source of income of benefit is admissible and is proof of the value, unless the contrary is proved.”*

It was argued in the Constitutional Court that the provision in the Anti Corruption Act contravened the right of the applicant to own property guaranteed under Article 26(1) of the Constitution and the right to the privacy of his home, correspondence, communication, and property under Article 27 of the Constitution. He contended that Section 31 legalises violation of these rights.

The Constitutional Court rejected these arguments and held that the Articles of the Constitution relied upon were not absolute. It held that the Constitution protected property legally acquired. We were unable to fault the reasoning of the

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Constitutional Court at this stage. We are of the view, therefore, that the likelihood of success of the appeals was not apparent from the submissions of the applicant.

We were not satisfied that the applicant would suffer irreparable injury if the application was not granted nor would the appeal be rendered nugatory. In our view, the balance of convenience was tilted in favour of having the trial expedited so that the charges against the applicant would be determined.

It was for those reasons that we dismissed the applications for interim orders of stay of execution pending the hearing of the main applications for stay of execution.

Dated at Kampala this 16th day ofMay.....2012.

B J ODOKI
CHIEF
JUSTICE

J W N TSEKOOKO
JUSTICE OF THE SUPREME COURT

Bart M Katureebe
JUSTICE OF THE SUPREME COURT

C N B Kitumba
JUSTICE OF THE SUPRE

EM Kisaakye
JUSTICE OF THE SUPREME COURT