

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA AT KAMPALA**  
**MISCELLANEOUS APPLICATION NO. 04 OF 2018**  
**(ARISING FROM CONSTITUTIONAL APPLICATION NO.03 OF 2018)**  
**(ARISING FROM CONSTITUTIONAL PETITION NO. 12 OF 2013)**  
**(Coram: Arach Amoko, Mwondha, Tibatemwa JJSC, Nshimye, Tumwesigye**  
**AG. JJSC)**

1. HASSAN BASAJJABALABA  
2. BASAJJABALABA MUZAMIRU } .....APPLICANTS

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

**RULING OF THE COURT**

This application was brought by way of Notice of Motion under Rules 2 (2), 6(2) (b), 42, 43(1), 50 & 51 of the Judicature (Supreme Court) Rules S1 13-11.

The applicants sought for an interim order of stay:

- a) Staying execution of the judgment and orders of the Constitutional Court in Constitutional Petition No.12 of 2013, delivered by four of the Justices of the Constitutional Court on the 2<sup>nd</sup> day of May 2018, specifically the order directing that the Registrar remits the file for Criminal case No.003 of 2013 Uganda Vs Basajjabalaba & Anor to the Anti-corruption Division of the High Court for the trial of the applicants to proceed, until the hearing and determination of the Applicant's main application for stay of execution pending before this Honourable Court.

- b) Staying the execution of the Judgment and orders of the Constitutional Court in Constitutional Petition No.12 of 2013 specifically the order for recommencement and continuation of the applicant's trial in Criminal case No. 0003 of 2013 Uganda Vs Basajjabalaba & Anor in the High Court (Anti-Corruption Division) until the hearing and determination of the applicant's main application for stay of execution pending before this Honourable Court.
- c) Staying the execution of the Judgment and orders of the Constitutional Court in Constitutional Petition No.12 of 2013, specifically any further or other action in pursuance of the order of the Court sanctioning the recommencement and continuation of the Applicant's trial in Criminal case No. 0003 of 2013 Uganda Vs Basajjabalaba & Anor in the High Court(Anti- corruption Division) until the hearing and determination of the applicant's main application for stay of execution pending before this Honourable Court.
- d) Costs of the Application be in the cause.

Briefly, the grounds on which the application is based are as follows:-

1. That the Applicants were partly, the unsuccessful parties in Constitutional petition No.12/2013 Hassan Basajjabalaba & Anor Versus Attorney General, and in a judgment delivered by only four of the five Justices of the Constitutional Court, the Court inter-alia ordered that the criminal trial of the applicants in Criminal case No.0003 of 2013 Uganda Vs Basajjabalaba & Anor in the High Court (Anti-Corruption Division) should proceed.
2. That the applicants are aggrieved by the judgment and orders of the Constitutional Court in Constitutional Petition No.12/2013



Hassan Basajjabalaba & Anor Versus Attorney General or in the alternative but without prejudice, parts of the judgment and some of the orders including the order denying the prayer for a stay of their criminal trial and have instructed their legal counsel to appeal to this Honourable Court against the same.

3. That the applicants have through their legal counsel already commenced the process of filing the appeal, have lodged the Notice of Appeal in the Constitutional Court and caused the same to be served on the respondent and subsequently to be transmitted to this Honourable court, all within the time prescribed by law.
4. That the applicants through their legal counsel have also lodged in the Constitutional Court, a request for typed and certified record of proceedings and Judgment, which has already been served on the Respondent, all within the time prescribed by law.
5. That in order to protect the right to relief in their intended appeal from being rendered nugatory, the applicants have filed in this Honourable court an application for stay of execution vide; Application No.03 of 2018, which application might take long to be heard and determined because of the Court's tight schedule.
6. That in the meantime, as the applicants await being availed with the typed proceedings and judgment so as to file their appeal to this Honourable Court, and pending determination of their main application for stay of execution, there is a serious threat and imminent danger of execution of the orders of the Constitutional Court by the Respondent, which orders are self-executing to wit;
  - i. The Applicants' prayer for stay of their criminal trial in criminal case No. 0003 of 2013 Uganda Vs Basajjabalaba

& Anor to the High Court (Anti- Corruption Division) was denied by the Constitutional court.

- ii. The applicants' prayer to be discharged from the criminal trial and prosecution was equally denied.
  - iii. The Constitutional Court directed the Registrar to remit the file for Criminal case No.0003 of 2013 Uganda Vs Basajjabalaba & Anor to the High Court (Anti-Corruption Division) for the said trial to proceed.
7. That the crux of the applicants' appeal is the legality of the judgment and orders of the Constitutional court, and the constitutionality, legality and propriety of the criminal proceedings and trial against them, and if the order of stay sought herein is not granted, the order of Constitutional court sanctioning the recommencement and continuation of the applicants' trial in the Anti- Corruption Division of the High Court, will be effected and or implemented, which will ultimately render the applicants' appeal to this Honourable Court and reliefs sought therein nugatory.
8. That the applicants' intended appeal to this Honourable Court has a high likelihood of success as it raises very pertinent legal and constitutional issues, warranting serious judicial reconsideration by this Honourable court and the outcome of the appeal of this Honourable court has a significant bearing on Criminal case No.0003 of 2013 Uganda Vs Basajjabalaba & Anor in the High Court (Anti-Corruption Division), which the Constitutional Court ordered to continue. The legal issues include among other things;
- i. The legality of the entire judgment of the Constitutional court, having been rendered by a panel of four learned



Justices of the Constitutional court, and not five Justices that should constitute the required Coram.

- ii. The legality of the entire Judgment of the Constitutional court, having been rendered by a panel of four Learned Justices of that Court, three of whom had since vacated the Court.
  - iii. The constitutionality, legality and propriety of the order that the applicants' criminal trial should proceed, despite the finding that the actions of the Uganda Police Force and Director of Public Prosecutions were high handed, deplorable and inexplicable and constituted a violation of the applicants' constitutional rights.
  - iv. The constitutionality, legality and propriety of the order that the applicants' criminal trial should proceed, despite findings on the defectiveness of the charges and the statutory non-compliance evidenced by commencement of the prosecution without the requisite consent of the Director of Public Prosecutions.
  - v. The failure by the Constitutional court to properly evaluate the evidence on record and apply the law governing the discharge of persons subjected to deplorable human rights violations from any further criminal prosecution
  - vi. Other grounds are set out in the Applicant's draft Memorandum of Appeal.
9. That the application has been made without unreasonable delay as judgment and the orders sought to be stayed was delivered on 2<sup>nd</sup> May 2018.


10. That the applicant is bound to suffer gross injustice, if the execution of the Judgment and orders therein are not stayed in the terms sought herein in the interim, as any continued criminal proceedings in Criminal Case No.0003 of 2013 Uganda Vs Basajjabalaba & Anor against them will occasion irreparable damage by rendering their appeal and the pending application for stay of execution nugatory.

11. That it is fair, just, equitable and necessary to achieve the ends of Justice that this Honourable Court be pleased to grant the interim order in the terms sought herein.

The application was supported by an affidavit deponed by the 1<sup>st</sup> applicant. On the record, there is an instrument by the 2<sup>nd</sup> applicant authorizing the 1<sup>st</sup> applicant to depone an affidavit on his behalf in this application. The affidavit was therefore deponed for the benefit of both applicants.

The respondent opposed the application and filed an affidavit in reply deponed by Ms. Christine Kaahwa, the Acting Director of Civil Litigation in the Attorney General's chambers.

In the affidavit in reply, the deponent avers:

That the applicants have not illustrated any serious threat or imminent danger of execution of the orders of the Constitutional Court. 

That the applicants have not illustrated any evidence of how their rights of appeal shall be infringed upon especially since upon fixing of the criminal case for trial, there is no bar to the appeal proceeding in tandem with the same.

That the application does not illustrate sufficient grounds for the grant of the interim orders sought by the applicants.



That she was informed by the lawyers who handled the matter that the applicants and their lawyers were never denied any opportunity to apply for interim stay of the orders of the Constitutional Court and therefore this application is improperly before this Court.

### **Background**

The applicants filed Constitutional Petition No.12/2013, Hassan Basajjabalaba & anor Vs Attorney General in the Constitutional Court challenging the constitutionality and legality of their trial and criminal prosecution in Criminal case No.0003 of 2013 Uganda Vs Hassan Basajjabalaba & Anor in the High Court (Anti-Corruption Division) and various violations of their rights by the Director of Public Prosecutions and the Uganda Police Force. The applicants sought orders from the Constitutional Court permanently staying all pending criminal charges and proceedings against the applicants in Criminal case No.0003 of 2013 in the Anti- Corruption Division of the High Court. This order was denied and the Constitutional Court directed the Registrar to remit the file for Criminal case No. 0003 of 2013, Uganda Vs Hassan Basajjabalaba to the High Court for the trial of the applicants to proceed.

The applicants, dissatisfied with the above decision lodged a Notice of Appeal in the Constitutional Court and served the same upon the respondent. There is also a letter requesting for certified copies of the Judgment and record of proceedings to enable the applicants formulate the grounds of appeal and consequently file their appeal in this Court. There is also a draft memorandum of appeal setting out the grounds of appeal the applicants intend to raise in this Court.

The applicants have filed in this Court an application for stay of execution Vide Miscellaneous Application No. 03 of 2018 hence this application for interim stay until the hearing and determination of the Applicants' main application for stay of execution.

## **Representation**

The applicants were represented by Senior Counsel John Mary Mugisha, Counsel Solomon Kisambira Balese, Counsel Caleb Alaka, Counsel Kenneth Kakande, Counsel Kyazze Joseph and Counsel Samuel Muyizi. The respondent was represented by Counsel George Kalemera, Principal State Attorney and Counsel Imelda Adong, State Attorney.

## **Applicants' submissions**

The Applicants through their counsel, filed skeletal submissions which they adopted at the hearing of the Application. The learned Senior Counsel for the applicants, John Mary Mugisha submitted that in order for Court to exercise discretionary powers to grant an interim order of stay of execution, the applicants must by affidavit evidence or otherwise prove that;

- (i) A Notice of Appeal was filed in the Constitutional Court and lodged in this Honorable Court.
- (ii) A substantive Application for stay of execution has duly been filed and is pending before this Honorable Court.
- (iii) There is imminent danger of execution of the orders of the Constitutional Court.
- (iv) The intended appeal to this Honorable Court is bonafide in the sense that it raises serious or pertinent questions meriting adjudication by the Court.
- (v) If an interim order of stay of execution is not granted, the reliefs sought in the substantive Application and the intended appeal will be rendered nugatory.
- (vi) The Application is commenced without inordinate delay.

He relied on the cases of **Theodore Ssekikubo and others Versus Attorney General Constitutional Application No. 4/2014** and **Francis Drake Lubega Versus Attorney General Misc. Application No.13/2015**.



Counsel contended that the position of the law is that at the stage of determination of an application for an interim order of stay of execution, the Court is not required to delve into the merits, which are matters to be considered in the substantive application. The authority of **The Attorney General Versus Fuelex (U) Limited Constitutional Application No.04 /2014** was relied on.

Counsel Caleb Alaka submitted that the applicants have met all the requirements for the grant of an interim stay of execution. Counsel averred that the appellants, being aggrieved with the judgment of the Constitutional Court filed a Notice of Appeal in the Court of Appeal and caused it to be transmitted to this Court and served on the respondent.

He submitted that the applicants have made a request for certified copies of the proceedings and judgment to enable them formulate grounds of appeal but in the mean time, have lodged in this Court the substantive application for stay of execution of the judgment and orders of the Constitutional Court.

He further submitted that there is imminent danger of execution since the orders of the Constitutional Court are self executory.

He contended that the intended appeal to this Honorable Court is bonafide and the applicants' appeal raises serious and pertinent legal and constitutional questions as demonstrated herein above.

It was argued that if an interim order of stay of execution is not granted, the reliefs sought in the substantive application and the intended appeal will be rendered nugatory

In addition, it was submitted that the application was filed without inordinate delay. He contended that Judgment was delivered on the 2<sup>nd</sup> May 2018 and the application was filed on 8<sup>th</sup> May 2018. The applicants' counsel prayed that the application is allowed and prayers be granted as prayed in the Notice of Motion.



## **Respondent's Submissions**

Mr. George Kalemera for the respondent opposed the application and submitted that the application is irregularly before this Court. He relied on Rule 41(1) of the Rules of this Court which provides as follows:

*"Where an application may be made either to the Court or to the Court of Appeal it shall be made to the Court of Appeal first."*

Counsel contended that in this regard therefore, the applicants were bound mandatorily to file this application in the Constitutional Court and they could not elect to file in the Supreme Court when the rules require that they actually file this application before the Constitutional Court.

Counsel submitted further that there is no serious threat of execution against the applicants. He argued that there cannot be orders that are self executing, since there should be officers of the Court namely advocates who take steps to execute the orders. He averred that in this case, it would be the Director of Public Prosecutions to take steps to recommence the trial and begin to try the applicants. He further submitted that there is no evidence on record to show that the Director of Public Prosecutions has taken steps to commence the trial of the applicants.

He argued that the applicant's affidavit was devoid of evidence to the effect that the applicants have tried to fix the main application. He prayed that the application be dismissed with costs and in the alternative that the main application for stay is fixed for hearing and there is no need to grant an interim order.

## **Applicants' submissions in rejoinder**

Counsel Kyazze Joseph submitted in rejoinder that rule 41(2) read together with rule 2(2) of the rules of this Court permit this Court to grant an application of this nature even where no such application



was made in the lower court. Counsel referred to paragraphs 17 and 18 of the affidavit in support where the applicant averred that they were denied opportunity to inform the Constitutional Court of their intention to appeal against the Judgment of the said Court, as the Judgment was delivered by only the Hon. Justice Kenneth Kakuru,JA who was not part of the Coram that heard the petition and that in the absence of a fully constituted bench of the Constitutional court at the time of delivery of the Judgment, the applicants, through their legal counsel were deprived of the opportunity to informally apply for a stay or an interim order of stay of execution in the Constitutional Court.

He submitted that there is serious threat of execution. Counsel averred that that the orders made by the Constitutional Court are self executing and of immediate action by the responsible authorities. Counsel contended that the fact that the Director of Public Prosecutions has not taken steps as argued by counsel for the applicant does not mean he cannot act neither is it a guarantee that he will not act and indeed the applicants are in time to prevent such action.

He further submitted that there is no requirement that the substantive application should be fixed. Counsel contended that the requirement is that there should be a pending substantive application. He reiterated the applicants' prayers as contained in the Notice of Motion

### **Consideration of the application:**

We carefully perused the application with the affidavit in support and affidavit in reply by the respondent. We also considered the submissions of both counsel on the application. Counsel for the respondent opposed the application and argued that under Rule 41(1) of the Rules of this Court, the applicants should have first filed their application in the Constitutional Court before coming to the Supreme Court.

Counsel for the applicants, on the other hand argued that rule 41(2) read together with rule 2(2) of the rules of Court permit this Court to grant an application of this nature even where no such application was made in the lower court.

He also argued that because the Judgment was delivered by Hon. Justice Kakuru, JA who was not part of the Coram, the applicants were deprived of an opportunity to informally apply for an interim order of stay of execution.

Rule 2(2) of the Rules of this Court provide as follows:

**Nothing in these Rules shall be taken to limit or otherwise affect the inherent powers of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.**

Rules 41(1) & (2) read as follows:

**Order of applications to the Court and to the Court of Appeal**

- (1) Where an application may be made either to the Court or to the Court of Appeal, it shall be made to the Court of Appeal first.**



(2) Notwithstanding sub rule (1) of this rule, 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 rule 6(2)(b) of these Rules to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal.

Rule 6 (2) (b) provides as follows:

(2) Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-

(b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 72 of these Rules, order a stay of execution, an injunction or stay of proceedings as the Court may consider Just.

The above provisions read together give this Court discretion to entertain an application that should have been made to the Court of Appeal at first instance. In **Hon. Theodore Ssekikubo & others Vs Attorney General & others (Supra)**, this Court stated as follows:

“Rule 2(2) of the Judicature Supreme Court Rules gives this Court very wide discretion to make such orders as may be necessary to achieve the ends of Justice. One of the ends of Justice is to preserve the right of appeal.”

Also in the cases of **Yakobo M Sekungu and Ors Vs Cresensio Mukasa (Civil Application 5/2013)** and **Guiliano Gargio Vs Calaudio Casadio (Civil Application 3/2013)**, this Court stated that:

“The granting of interim orders is meant to help the parties to preserve the status quo and then have the main issues between them determined by the full Court as per the Rules.”

Counsel for the respondent solely relied on Rule 41(1) for his position that the application is improperly before Court. Counsel for the applicants, on the other hand submitted that while giving judgment, the applicants were deprived of an opportunity to informally apply for stay of execution since the Hon. Justice Kakuru, JA who read the judgment was not part of the Coram that heard and determined the case. This Court finds that the above is sufficient reason to entertain this application. This application is therefore properly before this Honorable court.

The grounds for the application for the grant of an interim order of stay of execution have been settled in numerous cases including **Theodore Ssekikubo & others Vs Attorney General (Supra)** and **Francis Drake Lubega Vs Attorney General (Supra)** as rightly cited by Senior counsel for the applicants, John Mary Mugisha.

In **Theodore Ssekikubo and others Vs Attorney General (Supra)**, this Court held as follows:

**Considerations for the grant of an interim order of stay of execution or interim injunction are whether there is a substantive application pending and whether there is a serious threat of execution before the hearing of the substantive application. Needless to say, there must be a Notice of Appeal. (See Hwan Sung Industries Limited Vs Tajdin Hussein and 2 others (SCCA No.19 of 2008).**

In this application, the only ground in contention was whether there is a serious threat of execution. All the other grounds are not in contention. We find that a Notice of Appeal was duly lodged in the Court of Appeal and transmitted to this Court. There is also a



letter requesting for certified copies of the record of proceedings of the Constitutional Court and a draft memorandum of Appeal.

Counsel for the respondent argued that there is no serious threat of execution since no step has been taken by the Director of Public Prosecutions to commence the criminal trial against the applicants. Counsel for the applicants, on the other hand submitted that the orders of the Constitutional Court are self – executing and of immediate action by the responsible authorities.

In its Judgment, the Constitutional Court ordered as follows:

**The prayer for stay of criminal proceedings pending at the High Court High Court Criminal Case No. 0003 of 2013 Uganda Vs Hassan Bassajjabalaba is denied.**

**The Registrar is directed to remit the file for Criminal Case No.0003 of 2013 Uganda Vs Hassan Bassajjabalaba to the High Court for the trial of the petitioners to proceed.**

We accept counsel for the applicants' submission that these orders are self executing among other things. Court orders are not issued in vain. They must be acted upon by whomsoever they are directed to. There is therefore an imminent threat of execution against the applicants. We find no merit in the respondent's counsel submission in respect to this ground.

In the result, we allow the application and make the following orders:

- 1) An interim order doth issue staying execution of the decision and orders of the Constitutional Court in Constitutional Petition No. 12 of 2013 directing that the Registrar remits the file for Criminal case No.003 of 2013 Uganda Vs Bassajjabalaba & anor to the Anti-corruption Division of the High Court for the trial of the applicants to

proceed until the hearing and determination of the Applicants' main application for stay of execution.

- 2) An interim order doth issue staying execution of the decision and orders of the Constitutional Court in Constitutional Petition No. 12 of 2013 ordering for recommencement and continuation of the applicant's trial in Criminal case No. 0003 of 2013 Uganda Vs Bassajjabalaba & Anor in the High Court (Anti-Corruption Division) until the hearing and determination of the applicant's main application for stay of execution.
- 3) An interim order doth issue restraining any further or other action in pursuance of the order of the Constitutional Court in Constitutional Petition No. 12 of 2013 sanctioning the recommencement and continuation of the Applicant's trial in Criminal case No. 0003 of 2013 Uganda Vs Bassajjabalaba & Anor in the High Court (Anti- corruption Division) until the hearing and determination of the applicant's main application for stay of execution.
- 4) Costs of this Application shall be in the cause.

Dated at Kampala this.....<sup>11<sup>th</sup></sup>.....day of...July.....2018



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Hon. Justice Arach Amoko  
Justice of the Supreme Court

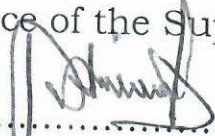


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Hon. Justice Mwendha  
Justice of the Supreme Court

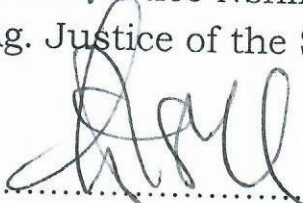


.....*Tibatemwa*.....

Hon. Justice Tibatemwa - *EKIRIKUBINZA*  
Justice of the Supreme Court

  
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Hon. Justice Nshimye  
Ag. Justice of the Supreme Court

  
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Hon. Justice Tumwesigye  
Ag. Justice of the Supreme Court