THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISC. APPLICATION NO.139 OF 2015

(Arising from Misc. Cause No.205 of 2008)

HON. PAULA TURYAHIKAYO::::::::::::::::::::::::::::::::::::: APPLICANT

VS

ATTORNEY GENERAL :: RESPONDENT

CORAM:

HON. JUSTICE. PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA sitting as Single Justice.

RULING OF COURT

This application seeks an interim order restraining the respondent from carrying out investigations against the applicant until the substantive application for stay of proceedings is heard and determined.

The application is by way of Notice of Motion under **Rules 2(2), 42 and 43** of the **Judicature (Court of Appeal) Rules S.I 13-1**. The applicant seeks orders that:

1. The implementation of the recommendations of the Judicial Commission of inquiry into mismanagement of the global funds by the Applicant be stayed pending determination of the applicant's intended appeal.
2. The costs of the application be provided for.

Background to application

The background to the application is that the applicant on the 8th of June 2004 was appointed as an Assistant Public Sector Coordinator for Project Monitoring Unit of the Global Fund to fight Aids, Tuberculosis and malaria under the Ministry of Health. Due to the allegation that the applicant had mismanaged funds and given fraudulent accountabilities, Legal Notice No.15 of 2005 was published that led to the appointment of a commission of inquiry into the alleged mismanagement of the funds. The Commission made recommendations against the applicant which briefly were that:

i. The Inspectorate of Government (IGG) conducts further examination of the applicant's alleged fraudulent accountabilities of the funds.
ii. The Directorate of Public Prosecutions (DPP) and the Directorate of Criminal Investigations (CID) to commence prosecution proceedings against the applicant for

interfering with evidence, thereby misleading the Commission's investigations and committing perjury.

iii. That due to the financial losses caused by the applicant, any gratuity to her be forfeited.

Following the Commission's recommendations, the applicant sought for and obtained leave to file an application for judicial review of the recommendations which in effect halted the implementation of the Commission's recommendations. However, before the application for judicial review was heard, the DPP instituted investigations against the applicant but later withdrew the same upon the applicant's lawyers notifying him that the above mentioned application was pending before the court.

Subsequently, the judicial review application was heard by Hon. Justice Kibuuka who dismissed the application on 11.11.2014. The applicant, dissatisfied with the dismissal, filed a Notice of Appeal in this Court.

The applicant, fearing that the DPP and the Commission may commence implementation of the recommendations since there is no longer any order to bar the respondent from carrying out the investigations, has come to this court seeking an interim order of stay of any proceedings and implementation of the said recommendations by the Commission.

Representation

At the hearing of the application, Mr. Blaze Babigumira of M/S Blaze Babigumira & Advocates appeared for the applicant and relied on the applicant's deponed affidavit in arguing the applicant's case. The respondent State was represented by Miss Suzan Akello Apita, State Attorney.

Applicant's submission

Applicant's counsel filed written submissions and based his arguments on the points raised in the filed affidavit in support of the application and the affidavit in reply. Counsel argued that it is not a requirement for an applicant to prove irreparable damage for a grant of an interim order.

He supported this submission with the authority of **HON. THEODORE SSEKIKUBO & 4 OTHERS V ATTORNEY GENERAL & 4 OTHERS IN CONSTITUTIONAL APPLICATION NO.4 of 2014** wherein the Supreme Court held that**:**

> **"… 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."**

Counsel for the applicant further argued that there was an impending threat of investigations against the applicant. He argued that the fact that the IGG and the DPP had previously commenced investigations against the applicant until they were notified by the applicant's lawyers that an application for judicial review was before the High Court, shows that the DPP and IGG would commence investigations again since there was now no court order halting action by the two institutions. He emphasized that it would be imprudent to sit back and wait for the applicant to be arrested before an application for the interim order would be sought.

Applicant's counsel concluded his submission by praying that this court grants the application for an interim order of stay.

Respondent's arguments

On the other hand, counsel for the respondent opposed the application and argued that there was no evidence that either the DPP or the Directorate of Criminal Investigations or the IGG has taken any steps to implement the recommendations of the Commission of inquiry. That, there was no serious threat to implement the said recommendations. Counsel emphasized that one of the requirements for the grant of an interim order as laid out in the **SSEKIKUBO case (supra)** is that there must be a serious threat of execution before hearing of a substantive application which was lacking in this instant case. That, the applicant was merely speculating the threat.

Counsel concluded her submission by praying that this court dismisses the application with costs for lack of merit.

In reply, counsel for the applicant submitted that the judicial review application which had the effect of staying the initial investigations by the DPP and the IGG was filed in 2008 and court gave its ruling in April 2015. That between 2008 and 2015, the IGG and the DPP had not commenced any further investigations because the judicial review application was still pending in court. He further submitted that since the judicial review application had been dismissed on 24th April 2015, imminent threat existed as any time investigations against the applicant would be commenced.

Resolution of Court

In an application for interim order, 2 major conditions must be satisfied. These conditions have been laid down in various Supreme Court decisions. [See for e.g. **HON. THEODORE SSEKIKUBO & 4 OTHERS V ATTORNEY GENERAL & 4 OTHERS (supra), HWAN SUNG INDUSTRIES LTD V TOJDIN HUSSEIN & 2 OTHERS SCCA NO.19 of 2008, ALCON INTERNATIONAL LTD V THE NEW VISION PRINTING & PUBLISHING CO.LTD & ANOTHER CIVIL APPLICATION NO. 4 of 2010 (SC)**] as follows:

> "First, the applicant has to show that a substantive application is pending before court and that a Notice of Appeal has been lodged.
>
> Secondly, that there is a serious threat of execution before the hearing of the pending substantive application."

Perusal of the affidavit in support of the application and of the written submissions indicates that the applicant lodged an application for stay vide Miscellaneous Application No. 139 of 2015 which is still pending before this court. The record also shows that the applicant filed a Notice of Appeal dated 30th of April 2015 which was received in the High Court on the same date.

Rule 6(2) (b) of the **Rules of this Court** provides that:

> **"The Court may in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76, order a stay of proceedings on such terms as the court may think just."**(Emphasis ours).

From the above, it is clear that the power to grant the orders sought is discretionary. Furthermore, **Rule 6 (2)** of the **Rules of this Court**, is to the effect that institution of an appeal does not automatically guarantee a stay of proceedings.

Thus apart from the applicant showing that there is a pending suit, she has to further show that the pending suit has a probability of success. This does not mean that the applicant ought to go to the merits of her case but as was held in **DEVON V BHADES [1972] E.A 22,** all the applicant needs to shows is that there are triable issues which raise a *primafacie* case for adjudication.

The order of court against which the applicant intends to appeals is as follows:

> *"Court has closely examined the reliefs the applicant sought vide this application. <u>It is of the view that if the prerogative orders of certiorari and prohibition were to be issued within the circumstances of this application they would be in vain</u>. <u>There appears to be no indication at all that there have been any steps taken to implement the Commission's recommendations in as far as they relate to the applicant</u>. Court invokes the provisions of S.36 (5) of the Judicature Act which provides that an order of mandamus, prohibition, and certiorari shall not be made where the order applied for would be rendered unnecessary."(Emphasis Ours).*

In my view the circumstances which existed at the time <u>Kibuuka J</u> dismissed the application for the prerogative orders are no different from what pertained at the time I heard this application.

But perhaps more important is that the applicant is in essence asking this court to interfere in the constitutional mandate of the IGG and the DPP.

Article 225 of the Constitution gives the IGG mandate to investigate any act, omission, advice, decision or recommendation by a public officer or any other authority to which this article applies, taken, made, given or done in exercise of administrative functions. Similarly, **Article 120 (3) (a) of the Constitution** gives the DPP the mandate to direct the police to investigate any act in form of a criminal nature and to report to him or her expeditiously.

The purpose of carrying out investigations by either the IGG or the DPP or the Police would necessarily be to establish at an evidential scale whether the allegations made against the

applicant are adequately established to warrant follow up by perhaps a criminal trial. The result can even be in favour of the applicant. On the other hand, the absence of the said investigations encumbers the relevant state institutions and makes it impossible for them to make legitimate or knowledge based decisions.

Regarding forfeiture of gratuity, this recommendation would only be adhered to if the investigations resulted into the applicant being found legally responsible for loss of state funds.

Following from the above, I would hesitate to interfere into and stifle constitutional mandate of the two bodies. And in a case where I see no irreparable damage that would arise from the conduct of the DPP or IGG, or irreparability of any injustice that the process of investigation may cause to the applicant, I decline to grant the orders prayed for.

ORDER OF COURT

For the foregoing reasons, the application for an interim order to restrain the respondent from implementing the recommendations of the Commission of Inquiry into the mismanagement of Global Funds by the applicant is hereby dismissed.

Costs of this application shall abide the outcome of the substantive application.

I so order.

Dated at Kampala this …10th… day of …September……… 2015.

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HON JUSTICE PROF. LILLIAN TIBATEMWA EKIRIKUBINZA, JA.