



THE REPUBLIC OF UGANDA

**THE COURT OF APPEAL OF UGANDA  
AT KAMPALA**

(Coram: Monica K. Mugenyi, JA)

**MISCELLANEOUS APPLICATION NO. 40 OF 2017**

**(Arising from Miscellaneous Application No. 39 of 2017 & Constitutional Petition No.  
41 of 2017)**

**CAROLINE KYAKABALE ..... APPLICANT**

**VERSUS**

**ATTORNEY GENERAL ..... RESPONDENT**

## RULING

### Introduction

1. This is an Application for an interim order of stay of proceedings against Ms. Caroline Kyakabale ('the Applicant') in **Criminal Case No. UPDF/GCM/001/2017** before the General Court Martial pending the disposal of the substantive application for stay of those proceedings, **Miscellaneous Application No. 39 of 2017**.
2. The Application is brought under Rules 2(2), 6(2), 42 and 43(1) and (2) of the Judicature (Court of Appeal Rules), SI 13-10, and is supported by an affidavit deposed by the Applicant and lodged in this Court on 12<sup>th</sup> October 2017. Before it could be heard by this Court, the Applicant lodged **Miscellaneous Cause No. 21 of 2018** in the High Court that sought and, vide a Ruling dated 14<sup>th</sup> August 2020 (Mugambe, J) secured the halting of her trial before the General Court Martial.
3. The Application is opposed by the Respondent, who did at the hearing thereof intimate that it had since been overtaken by events given the decision in **Miscellaneous Cause No. 21 of 2018**. On the question of jurisdiction, it was argued for the Respondent that the Application should have been placed before a coram of three judges of the court.
4. At the hearing of the Application, neither the Applicant nor her advocate made an appearance, despite proof of due service of court process. The Respondent was represented by Mr. Jimmy Oburu Odoi.

### Determination

5. The lodging of petitions or references before the Court of Appeal sitting as the Constitutional Court is governed by the Constitutional Court Rules of Procedure. Indeed, the procedure applicable to such petitions and references is encapsulated in Rule 23(1) of those Rules, which provides for such procedure to be '**regulated, as nearly as may be, in accordance with the Civil Procedure Act and the rules made under that Act and the Court of Appeal Rules, with such modifications as the (Constitutional) Court may consider necessary in the interest of justice and expedition of the proceedings.**'



6. Meanwhile, the jurisdiction of the Constitutional Court is delineated in Article 137(1) of the Constitution, and has been severally construed to restrict the Court's jurisdiction solely to the interpretation of the Constitution. See Attorney General v Major General David Tinyefuza, Constitutional Appeal No. 1 of 1997 (Supreme Court), Ismail Serugo v Kampala City Council & Another, Constitutional Appeal No. 2 of 1998 (Supreme Court) and, more recently, George William Alenyo v The Chief Registrar, Courts of Judicature & 2 Others, Constitutional Petition No. 32 of 2014 (Constitutional Court). In George William Alenyo v The Chief Registrar, Courts of Judicature & 2 Others (supra), the Constitutional Court observed that for it to have jurisdiction over any matter brought before it, '(the) interpretation of a provision of the Constitution must be necessary in the resolution of the said complaint.' In that case, the Constitutional Court relied upon the interpretation of Article 137(1) rendered in Attorney General v Major General David Tinyefuza (supra), where the Supreme Court (per Wambuzi CJ) held that 'no other jurisdiction apart from the interpretation of the Constitution is given.'
7. The matter under consideration presently is an application for interim orders of stay of proceedings that poses no question for constitutional interpretation. It simply seeks to halt the Applicant's prosecution before the General Court Martial until the constitutional implications of those proceedings have been determined by the Constitutional Court. Therefore, any questions for constitutional interpretation would ensue under Constitutional Petition No. 41 of 2017, in respect of which this Application arises, and not under the Application *per se*. The question then is would the jurisdiction of the Constitutional Court extend to the determination of such an application by the coram prescribed therefor in Article 137(2)?
8. I am alive to the literal rule of interpretation that underscores the application of words' ordinary, natural and plain meaning where there is no ambiguity; otherwise, recourse would be made to a purposive interpretation of a law. These rules of interpretation were well articulated in the cases of the Returning Officer Kampala & Another v Margaret Zziwa, Civil Appeal No. 39 of 1997, cited with approval in Murisho Shafi & 5 Others v Attorney General & Another, Constitutional Application No. 2 of 2017, and Uganda Law Society v. Attorney General, Constitutional Petition No. 52 of 2017.



9. In Returning Officer Kampala & Another v Margaret Zziwa (supra) it was held:

Where the words of the Statute to be construed are clear and unambiguous, they must be given their ordinary and natural meaning irrespective of the consequences. ... if the words of the Statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law-givers.

10. In the same vein, in Uganda Law Society v Attorney General (supra), the applicable rules of interpretation were *inter alia* summed up as follows:

1. ....
2. ....
3. ....
4. ....
5. Where the words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.
6. Where the language of the constitution or statute sought to be interpreted is imprecise or ambiguous a liberal, general or purposeful interpretation should be given to it.

11. It seems to me that a literal interpretation of Article 137(1) of the Constitution is that the Court of Appeal shall sit as the constitutional court for purposes of its constitutional interpretation mandate. That interpretation should resolve the question as to whether the Court of Appeal sitting as the Constitutional Court may consider any other matter (including interlocutory and other applications) other than the interpretation of the Constitution. I read nothing in the words in that constitutional provision in its plain and natural meaning that confers the Court of Appeal sitting as the Constitutional Court with the mandate to do so. Such an interpretation would negate the determination by the Constitutional Court of applications arising from a petition lodged in respect of its interpretative mandate.

12. Be that as it may, given the myriad of interpretations that have been applied to interlocutory and other applications that arise from constitutional petitions, it would appear that the import of Article 137(1) and (2) is not as precise and unambiguous as was hitherto perceived. It is necessary, therefore, to revert to a liberal or purposive interpretation

thereof to deduce the intention of the framers of those constitutional provisions. A review of the legal framework governing the Constitutional Court viz the Court of Appeal is instructive.

13. The Court of Appeal and Constitutional Court of Uganda are respectively established by Articles 134(1) and 137 of the 1995 Constitution as amended. The functions and coram of the Court of Appeal are delineated in Articles 134(2) and 135(1) of the Constitution, while those that pertain to the same court sitting as the Constitutional Court are encapsulated in Articles 137(1) and (2) of the Constitution. For ease of reference, I reproduce the foregoing provisions below.

Article 134(2)

**An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law.**

Article 135(1)

**The Court of Appeal shall be duly constituted at any sitting if it consists of an uneven number not being less than three members of the court.**

Article 137

**(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**

**(2) When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court. (emphasis mine)**

14. It seems to me that reference in Article 137(1) and (2) of the Constitution to the constitutional court as the Court of Appeal sitting exclusively in determination of a question for constitutional interpretation does, in my view, lend credence to the Court of Appeal either sitting as a Constitutional Court in its constitutional interpretative jurisdiction or, in every other instance, as the Court of Appeal albeit (where necessary) supporting the function of the Constitutional Court. That procedural function of the Court of Appeal is clarified in the ensuing part of this Ruling.

15. Following the promulgation of the Constitution, the Judicature Act, Cap. 13 (as amended) was enacted to engender the constitutional provisions relating to the judiciary as can be



deduced from its long title, to wit, '**an Act to consolidate and revise the Judicature Act to take account of the provisions of the Constitution relating to the judiciary.**' Whereas section 10 of that Act essentially re-echoes the provisions of Article 134(2) of the Constitution with regard to the function of the Court of Appeal, section 12 thereof provides for the power of a single judge of the Court of Appeal as follows:

**A single judge of the Court of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.**

16. In my considered view, the import of Articles 134(2) and 135(1) of the Constitution are that the Court of Appeal, as duly constituted by an uneven number of not less than three members of the court, shall have jurisdiction over appeals from decisions of the High Court as by law prescribed. Section 12(1) of the Judicature Act, however, places judicial authority in a single judge of that court to entertain any interlocutory causes or matters lodged in the Court of Appeal, such matters to be subject to appeal before three justices of the same court under section 12(2) of the Judicature Act. Rule 53 of the Court of Appeal Rules, on the other hand, regulates the jurisdiction of a single judge of the Court of Appeal, negating its applicability to applications outlined in subrule (2) thereof. Construed together with section 12 of the Judicature Act, therefore, Rule 53 mandates a single judge of the Court of Appeal to preside over **any interlocutory cause or matter before the Court of Appeal**, save for the matters enlisted in Rule 53(2). In addition, the same Rule mandates a single judge of the court to *suo moto* refer an application to a duly constituted coram of the Court of Appeal, that is, an uneven number of not less than three judges. I reproduce both legal provisions below:

Section 12 of Judicature Act

- (1) A single justice of the Court of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.**
- (2) Any person dissatisfied with the decision of a single justice of the Court of Appeal in the exercise of any power under subsection (1) shall be entitled to have the matter determined by a bench of three justices of the Court of Appeal which may confirm, vary or reverse the decision.**



Rule 53 of the Court of Appeal Rules

(1) Every application, other than an application included in subrule (2) of this rule, shall be heard by a single judge of the court, except that any such application may be adjourned by the judge for determination by the court.<sup>1</sup>

(2) This rule shall not apply to –

- a. An application for leave to appeal, or for certificate that a question or questions of great public or general importance arise;
- b. An application for a stay of execution, injunction or stay of proceedings;
- c. An application to strike out a notice of appeal or an appeal; or
- d. An application made as ancillary to an application under paragraph (a) or (b) of this subrule or made informally in the course of the hearing, including an application for leave to extend time if the proceedings are found to be deficient in the matters in the course of the hearing.

17. I am constrained to observe here that the coram of the Court of Appeal on appeal in interlocutory matters is not *per se* necessarily indicative of that court as fully constituted, but simply a coram of three judges of the court. I find apposite direction on this position from the three-judge coram prescribed in section 8(2) of the same Act for appeals from the decision of a single judge of the Supreme Court, despite the constitutional provision in Article 131(1) of the Constitution that the Supreme Court is duly constituted when comprised of an uneven number of not less than five judges.

18. The foregoing discourse on the application of section 12 of the Judicature Act and Rule 53 of the Court of Appeal Rules attempts to sum up the letter and import of the law governing applications lodged in the Court of Appeal. Against that background, a liberal and purposive interpretation of Articles 137(1) and (2) of the Constitution could very well be that whereas the Court of Appeal sitting as the Constitutional Court was purposely restricted to the determination of questions that require constitutional interpretation; the Court of Appeal sitting as such (and not as the constitutional court) may determine all other matters lodged before it, including applications formally filed under Rule 43(1) of the Court of Appeal Rules. Such applications would be subject to the Court of Appeal Rules and not necessarily Article 137(2) of the Constitution as they do not raise any question for constitutional interpretation. They would be subject to the provisions of section 12 of the

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<sup>1</sup> Reference to 'court' is the Court of Appeal established under Article 129 of the Constitution as duly constituted by three judges in accordance with Article 135 of the Constitution.



Judicature Act and Rule 53 of the Court of Appeal Rules as construed above. However, applications filed under section 12 of the Judicature Act, and Rules 43(1) and 53(1) of the Court of Appeal Rules are to be distinguished from applications made in the course of a hearing of the Constitutional Court, which may under Rule 43(3)(a) be made to the duly constituted Constitutional Court comprised of five judges.

19. For the above reasons, I would respectfully defer to the decision in **George Owor v Attorney General & Another, Constitutional Application No. 38 of 2010** that a single judge of the court does have jurisdiction to hear an application for interim orders, such as the present application. Such a judge would not be sitting as a single judge of the Constitutional Court but as a single judge of the Court of Appeal considering an application filed under Rule 43(1) of the Court of Appeal Rules. A single judge sitting as such is duly provided for under section 12(1) of the Judicature Act, Cap. 13, as well as Rule 2(2) of the Court of Appeal Rules. Under those circumstances, therefore, substantive applications for stay of execution, stay of proceedings or injunctive relief pending the determination of a constitutional petition would be heard by three judges of the Court of Appeal and not five judges of that court sitting as the Constitutional Court. For the same reasons, with the greatest respect, I would depart from the decision in **Murisho Shafi & 5 Others v Attorney General & Another, Constitutional Application No. 2 of 2017**. In that case, it was *inter alia* observed that section 12 (then section 13) of the Judicature Act may over-ride Rule 53 of the Court of Appeal Rules in relation to business before the Court of Appeal. That finding would, in my view, have the effect of rendering Rule 53(2) redundant and remitting all the applications delineated thereunder to the determination of a single judge under Rule 12(1) of the Judicature Act, an eventuality that I am most respectfully unable to contemplate.
20. Having so held, I am satisfied that the present Application is properly before a single judge and would now turn to a determination thereof. Rule 2(2) of the Court of Appeal Rules recognizes the inherent power of the court to 'make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court ... and shall be exercised to prevent abuse of the process of any court caused by delay.' In the instant case, given the hearing and determination of **Miscellaneous Cause No. 21 of 2018** whereby the orders sought herein were granted by the High Court, this Application has indeed been rendered superfluous.



**Conclusion**

21. In the result, I find no reason to grant the Application and would hereby dismiss it with no order as to costs.

It is so ordered.

Dated at Kampala this 5<sup>th</sup> day of Oct ..... 2021.

*Monica K. Mugenyi*

**Hon. Lady Justice Monica K. Mugenyi**

**JUSTICE OF APPEAL**