

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSTITUTIONAL APPLICATION NO. 0015 OF 2015

GURINDWA PAUL.....APPLICANT

VERSUS

ATTORNEY GENERAL,

DIRECTOR PUBLIC PROSECUTION UGANDA REVENUE RESPONDENT
AUTHORITY -

CORAM: Hon. Mr. Justice Eldad Mwangusya, JA

RULING

The applicant, **GURINDWA PAUL** is facing trial in the High Court of Uganda for offences related to fraudulent evasion of taxes. He last appeared in Court on 24th April 2013 when Court ruled that he had a case to answer and his defence was fixed for hearing on 10th May 2013. He never appeared to give his defence. Neither his Counsel nor his sureties knew of his whereabouts. Later the prosecution applied to proceed in absence of the applicant and the Court granted the application. The applicant then applied her reinstatement of his bail on the ground that he had not absconded from his trial because he had gone to Canada to receive medical treatment with the knowledge of the Court. The application for reinstatement of bail is still pending hearing.

The applicant has petitioned the Constitutional Court challenging the constitutionality of his trial in his absence. He also applied for a temporary injunction and an interim order which is the subject of this ruling. The application seeks order that are stated in the Motion as will be shown. This application is by Notice of Motion brought under Article 137 of the Constitution, Rule 23 of the Constitutional Court (Petitions and References Rules) SI. 91 of 2005, Rules 3 and 4 of the Judicature (Fundamental Rights and Freedoms Enforcement Procedure) Rules, 2008 seeking order that:

- (a) An interim order be granted restraining the Respondents, their servants, officials or agents and or those claiming authority under them and any actions of the state through International Police Force (Interpol) against the applicant as a wanted person and or against the personal liberty of the applicant and from enforcing, implementing or otherwise executing the decisions, directives, orders and all subsequent decisions, actions and directives from any such proceeding, pending the disposal of the main application Civil Application No ... of 2015
- (b) An interim order of stay of proceedings and any order against the Applicant and his business companies be granted in the following various cases in Courts of Judicature pending determination of the Civil Application No... of 2015 in this Honourable Court.
 - 1. High Court (Anti-Corruption Division HCT-00-ACD-CSC-0070 of 2012 and orders therefrom
 - 2. High Court (Anti-Corruption Division) HCT-00-ACD-CSC-No 0088 of 2012 and orders therefrom.
 - 3. High Court (Commercial Division) HCT-00-CS-No. 672 of 2013 and Execution Division EMA No 2265 of 2014 arising therefrom.
 - 4. High Court (Commercial Division) HCT-00-CS-No 415 of 2013
 - 5. Chief Magistrates Court of Mengo CV-CS-00-0607 Of 2012

The application is supported by the affidavit of **FLORENCE KOMUNAGI** the wife

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of the applicant and is based on the following grounds:-

- (1) The applicant lodged a Constitutional Petition No 18 of 2015 in this Honourable Court for the determination of matters infringing and touching upon his Constitutional rights which he verily believes were infringed upon by the Respondents jointly and severally in the course of investigations, proceedings and order of Court and prosecution of High Court (Anti-Corruption Division) **HCT-OO-ACD-CSC-No 0070 of 2012** and **Criminal application No 005 of 2015** arising from **ACD-CSC-0070 of 2012 (DPP Vs Gurindwa Paul)** and High Court (Anti-Corruption Division) vide **HCT- OO-ACD-CSC-No 0088 of 2012** against the applicant and Civil Application No 19 of 2015 for inter alia stay of the said proceedings and the said Petition and Civil Application No 14 of 2015 have high likelihood of success of the triable issues presented therein.
- (2) The applicant also petitioned this honourable Court for determination of the matters infringing upon his Constitutional rights which he verily believes were perpetrated by the 3rd respondent and her subordinate officers by their acts of directing and requesting for Interpol Police to issue an international warrant of arrest with Interpol for no justifiable reason, thereby preventing the applicant's return to Uganda to undertake his various ongoing trials in the High Court causing negative circumstances against the applicant to be granted political asylum by the Government of Canada owing to overt infringement of the Applicants human rights by stated organs of his own country.
- (3) The applicant will suffer irreparable injury if the pending impugned proceedings and order; are not stayed in High Court (Anti-Corruption Division) **HCT-OO-ACT-CSC-No 0070 of 2012** and **Criminal Applications No 005 of 2015** arising from **ACD-CSC00070 of 2012 (DPP Vs Gurindwa Paul** which illegally deemed the Applicant to have forfeited his Constitutional Right to defend himself against the criminal charges therein without giving him a chance to return to Uganda.
- (4) This application seeks to safe guard the applicant from imminent infringement of the Applicant's rights by way of various proceedings in the subordinates courts against the applicant as a party therein which may be unconstitutional by this honourable court pending petition as such, the Respondent shall not be prejudiced if this application is granted.

- (5) This application seeks to safe guard the applicant's petition for it if is not granted the applicant's rights in the petition will be grossly violated and as such, rendered nugatory and overtaken by events.
- (6) It is in the interest of justice, equity and good conscience that allowing the applicant to exercise his right to enforce his fundamental rights that this application is granted.

The affidavit in support which contains thirty four paragraphs is to me unnecessarily lengthy. It can be divided in two broad categories. In the first category are averments of which the information is given to the deponent by her husband and in the second category are averments of which information is given to her by Counsel for the applicant. Both categories contain information that is clearly hearsay and is inadmissible in evidence. I will cite averments in each category to illustrate the point paragraph 2.

“that I was informed by the Applicant that, before the proceedings in the High Court **ACD-CSC-070 of 2012** were commenced against the Applicant, he was high handedly arrested at URA Checkpoint at Busitema on Kampala Iganga - Mbale road by the subordinate officer of the 3rd Respondent one Bushara Jalloudh who operated a road block there at, where he was tortured, assaulted and lost his property worth Ug. Shs20,000,000/= USD 650.00 Our family motor

vehicle a pickup registration no UAL 540 in which he was travelling, that was later found by our mechanic to have been destroyed by pouring a corrosive substance in its engine causing it to cease, and the said motor vehicle was never returned to us to date and we filed a case to recover it in Nakawa Chief Magistrate Court case No **Nak- 00-CV-S-0607-2013**.

Paragraph 5

“I am informed by the applicant that, the said subordinate of the 3rd Respondent the same Bushara Jalloudh, in act of vengeance without reasonable cause, hunted down other imports of the applicant handled as traced in URA system, and unlawfully cause the impounding of merchandise in containers already in Uganda then at a go down in Kampala, imported by the applicant’s clients names* Kyotera Victoria fishnet Co. Ltd and one Kagambo Vincent who successfully filed a case against the 3rd Respondent vide Nakawa Chief Magistrate Court Civil Suit No 312 of 2012 and Miscellaneous application No 275 of 2012 arising therefrom, in which the Court ordered for the release of the impounded goods to the said applicants clients to the chagrin and embarrassment of the 3rd Respondent and much annoyance and flare of hate by the said Bushara Jalloudh targeting the Applicant. (Refer to annexures attached hereto and marked “C1”, “C2”, “C3” and “C4V

Other paragraphs in this category include paragraphs 8, 9,11,12,14,15,16, 17, 18, and 21. Apart from being hearsay which makes them inadmissible they are all badly drafted. The two examples given demonstrate that a number of facts are mixed up in one paragraph instead by separating them and making them more precise.

The second category consists of facts on information from the lawyers some of which is misleading. I will cite three of such paragraphs to illustrate the point.

“that I am advised by my lawyers Geoffrey Nangumya and Company Advocate whom I believe to be telling me the truth, that the above mentioned case (HCT-00-ACD-CSC-070-of 2012) after the conviction of the co-accused with the applicant wrongly and illegally proceeded against the applicant without amending the indictment or charge sheet

to prosecute him alone until he was put to his defence which greatly prejudiced him and later by Court orders denied him his Constitutional right to defend himself in court owing to his absence, and he was ordered by Court to file his defence submissions which was done, now pending judgment in his absence. (Refer to annexure “G3” attached hereto).”

Para 13

“that I am informed by my lawyers Geoffrey Nangumya and Company Advocates whom I verily believe to be telling the truth that subsequent proceedings at and order of the High Court (Anti- Corruption Division) against the Applicant and his sureties were unlawful and that the orders of forfeiture and payments of surety Bond cash made to Court were illegal and void, (refer to annexure marked “J” attached hereto).”

Para 19

“that I am advised by my lawyers Geoffrey Nangumya and Company Advocates whose advice I verily believe to be true and correct that the High Court Trial Judge unlawfully heard and allowed the said application for forfeiture of the Applicants right to defend himself and subsequent orders that the prosecution and defence lawyers to file written submissions despite having filed criminal Application No 012 of 2015 on record, arising from CSC No 70 of 2012 on record, which was later withdrawn unheard when the trial Judge deemed it having been overtaken by events at the date of delivering his ruling, despite the application (criminal application No 005 of 2015) having been unconstitutional and fatally defective as brought personally by the DPP against your petitioner other than the Republic of Uganda prejudicing the applicant to defend himself thereof. (Refer to annexures marked “PI” and “P2”)”

Again the averments lack precision and clarity. A lot of facts are lumped together and the substance of the affidavit is lost. That apart the matters raised are either subject of adjudication or have been adjudicated upon and a decision made by the trial Court and until the decision of the trial Court is reversed a witness is not competent to aver that the decision is “unconstitutional”, “unlawful”, “illegal” or “null and void” because she has been advised so by her Counsel. In addition to paragraphs cite above the other part of the affidavit in this category are paragraphs

20, 22, 24, 25, 28, 31, and 32 which will also be struck out because neither the witness nor the Counsel on whose advice she relied were competent to testify as to the legality of the matters pending adjudication in a competent Court. The application will be determined from the surviving parts of the affidavit and the affidavits filed in reply.

In opposition to the application the first respondent filed an affidavit in reply sworn by Mr. Elisha Bafirawala a Senior State Attorney in the Attorney General's chambers. The gist of Mr Bafirawala's affidavit is that the applicant who had been properly charged before the High Court jumped bail during his trial and sought refuge in Canada where he now reside, the process to bring him back is within the Law.

The third respondent filed an affidavit in reply sworn by Mwajumah Nakku Mubiru a Supervisor, litigation Uganda Revenue Authority in which she depones that she is the prosecuting Counsel in the case against the applicant who jumped bail during his trial and neither his Counsel nor his sureties knew of his whereabouts. After waiting for almost two years the Court decided to proceed in

his absence. She stated that contrary to the applicants assertion that he had left the jurisdiction of the Court with the knowledge and permission of the Court no such permission had been granted and the applicant left without the passport that he had deposit in the Court as one of the securities.

At the hearing of the application, Mr. Geoffrey Nangumya appeared for the applicant while Ms Genevieve Kampaire, State Attorney and Mr. Peter Muliisa appeared for the Attorney General and Uganda Revenue Authority respectively. All the Counsel made oral submissions and they were in agreement that that in order for this application to succeed the criteria to be followed was as under:-

- (a) That there was a prima facie case i.e. that the matters being raised in the main petition had a high probability of success.
- (b) That the order being sought would cause irreversible damage that could not be compensated by award of damages.
- (c) That in the event the applicant fails to establish any or both (a) and (b) above, the Court should determine the applicant on the basis of the balance of convenience.

On perusal of the pleadings from all the parties and after listening to submissions of all Counsel I make findings on each of the criteria for grant of an interim order as follows:-

- (a) All the matters being raised in the application are pending before the High Court which is clothed with jurisdiction to hear a case in its original form and where need be review its own decisions. A final decision by the High Court is appellable to this Court which has such jurisdiction that a trial can be even be nullified. In the case of **Gilbert Asiimwe and Attorney General (Constitutional Application No 15 of 2010)** (unreported) Hon. Justice Amos Twinomujuni, JA expressed this Court's reluctance to interfere with a process through which the trial Court not only has capacity to adjudicate on a matter but there is also an appellate system where an aggrieved person has redress. He cited with approval the following passage from the case of Hon. Jim Muhwezi Vs Attorney General & Another (Constitutional Application No 18 of 2007) (Unreported) where this Court stated:-

“the section of the Penal Code Act under which the applicant is being prosecuted at Buganda Road Court is not being challenged. In such a situations, the prosecution can continue despite the challenge in the Constitutional Court of the truth and the manner of investigations leading to the charges in the criminal Court.

The trial Court is capable of fairly and accurately pronouncing itself on the matter without prejudice to the accused. Where any prejudice occurs, the appeal system of this country is capable of proving a remedy. Was it to be otherwise, a situation would arise whereby anyone charged with an offence could rush to the Constitutional Court with a request to stop the prosecution pending hearing his challenge against the prosecution. In due course this Court would find itself engaged in petitions to stop Criminal Prosecutions and nothing else. This could result into a breakdown in the administration of the Criminal Justice System and affect the smooth operations of the Constitutional Court (emphasis added)

In the instant case the applicant was facing trial. The trial Court granted him bail pending his trial and the trial proceeded up to the time he left for Canada. According to the affidavit of his wife there is no indication that he left the jurisdiction of the Court because of the manner in which his trial was being conducted but he left with the permission of the Court to go for treatment in Canada. But for almost two years the Court did not hear from him. The Court decided to conclude the trial in his absence. The constitutionality of the decisions to proceed in his absence can be decided even after the trial has been concluded and I find that this application does not arise a prima facie case that would warrant issuance of an interim order pending hearing of the main application.

- On the issue as to whether the non-grant of the interim order would cause irreversible that would not be compensated by way of damages there are two remedies available to the applicant if his petition was to succeed. The first remedy would be that if the court found his trial was unconstitutional, it would be nullified. Secondly the nullification of the trial would attract an award of damages.
- - I therefore find that the application does not meet the second criteria for grant of an interim order pending hearing of the main application because at the conclusion of the petition there are remedies available to him If successful.

(b) On the balance of convenience Court observes that the applicant was the architect of his own situation. Even if it was to be believed that he had travelled to Canada on being granted permission by Court there was absolutely no reason for not informing his Counsel and sureties

of his intention to go to Canada for treatment and keep them posted if the treatment took longer than anticipated. He, through his Counsel should have kept Court informed of the progress of his treatment especially when it was going to take almost two years without reporting to Court for conclusion of his trial.

I do not believe that the applicant, who absconded from his trial should benefit from a Court Order that would grant him freedom from a process of the Law meant to ensure his return to face the Law. Rather the Law should be allowed to take its course. There is also nothing to stop him from returning if he wishes to return. But ground 2 of this application seems to suggested that because he is being looked for by Interpol he cannot be granted political asylum in Canada which may be partly the reason for seeking clearance from this Court for his safe return, if at all.

Finally a brief comment on Mr. Nangumya's submission that if the international warrant of arrest is not removed the applicant would be arrested and subjected to the laws and penalties of the jurisdiction where he would be arrested from. This is not possible because a Ugandan who illegally committed offences in Uganda can only be tried under Ugandan Law and not under any other jurisdiction.

In conclusion I find no merit in this application which is dismissed.

Dated at Kampala this 23rd day of July 2015

Hon.Mr. Eldard Mwangusya

JUSTICE OF APPEAL