

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
ANTI-CORRUPTION DIVISION

CRIMINAL MISCELLANEOUS APPLICATION NO 0076 OF 2023
(ARISING FROM MISCELLANEOUS APPLICATION NO 053 OF 2023)

and

(ARISING FROM HCT-00-AC-0005-2023)

KITUTU MARY GORETTI KIMONO APPLICANT

VERSUS

ATTORNEY GENERAL RESPONDENT

Before: Okuo Jane Kajuga, J

Ruling

Introduction

This is an application brought by way of Notice of Motion under **Sections 8,16 and 17 of the Human Rights (Enforcement) Act 2019** and Rule 42 of the **Judicature (Court of Appeal Rules) Directions S1 13-10** seeking for orders that the proceedings in Criminal Case No 0005/2023, **Uganda versus Kitutu Mary Goretti Kimono and two others** be stayed pending the final determination of Civil Appeal No 1525 of 2023 in the Court of Appeal of Uganda. The appeal emanates from this court's decision in Miscellaneous Application No 53/2023 whereby the applicant had unsuccessfully sought an order nullifying her prosecution on grounds that her non derogable rights to a fair trial had been abused.

Background

The applicant who is the Minister for Karamoja Affairs in the Office of the Prime Minister (OPM) was charged with two counts of **Loss of Public Property** c/s 10(1) of the Anti-corruption Act 2009 and **Conspiracy to Defraud** c/s 309 of the Penal Code Act, Cap 120. She was charged alongside her personal assistant Abaho Joshua who is a Senior Assistant Secretary at OPM and her brother, Naboya Kitutu Micheal. It is alleged



that between June 2022 and January 2023 at the Office of the Prime Minister's stores in Namanve, she caused loss of public property to wit 9,000 and 5,500 pre-painted iron sheets Gauge 28 respectively, by diverting the iron sheets from the intended purpose of benefitting the Karamoja Community Empowerment Program to her benefit and that of third parties.

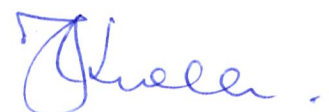
Following her committal to the High Court for trial, she filed Miscellaneous Application No 53/2023 against the Attorney General under the Human Rights (Enforcement) Act, 2019 alleging violation of her non-derogable due process rights by the agents of the respondent and praying for nullification of the criminal proceedings against her. In keeping with the provisions of section 8(1) of the Human Rights Enforcement Act, the criminal proceedings were stayed pending the resolution of the human rights violation alleged. By a ruling delivered on 28th November 2023, the application was dismissed and an order for the resumption of the criminal trial was made.

Being dissatisfied with this court's ruling, the applicant filed Civil Appeal No 1525/2023 at the Court of Appeal challenging the dismissal of her application. By this current application, the applicant seeks an order for a stay of the criminal proceedings due to commence later in February 2024.

The application is supported by the applicant's affidavit deponed on the 15th June 2023.

The grounds of the application briefly are that:

1. The applicant commenced the appellate process against the said ruling without delay and in good faith, by filing a Notice of Appeal and a letter requesting for certified proceedings.
2. The Applicant has an unrestricted right of appeal to the Court of Appeal and intends to argue that her non derogable due process rights as an accused person were violated by the Respondent's agents and this has the legal effect of rendering the current criminal charges against her vide HCT-00-AC-0005-2023 in this Court a nullity.
3. The Stay of Proceedings in HCT-00-AC-005-2023 is warranted because the intended and impending trial will frustrate and undermine the applicant's unrestricted right to appeal.



4. The appeal raises serious questions of law on the violation of non-derogable rights which will be rendered moot and pre-empt the consideration of the appeal.
5. The question of non derogable due process rights of accused persons which is the pivot of the applicant's appeal is so fundamental that the law requires that any pending criminal proceedings be stayed till the said questions have been conclusively resolved on appeal.
6. It is in the interest of justice that the Court wholly grants this application for a stay of proceedings in HCT-00-AC-0005-2023 so that the Applicant can exercise her right to be heard on appeal.

Representation

The applicant was represented by **Jude Byamukama** and **Zahara Tumwirikirize** from JByamukama & Company Advocates while the Respondent was represented by **Johnson Natuhwera (SSA)**, **Jackline Amusugut (SA)**, **Raymond Nyanzi (SA)** and **Arnold Kyeyune (SA)** from Attorney General's Chambers. Both parties made oral submissions which I have considered in this Ruling.

Applicant's Submissions

Counsel for the applicant submitted that the application is premised on Rule 42 of Judicature (Court of Appeal Rules) Directions SI 13-10 which provides that whenever an application may be made either in the Court of Appeal or the High Court, it shall first be made in the High Court, and that this applies to applications for stay of proceedings. He relied on the authority of **Aids Health Foundation versus Dr Stephen Mirembe Kizito (Court of Appeal Civil Application No 146/2014)** where it was held as follows;

"The High Court has jurisdiction to hear and determine an application for stay of execution pending appeal to this court, an injunction and a stay of proceedings. The Rules of this Court require that where this court and the High Court have concurrent jurisdiction over a matter, such a matter ought to be brought in the High Court first"

He further cited **Augustine Mukiibi versus Hosanna Evangelistic Mission and 4 others, Court of Appeal Civil Application No 294/2017)** where Musoke J reiterated the same position that it is ideal for the High Court to handle an application for stay first and only where it fails to do so, or fails to accept jurisdiction and only in special circumstances will the Court of Appeal handle the application first. There is no contest



to the jurisdiction of this court to handle the application, and legal position was aptly elaborated by counsel for the applicant.

On the substantive application, he submitted that the provisions of the Human Rights (Enforcement) Act 2019, specifically Sections 8(1), 16 (1)(b) and (3) read together can only be interpreted to mean that when a question regarding violation of human rights is on appeal, the proceedings must be stayed pending the outcome of the appeal. In his considered view, this is emphasized by the provision of statutory timelines for determination of appeals under the Act

He prayed that the court adopts the decision in the case of **Paul Wanyoto versus Sgt Oumo and Attorney General, Miscellaneous Application No 2 of 2021** where the Hon. Justice Gidudu Lawrence in consideration of the Human Rights (Enforcement) Act stayed criminal proceedings pending the outcome of an appeal filed in similar circumstances. He implored the Court to apply the same precedent which is the correct position of the law, and be pleased to stay the criminal proceedings to avoid rendering her appeal nugatory. He also prayed that costs abide the outcome of Civil Appeal No 25 of 2023.

Submissions of the Respondent

The Respondent opposed the application and filed an affidavit in reply deposed by Anna Kiiza, a Chief State Attorney in the office of the Director of Public Prosecutions. They contended that the civil proceedings in the court of appeal cannot bar the applicant's prosecution on criminal charges in the High Court and both matters can proceed concurrently. Further, that the applicant has failed to demonstrate a prima facie case and the likelihood that the appeal will be rendered nugatory if the application for stay is not granted. In their considered view, the applicant's memorandum of appeal does not raise arguable grounds and offers no plausible justification to alter the ruling of this court, hence is not likely to succeed.

It is the respondent's case that the criminal matter against the applicant is a matter of public interest and therefore takes precedence over any civil matters. In law, a stay of criminal proceedings is a grave judicial action requiring the application of a higher and more stringent test before issuance. They argued that the application had been brought in bad faith with the pure intention of delaying the criminal proceedings.

They relied on the case of **Hon Sekikubo and others Vs Attorney General Supreme Court Constitutional Application No. 4 of 2014** for the principles governing stay of execution of orders, that the applicants must prove the appeal has a likelihood of



success and that he will suffer irreparable damage if a stay is not granted. They urged the court to consider the balance of convenience which was in favour of the victims of the crime, the people of Karamoja.

Counsel for the Respondent cited the case of **Sara Kulata Basangwa Vs IGG, Supreme Court Misc. Application No 465 of 2011** which relied on **Zedekia Kato Vs Uganda Court of Appeal CA No 100 of 2019** where it was held that an order for stay of criminal proceedings should be made sparingly and only in exceptional circumstances. In the instant case, they argued that no exceptional circumstances have been demonstrated.

They argued that the applicant is well represented and will receive a fair and just hearing from the court, emphasizing that a fair trial is not only about protecting suspects but also assuring victims of crime of attaining justice, as held in **Dr. Stella Nyanzi versus Uganda, Criminal Appeal No 79 of 2019**.

They highlighted the distinction between criminal and civil proceedings and stated that the applicant will not be prejudiced in any way as the case which is on appeal is purely a civil matter which can be atoned by way of damages. That the constitution requires a fair speedy and public trial in criminal matters, and any delays will lead to a deterioration in evidence and likely compromise of witnesses.

Lastly, they submitted that the orders the applicant seeks to rely on will lead to a breakdown of the administration of criminal justice in the Country by setting a precedent where a person charged with a criminal offence will rush to another court with intent to stay proceedings, effectively interfering with the mandate of the DPP. The case of **Dr Tiberius Muhebwa Vs Uganda, Constitutional Petition No 09 of 2012** was cited as authority for this position.

That a stay of proceedings pending disposal of a civil appeal isn't envisaged under the Human Rights Enforcement Act after a decision has been rendered.

Accordingly, they prayed that the application is dismissed as the applicant is not entitled to any of the remedies sought.

In rejoinder, counsel for the applicant disagreed with the argument that civil matters must give way to criminal matters. He pointed out that the legal authorities relied on by the respondent do not apply as they don't arise from the Human Rights Enforcement Act, 2019 and that **Sections 8, 16 and 17** thereof create a different structure granting



precedence to matters of violation of non derogable rights within the ambit of enforcement of Human Rights.

He concluded that the Human Rights Enforcement Act provides an automatic right of appeal and **Section 16(2)** thereof provides that the appeal must be heard within 3 months. This is intended to avoid the mischief of such applications being used to delay criminal trials and allay any such fears on the part of the respondent.

They reiterated their prayer that the application be granted.

THE LAW

It is imperative that in resolving the question of whether a stay of proceedings ought to be granted in the circumstances of this case or not, the provisions of the Human Rights (Enforcement) Act, 2019 which is the legislation under which this application is brought, must be critically and wholly analyzed to interpret the meanings of the provisions therein and the spirit of the law.

The preamble to the Act asserts that it was enacted to provide a procedure for the enforcement of Human Rights guaranteed under Chapter Four of the 1995 Constitution. It enables a person or organisation who claims that their fundamental or other right or freedom guaranteed under the Constitution is infringed to apply for redress to a competent Court. Section 4 thereof grants the High Court the jurisdiction to hear and determine applications relating to the enforcement or violation of non derogable rights guaranteed under Article 44 of the Constitution.

More specifically, Section 8 guides on the procedure to be adopted where during proceedings in the High Court, a question arises as to the violation of a fundamental right or freedom.

Section 8 (1) thereof reads as follows;

“Where, in any proceeding in the High Court, a question arises as to the violation of a fundamental right or freedom, the presiding Judge shall immediately stay the proceedings and determine the question raised”

The import of this provision which is couched in mandatory terms with the use of the term “shall”, is that the High Court must pend the criminal trial until it has resolved the allegation of human rights violation raised during the trial. This position is in my considered view, necessitated and strengthened where the alleged violations relate to the right to a fair trial, which is a non-derogable right under Article 44 of the

Constitution, owing to the subsequent provisions of **Section 11 (2) (a, b and c)** which provides as follows:

“Whenever in any criminal proceeding-

(a) It appears to the judge or magistrate presiding over a trial,

(b) It is brought to the attention of the competent court, or

(c) The competent court makes a finding

that any of the accused person’s non-derogable rights and freedoms have been infringed upon, the Judge or Magistrate presiding over the trial shall declare the trial a nullity, and acquit the accused person. (emphasis mine)

The effect of a finding in favour of an applicant who alleges violation of a non derogable right to a fair trial is the automatic nullification of the proceedings and discharge of the accused. In that context, it is logical that the trial court awaits the outcome of the investigation into the human rights violation before delving into a trial. That, in my view, is what the enactors of the law intended.

Section 16 provides for a right of appeal where a person is aggrieved by the decision of the competent court in respect of the enforcement of Human Rights, as follows;

(1) A person aggrieved by a decision or order of a competent court may,

(a) in case of decisions or orders of a magistrate court, appeal to the High Court

(b) in case of decisions or orders of the High Court, appeal to the Court of Appeal, or

(c) in case of decisions or orders of the Court of Appeal, appeal to the Supreme Court

(2) The court to which an appeal is filed under subsection (1) shall proceed to hear and determine the appeal within three months from the date of filing the appeal and may for that purpose, suspend any other matter pending before it (emphasis mine)

The law requires that an appellate court hearing and determining an appeal filed under the Human Rights (Enforcement) Act 2019 relating to the violation of fundamental human rights and freedoms must do so with urgency, and must prioritize the



resolution of the appeal, including setting aside other matters in order to do so, wherever and whenever necessary.

It is my take that the above provisions of the Act, read together, support the position that the question relating to violation of human rights must be resolved first before the criminal trial can proceed. The enactment of the law was intended to improve the rule of law in Uganda by fostering adherence to the bill of rights enshrined in Article 4 of the Constitution. The Human Rights (Enforcement) act, 2019 changed the landscape of criminal proceedings, by requiring courts presiding over criminal cases to be sensitive to the full realization of the rights of the accused persons through the processes of the criminal justice chain including arrest, detention, interrogation and investigations, and other pre-trial and prosecutorial actions.

In the case of **Wanyoto versus Sgt Ouma and Another, Civil Appeal No 91 / 2021**, which is binding upon this court, the Court of Appeal cited with approval, the decision of the Court of Appeal of Kenya in **Albanus Mwasia Mutua versus Republic [2006] eKLR**, where it observed that it is the duty of the courts to enforce the provisions of the Constitution otherwise there would be no reason for having those provisions in the first place.

In the same case, our own court of Appeal emphasised that;

“...it is our duty as courts of law to enforce fundamental human rights and freedoms under both the Constitution and the Human Rights (Enforcement) Act, 2019... The law does not permit competent courts to turn a blind eye to the actions of the respondent No 1 which amounted to a violation of the appellant’s rights to a fair hearing. The law compels us to hasten to protect people’s fundamental rights and freedoms and has provided various remedies including nullifying any prosecution that violates the non-derogable rights of a person”

The spirit of the law is well encapsulated in the above decision. As a balance to ensure no delay to the main criminal trial out of which the violation arose, **Section 7 (1)** of the same Act sets a timeline of 90 days within which the question of violation must be resolved. Section 16 sets a time line of three months in cases where when the case goes on appeal.

There is no provision in the Human Rights Enforcement Act expressly requiring a stay of proceedings when an appeal is filed under Section 16 of the Act. The mandate for a stay of proceedings pending appeal in criminal cases, is inferred from the inherent powers of the court as provided under **Section 33 of the Judicature Act** and the

application of the rules of civil procedure stipulated under Section 17 of the Human Rights enforcement Act.

There are a myriad of decisions that offer guidance to this court regarding the stay criminal trials.

- 5 In **Goddy Mwakio and another versus Republic [2011] eKLR** the Court of Appeal of Kenya stated; ***“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances”***

In **Kenya Wildlife Services Versus James Mutembei (2019)**, it was held that;

- 10 ***“stay of proceedings is a grave judicial action which seriously interferes with the right of the litigant to conduct his litigation, it impinges on the right of access to justice, right to be heard without delay and overall, right to a fair trial. Therefore, the test for stay of proceedings is high and stringent.”***

The Court in that case quoted with approval, **Global Tours and Travels Limited, Nairobi HC Winding Up Cause No 43 of 2000** where it was stated thus;

- 15 ***“...Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms should it be granted. In deciding whether to order a stay, the court should essentially weigh the pros and***
20 ***cons of granting or not granting the order...and in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not, but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought***
25 ***expeditiously”***

The application for stay of proceedings in the Kenya Wildlife case was unsuccessful on grounds that the same would foster delay and that the applicants had not demonstrated an arguable appeal.

- 30 I find the above authorities instructive and persuasive as they set out the general principles of the law regarding stay of proceedings. I note however that both decisions were not decided in the context of human rights violations, as envisaged under the Act, 2019.



It is also the general principle that where an unsuccessful party is exercising their unrestricted right of appeal, it is the duty of the Court to make such order for staying proceedings that will prevent the appeal from being rendered nugatory (**Wilson Vs Church (1879) volume 12ch d454** followed in **Global Capital Save 2004 Ltd and Anor Vs Alice Okiror & Anor HCMA No 484 of 2012**).

This power to grant stay of proceedings is to be exercised sparingly and carefully given the peculiar circumstances of each case. (See **Omar Awadh Omar and 10 others versus Attorney General, Consolidated Constitutional Petitions No 55 and 56 of 2011**)

I have considered the decision of Justice Lawrence Gidudu in **ACD Miscellaneous Application No 2/2021, Paul Wanyoto Mugoya versus Sgt Oumo Joshua and Attorney General** where an application similar to the instant one was handled. He held as follows;

“Under the Human Rights (Enforcement) Act, allegations of torture must first be resolved before the trial proceeds. The applicant seeks to nullify the trial from which a warrant of arrest has been issued against him. With all the sympathies for the complainant in the main criminal case, in view of the appeal filed against the decision of this court I am constrained to stay the trial of criminal CASE No 75/2019 and consequently the warrant of arrest issued against the applicant to allow the court of Appeal pronounce itself on the legality of the case before this court. I am hopeful that the issue will be resolved soon one way or another by the court of Appeal since Section 16 (2) of the Human Rights (Enforcement) Act requires that the appeal be disposed of within three months. It would be pointless to proceed with the trial here only for the court of Appeal to decide otherwise”

I agree fully with the above decision, and see no cause to depart from it. This point is emphasised by the fact that the Court of Appeal in that case, went ahead to find that the appellant’s non derogable rights had been infringed and the charges in the High Court were nullified. A stay of prosecution was ordered.

Resolution of the Court

It is not in contention that the applicant has filed an appeal in court of appeal. A notice of appeal was attached to the affidavit in support of the application and marked “C1”. I have also looked at the memorandum of appeal attached to the supplementary affidavit in support of the application and considered the grounds raised on appeal. I am unable to conclude that the appeal is vexatious, lacks a legal basis or merit and is filed in bad



faith, even though the application before me failed. I am only required to be satisfied that the points are arguable and I so find.

It is the spirit of the Human Rights (Enforcement) Act, 2019 that any allegations of violation of fundamental rights and freedoms that arise during criminal proceedings, most especially non derogable rights specified in Article 44 of the Constitution, that the question must first be settled before the trial resumes. This applies both to the trial court's determination, and where an appeal has been filed in the appellate court, in this case, the Court of Appeal.

It is my considered view that any fears of delay in the criminal trial that may be caused by a pending appeal are allayed by **Section 16 (2) of the Human Rights Enforcement Act** which requires the appellate court to prioritise the hearing and resolution of the appeal and conclude it within three months. There's no likelihood of delay on the part of this court as the record of proceedings has already been typed and certified ready for the appellate court. I am satisfied that the Act provides this safety measure of the deadline to curtail any prejudice that the prosecution or the victims of crime may face from any inordinate delay.

It will be a futile and costly exercise for the court to proceed with the trial, and for the prosecution to call its witnesses and proceed to lead evidence, and even for the accused to defend themselves, only for the Court of Appeal to decide otherwise.

I see no miscarriage of justice that would be occasioned by a grant of the application.

In conclusion therefore, the application succeeds.

I accordingly stay the proceedings in Criminal Case No 5/2023 pending the decision of the Court of Appeal in Civil Appeal 1525/2023

I so order



Okuo Jane Kajuga

7/2/2024