THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 109 OF 2024

(Arising from Civil Appeal No.147 of 2024)

KITUTU MARY GORETTI KIMONO :::::::::::::::::::::::::: APPLICANT

VERSUS

1. **THE ATTORNEY GENERAL**
2. **HON. BETI KAMYA TURWOMWE**
3. **THE INSPECTOR GENERAL :::::::::::::::::: RESPONDENTS OF GOVERNMENT**

BEFORE: HON JUSTICE OSCAR KIHIKA, JA

(Sitting as a single Justice)

RULING OF COURT

This application was brought under **Sections 8, 16 (1) (b) and 17 of the Human Rights (Enforcement) Act 2019** and **Rules 2(2), 6(2)(b), 43(1) & (2)** and **Rule 44** of the **Judicature (Court of Appeal Rules) Directions SI 13-10** seeking for orders that;

1. An order of stay of the criminal proceedings against the Applicant in HCT-00-AC-CO-0056-2023 (Uganda Vs Kitutu Mary Goretti and others) at the Chief Magistrate's Court (Anti-Corruption Division) till the disposal of the Applicant's intended appeal to this Court vide Civil Appeal No. 147 of 2024 against

the ruling of the High Court in Miscellaneous Application No. 002 of 2024 (Kitutu Mary Goretti Vs AG & IGG, Beti Kamya).

2. Costs of this Application abide the outcome of the intended Appeal vide Civil Appeal No. 147 of 2024 before this court.

Background

The Applicant is the Woman Representative for Manafwa District and former Minister for Karamoja Affairs and was charged by the office of the DPP with two counts of Loss of Public Property c/s 10(1) of the Anti-Corruption Act and Conspiracy to Defraud c/s 309 of the Penal Code Act in Criminal Case No. HCT-00-AC-005-2023. The IGG also issued written summons to the Applicant requiring her to appear at her offices on 11th January 2024 to give information on an ongoing inquiry in respect of management of supplementary funds released to the OPM for FY 2021/2022. The Applicant filed 2 applications seeking a temporary injunction and interim orders against the IGG challenging their summons and investigations.

Before these applications could be heard, the IGG brought fresh charges against the Applicant at the Anti-Corruption Court vide HCT-00-AC-005/2023 by amending the charge sheet to include the Applicant. The Applicant filed an application vide Miscellaneous Application No. 002 of 2024 seeking a declaration that the subsequent charges brought against the Applicant contravene her right to a fair hearing and a permanent injunction against the IGG restraining further prosecutions arising out of the alleged mismanagement of supplementary funds released to the office of the

Prime Minister to support peace-building activities in the Karamoja sub-region. The Trial Court dismissed MA 002 of 2024 and ruled that the parallel and additional charges against the Applicant are lawful and do not violate her right to a fair trial save for subjecting her to additional legal expenses.

The Applicant was dissatisfied with the ruling of the High Court (Anti-Corruption Division) and filed an appeal against the ruling in this court vide Civil Appeal No.147 of 2024. The applicant also filed this application before me seeking to stay the proceedings in HCT-00-AC-CO-0056-2023.

The grounds upon which this application is premised are set out in the Notice of Motion and the affidavit in support of the Notice of Motion sworn by the Applicant on the 21st of February 2024. The grounds are briefly that;

1. The Applicant is aggrieved with the ruling of the High Court delivered on the 19th February, 2024 in Miscellaneous Application No.002 of 2024 declining to prohibit the 2nd Respondent from instituting parallel and additional criminal proceedings against her arising out of one broad investigation concerning alleged mismanagement of a supplementary budget for Karamoja sub region in the financial year 2021/2022.
2. The Applicant has an automatic right of appeal against the said ruling and has already filed an appeal vide Civil Appeal No.147 of 2024 by lodging a Notice of Appeal and letter for requesting for certified proceedings.

3. The charges preferred against the Applicant by the 2nd Respondent vide HCT- 00-AC-CO-0056-2023 manifestly violate her right to a fair trial as they arise out of the same broad investigation that led to the charges against her in HCT-00-AC-0005-2023.
4. The Applicant's appeal No.147 of 2024 before this court has a high likelihood of success and it is unjust for the criminal proceedings in HCT-00-AC-CO-0056-2023 to commence against the Applicant as scheduled on **29th February, 2024** before my appeal is conclusively determined.
5. The intended appeal in this court will be rendered nugatory if the criminal proceedings instituted by the 2nd Respondent vide HCT-00-AC-CO-0056 are not stayed pending determination of the appeal.

The application was opposed by the respondents who filed an affidavit in reply sworn by Brenda Kimbugwe Mawanda on the 26th of February 2024 briefly stating that;

1. The application is incompetent and ought to have been filed in the High Court first.
2. The 2nd Respondent is sued as the Inspector General of Government in exercise of her constitutional functions and was therefore wrongly added as a party to the suit.
3. The trial court found that there was no connection between the acts that constitute the transactions in the alleged diversion of iron sheets and the charges under case No. 56 of 2023.

4. That the offences with which the Applicant is charged were not committed in the course of the same transaction and are quite different.
5. The Applicant's appeal has no likelihood of success and the Applicant has not demonstrated a prima facie case with the possibility of success.
6. That the Applicant's appeal is a civil matter and proceedings in the criminal matter do not affect the proceedings in a civil matter.
7. The balance of convenience lies in favor of the Respondent who has the constitutional mandate to eliminate and foster elimination of corruption and abuse of office by public officers.
8. This application was brought in bad faith and is intended to interfere with the constitutional mandate of the Inspectorate of Government and defeat the course of justice.

Representation

At the hearing of this application, Mr. Jude Byamukama and Ms. Zahara Tumwikirize appeared for the Applicant while the Respondents was represented by Ms. Jackie Amsugut and Mr. Arnold Kyeyune together with Mr. Vincent Kasujja from the Inspectorate of Government.

Consideration of the Application

I have carefully considered the law applicable to this application and the authorities cited to court together with the affidavit evidence on record.

Before I consider the merits of this application, I find it pertinent to address the issue raised by the Respondents' counsel that this application ought to have been filed in the High Court in the first instance.

Following the decision of the **Supreme Court in Lawrence Musiitwa Kyazze versus Eunice Busingye Civil Application No. 18 of 1990,** an application of this nature ought to have been made at the High Court first. In that case the Supreme Court stated as follows at page 10;

> *"This court would prefer the High court to deal with the application for a stay on its merits first, before the application is made to the Supreme Court. However, if the High Court refuses to accept the jurisdiction, or refuses jurisdiction for manifestly wrong reasons, or there is great delay, this court may intervene and accept jurisdiction in the interest of justice"*

Rule 42 of the Rules of this Court requires 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.

It provides as follows: -

> ***"42. Order of hearing applications***
>
> ***(1) Whenever an application may be made either in the court or in the High Court it shall be made first in the High Court.***

(2) Notwithstanding subrule (1) of this rule, in civil or criminal matter, the court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any as the justice of the case requires, or entertain an application under rule 6 (2) (b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court."

The above Rule therefore requires that applications of this nature should be first filed in the High Court as a general rule, and should only be filed in this court, where exceptional circumstances exist.

In this case, the Applicant submitted that there are exceptional circumstances of foreseeable unreasonable delays in case the Applicant had filed for stay before the High Court first. That the intended second criminal trial against the Applicant was slated to commence on the 29th day of February, 2024 when the Applicant was required to answer summons to appear before the Anti-Corruption Court. It is the Applicant's case that there would be no adequate time for a stay application to be heard by the High Court and then if unsuccessful, for this court to weigh in and entertain a fresh application.

I am inclined to agree with the Applicant that the circumstances of this application are special, given the timelines set for the

commencement of the second criminal trial. As such this would justify the presentation of the application in this court without having first to file the same in the High Court.

The Respondents also raised an issue regarding the 2nd and 3rd Respondents. It has been argued that the 2nd and 3rd Respondents were wrongly added as parties to this Application. I find it necessary to address this issue as well.

The Respondent argues that the 2nd Respondent was sued in her personal capacity in Civil Appeal No. 147 of 2024 from which this application arises. However, Miscellaneous Application No. 002 of 2024, which led to the institution of Civil Appeal No. 147 of 2024 was against the 1st and 2nd Respondents and the court disregarded the 3rd Respondent as a party to the suit in her capacity as the Inspectorate of Government. In my view, the issue of whether the 2nd Respondent is properly joined to these proceedings having been party to Miscellaneous Application No.0002 of 2024 is a matter that will be handled by this court in Civil Appeal No.147 of 2024. The 2nd and 3rd Respondents are also parties to the appeal and it would be premature for this court to determine the viability of the appeal or application herein against the 2nd and 3rd Respondents.

The Application

It is settled law that for an application for an order of stay of proceedings or injunction, whether interim or not, to succeed, the applicant has to show court that:

1) He/she has a prima-facie case in the appeal, that the appeal is neither frivolous no vexatious and that the matters raised therein have a probability of success.

2) Failure by court to grant the order of stay of proceedings sought will cause irreparable damage that cannot be compensated for by an award of damages.

3) If court is in doubt on both of the above two requirements or any of them, the court will determine the application on the balance of conveniences.

See **Geilla vs Cassman Brown & Co. Ltd [1973] EA. 358; Noor Mohammed Kassamali VIRJI Vs Madhani [1953] 20 EACA 80, Robert Kavuma vs M/S Hotel International, SCCA No. 19 of 1990**, and **American Cyanamid Co. V Ethicon Ltd [1975] ALL ER 504 at P 510** Per Lord Diplock.

(a)Prima-facie case

On the question of whether the applicant has shown a prima-facie case with a probability of success, the applicant's counsel submitted that the Applicant's appeal vide Civil Appeal No.147 of 2024 raises pertinent legal questions in light of the Constitutional Court decision in **Kazinda Geoffrey vs Attorney General CP 30 of 2014**, which prohibited splitting and sequentially initiating charges of offences founded on the same facts. That the Applicant herein could be subjected to two different criminal proceedings arising out of alleged

mismanagement of a supplementary budget for Karamoja for the financial year 2021/2022.

Counsel submitted that this court shall also resolve the issue of whether the Prosecution commenced by the Office of the DPP vide HCT-00-AC-005-2023 and the Prosecution commenced by the IGG vide HCT-AC-CO-0056-2023 are of a similar character and can be joined in one trial.

In reply, counsel for the 2nd Respondent argued that the 2nd Respondent was wrongly sued in this case and the application ought to be dismissed as against the 2nd Respondent. In addition, counsel argued that the 2nd and 3rd Respondents do not qualify to be parties to the suit in view of the provisions of Article 250(1) of the Constitution which provides that such claims ought to be brought before government.

Counsel argued that no extra ordinary circumstances have been illustrated by the Applicant to warrant a stay of the criminal proceedings against the Applicant in HCT-00-AC-005-2023. That the Applicant has not demonstrated a prima facie case with a probability of success. That there is no connection between the acts that constitute the transactions in the alleged diversion of iron sheets and the peace building activities. The Respondent's counsel submitted that the Applicant has no arguable case and no fundamental rights were infringed upon by the prosecution of the DPP and the IGG.

The Applicant, contends in paragraph 7 of her affidavit that she has satisfied this condition for the grant of stay of the criminal

proceedings against her because Civil Appeal No.147 of 2024, which she has filed before this court intends to raise pertinent legal questions for determination to wit;

i. Whether, in light of the Constitutional Court decision in **Kazinda Geoffrey vs Attorney General CP 30 of 2014**, prohibiting endless investigations as well as splitting and sequentially initiating charges of offences founded on the same facts, the Applicant could be subjected to two different criminal proceedings arising out of alleged mismanagement of a supplementary budget for Karamoja for the financial year 2021/2022, per paragraph 4 of the affidavit in support.

ii. Whether the Prosecution commenced by the Office of the DPP vide HCT-00-AC-005-2023 and the Prosecution commenced by the IGG vide HCT-AC-CO-0056-2023 are of a similar character and can be joined in one trial?

The above issues raised by the Applicant pose arguable questions to be determined by this court. In **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] e KLR,** the Court of Appeal of Kenya described an arguable appeal in the following terms:

"vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or

final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."

I find that the decision in **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others** (supra) is of persuasive value and would adopt the same reasoning. It is thus not necessary to pre-empt considerations of matters for the full bench in determining the appeal, as were argued by the Respondents in their affidavit in reply and the submissions. In the instant case, the applicant has laid out the questions for this court to determine in the appeal. It is therefore my considered view that the applicant has established that she has a prima facie case pending determination before this court.

(b) Irreparable damage

The second consideration is whether the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if an order of stay of proceedings is not granted.

The Applicant's counsel submitted that the Applicant complains about infringement of her right to a fair hearing in HCT-00-AC-005-2023 which will lead to irreparable damage that cannot be atoned for in terms of monetary damages. Counsel relied on the decision in **Constitutional Application No. 06 of 2013 Davis Wesley Tusingwire V Attorney General** for the proposition that irreparable damage amounts to damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement.

In reply, counsel for the Respondent submitted that the Applicant has not shown that she will suffer irreparable damage that cannot be atoned by way of compensation. Counsel argued that the matter involves public interest and the state injuries are irreparable compared to the damage caused to the Applicant.

The term "irreparable damage" is defined in **Black's Law Dictionary, 9th Edition at page 447** to mean;

"damages that cannot be easily ascertained because there is no fixed pecuniary standard measurement"

In my understanding, the applicant has to show that the damage bound to be suffered is such that it cannot be undone or compensated for in damages.

In **Giella v. Cassman Brown & Co. [1973] E.A 358**, it was held that by irreparable injury, it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or material one that is; one that cannot be adequately atoned for in damages. Likewise, In the case of **American Cynamide vs Ethicon [1975] 1 ALL E.R. 504** it was held;

> *"The governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a Permanent Injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant's continuing to do what*

was sought to be enjoined between the time of the Application and the time of the trial."

In the instant case, the Applicant argues that the commencement of the second criminal proceedings would infringe on her right to a fair hearing. This of course is a matter that is to be determined in the main appeal. However, the right to a fair hearing in Article 28 of the Constitution is an inalienable right that ought to be strictly observed. If the second trial were to proceed before determining whether or not the Applicant's right to a fair hearing was infringed upon, would in my view be prejudicial to the Applicant who would suffer immeasurable damage on account of being subjected to proceedings that could affect her right to a fair hearing. I therefore find that the Applicant has satisfied this court that she will suffer irreparable damage if this application is not granted.

Given that the Applicant has established that she has a prima facie case and that she is bound to suffer irreparable damage, I do not find it necessary to consider the balance of convenience. The position of the law is that a court should consider balance of convenience when in doubt. See **Jayndrakumar Devechand Devani Vs. Haridas Vallabhdas Bhadresa & Anor, Civil Appeal No. 21 of 1971** where the Court of East Africa observed *inter alia* that:

"Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to

the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff."

I therefore find that the Applicant has made out a case for issuance of an order of stay of proceedings and I hereby allow this application with the following orders;

1. An order for stay of the criminal proceedings against the Applicant in HCT-00-AC-CO-0056-2023 (Uganda Vs Kitutu Mary Goretti and others) at the Chief Magistrate's Court (Anti-Corruption Division) is hereby issued till the disposal of Civil Appeal No. 147 of 2024 pending before this court.
2. Costs shall abide the outcome of the appeal.

I so order

Dated this ....28th.... day of .....March.....2024

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OSCAR JOHN KIHIKA
JUSTICE OF APPEAL