

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**  
**MISCELLANEOUS APPLICATION NO.551 OF 2018**  
**(ARISING FROM MISCELLANEOUS CAUSE NO.212 OF 2018)**

**ACP BAKALEKE SIRAJE----- APPLICANT**

**VERSUS**

**ATTORNEY GENERAL ----- RESPONDENT**

**BEFORE HON. JUSTICE MUSA SSEKAANA**

**RULING**

The Applicant brought this application by way of Chambers summons against the respondent under Section 7 and 10 of the Government Proceedings Act Cap 77, Section 33 of the Judicature Act cap 13 and Section 98 of the Civil Procedure Act, Rule 6 of the Government Proceedings (Civil Procedure) Rules and Order 41 r 1, 2 & 9 of the Civil Procedure Rules, for orders that;

1. The applicant be granted leave to proceed *ex parte* against the respondent in Miscellaneous Cause No. 212 of 2018.
2. That a temporary injunction be issued against the respondent and or any of her agents from prosecuting the applicant until the main application is heard and determined on merit.
3. Costs of the application be provided for.

The grounds in support of this application are set out in the affidavit of Bakaleke Siraj and Kasule Joseph dated 19<sup>th</sup> September 2018 which briefly states;

1. That the applicant instituted an application for judicial review against the respondent vide Miscellaneous Cause No. 212 of 2018 which is pending before this Honourable Court.
2. That the respondent was duly served with the application but neither did she make a reply nor attend court when the matter came up for hearing on 11<sup>th</sup> September 2018.
3. That the applicant is at threat of being prosecuted upon the decision which is being challenged in Miscellaneous Application No. 212 of 2018.
4. That the respondent through the Director of Public Prosecutions instituted charges against the applicant without any scintilla of evidence and on directions of a third party which led to the suspension of the applicant.
5. That the applicant is challenging its decision on grounds of it being arbitrary, unreasonable and contrary to public interest and an abuse of court process and the law.
6. That the Anti-Corruption court issued summons against the respondent in respect of charges which are a subject of judicial review before this court.
7. That if leave is not granted, the respondent's agent to wit DPP will continue to persecute the applicant which will irreparably infringe on my rights.

In opposition to this Application the Respondent through a Samuel Tsubira- State Attorney in Attorney General's chambers filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. The DPP properly acted within the powers and functions granted by the Constitution in handling matters upon which the above application arises.

2. The respondent counsel was unable to reply and attend court on the day the matter was fixed for hearing since he had an earlier scheduled matter in the High Court of Uganda at Jinja before Justice Elubu.
3. That the respondent upon receipt of the application MA 212 of 2018 sent out letters to DPP seeking instructions to represent them and sought further and better particulars.
4. That the DPP perused case file Ref AVPOL CRB 047/2018 involving the applicant and determined the evidence was sufficient to instituted criminal proceedings against him on the preferred charges of Abuse of Office, Conspiracy to Defraud, Kidnapping or Abducting with intent to confine and Conspiracy to commit a felony as contained in the charge sheet.
5. That the DPP took the case to the Anti-Corruption Court, where the prosecution evidence will be adduced in the presence of the applicant and he will have a right and opportunity to respond.
6. That a civil court will not have the opportunity to hear the evidence, cannot have the opportunity to properly determine the criminal liability of the applicant, or determine that there is no scintilla of evidence as alleged by the applicant ,on the basis of judicial review.
7. That the application if granted will constituted a miscarriage of justice and the same should be dismissed with costs.

In the interest of time the respective counsel were directed to file written submissions and i have considered the respective submissions. The applicant was represented by *Mr Ssenfuka Robert* whereas the respondent was not represented and by the time of writing this ruling they had not filed any submissions.

***Whether the applicant should be granted leave to proceed ex parte against the respondent?***

The applicant's counsel submitted that, the grounds for grant of this application are that the Attorney was duly served with the main application and that the attorney General did not enter appearance neither have they filed a reply before this honourable court this is evidenced in one of the ground of the application supported by the affidavit of the applicant and the additional affidavit of Kasule Joseph

Counsel further submitted that this instant application was also served onto the respondent together with the DPP's office (as directed by this honourable Court) but the respondent still chose not to respond and or appear when the matter was called on the 2<sup>nd</sup> day of October,2018.

This court notes that it is not true that the respondent did not respond to this current application. The respondent filed an affidavit if reply on 4<sup>th</sup> October 2018 and they set out the reasons why they were not able to file a reply in time. They stated that the respondent counsel who had personal conduct of the matter was appearing in Jinja before Justice Elubu.

Secondly, they stated that upon being served with the Miscellaneous Cause 212 of 2018, they sent out letters to DPP seeking instructions to represent them and also sought further and better particulars about the case.

It is clear from the affidavit in reply that the Attorney General is interested in taking part in the proceedings of this matter and it would be unfair to shut him out of the proceedings and above all it is in the interest of justice that they make a response to the serious allegations made against the DPP in this matter.

This court would not grant leave to proceed *exparte* against the Attorney General.

***Whether a temporary Injunction should issue against the respondent?***

The applicant's counsel submitted that the applicant seeks an order of a temporary injunction to be issued against the respondent and or any of her agents from prosecuting the Applicant until the main application is heard and determined on its merit.

The applicant's counsel set out the law on temporary injunction as provided for under S.33 of the Judicature Act Cap.13, S.98 of the Civil Procedure Act (CAP.71), O.41 R1, 2 & 9 of the Civil Procedure Rules (S.I71-1) and it's granted at court's discretion. This is aimed at maintaining the status quo or the existing state of affairs before a given particular point in time as stated in *Erisa Rainbow Musoke v Ahamada Kezala [1987] HCB 81*. Further the case of *Kiyimba Kaggwa v Haji Abdul Nasser Katende [1985] HCB 43*, lays down the rules for granting of a temporary injunction which include;

- *There should be a prima facie case disclosed and*
- *To maintain the status quo*
- *The order is intended to save the applicant from suffering irreparable injury or damage.*

***There should be a prima facie case disclosed;***

Before deciding to grant or to deny a temporary injunction, it's important to consider if there is a prima facie case , according to *Lord Diplock* in ***American Cyanamid Co. v Ethicon Ltd [1975] AC 396 [407—408]***, the applicant must first satisfy court that his claim discloses a serious issue to be tried. The applicant in paragraph 3 depones that he instituted a case for judicial review against the respondent seeking orders of certiorari against the decision of the Director of public prosecutions to prosecute him arbitrarily without evidence. It is not in contention that the Director of public prosecutions is a public officer exercising a public function. In this case, the applicant seeks a prohibitive order in the main application which is similar to a temporary injunction. Arguing the merits and making submission on whether the Director of public prosecution acted arbitrarily, against public policy and abused the legal process at this stage will be pre-empting the merits of the case. In the case of ***Elias Lukwago, Lord Mayor and KCCA v Attorney General HTC-00-CV-MC-No 237 of 2013***, court agreed with the respondent counsel's submission that the application sought almost the same requirement of proof and same remedies as in the main suit and as such was not necessary in the instance to determine.

### ***Maintaining the status quo;***

The applicant's counsel submitted on preservation of status quo; "*Status quo*" simply denotes the existing state of affairs before a given particular point in time. The purpose of the order for temporary injunction is primarily to preserve the status quo of the subject matter of the dispute pending the final determination of the case, and the order is granted in order to prevent the ends of justice from being defeated. See: ***Daniel Mukwaya v. Administrator General, H.C.C.S No. 630 of 1993; Erisa Rainbow Musoke v. Ahamada Kezala [1987] HCB 81.***

In the instant case, the status quo to be preserved is that the anti-corruption court issued criminal summons against the applicant requiring him to appear in court on the 5<sup>th</sup> day of October 2018 in respect of the charges which are a subject of judicial review before this court. And the status quo is that the applicant has not yet appeared before the said court and should not appear until the main application has been heard and finally determined and in case he appears before the grant of an order for a temporary injunction then he should be barred from further appearance until the main application is heard and determined since status quo is as at the time of application. Should the temporary injunction be denied, the main suit will be merely for academic purposes and not beneficial to the litigant anymore for whatever he seeks to challenge will have been done. The applicant would be a prisoner and not a free man by the time the main application is heard and determined. The reputation of the applicant would have been damaged even if the main application succeeds. Counsel submitted that the *status quo* would be altered if this application is not allowed.

### ***Irreparable damage;***

Counsel further submitted, the other cardinal consideration is whether in fact the applicant would suffer irreparable injury or damage by the refusal to grant the application. If the answer is in the affirmative, then court ought to grant the order. 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 by way of damages. In ***Commodity Trading Industries v Uganda Maize Trading Industries***

**[2001 -2005] HCB 119**, it was held that this depends on the remedy sought. If damages would not be sufficient to adequately atone the injury, an injunction ought not to be refused.

The applicant depones under paragraph 3 of his affidavit in support of the application, that actions under judicial review challenges the Director of public prosecutions for being unreasonable, acting arbitrarily, contradicting public policy and abusing court process and the law and this is a serious constitutional challenge. Nothing will atone the damage of the applicant if it turns out to be true that the Director of Public Prosecutions prosecuted the applicant in total disregard of his constitutional mandate under article 120 (5). We therefore submit that the damage to the applicant's person will be material and substantial and no amount of compensation can atone it.

### ***The balance of convenience***

The balance of convenience simply means that the applicant has to show that failure to grant the temporary injunction is to his greater detriment. In ***Kiyimba Kaggwa v Haji A.N Katende [1985] HCB 43*** court held that the balance of convenience lies more on the one who will suffer more if the respondent is not restrained in the activities complained of in the suit.

In the instant scenario, the Director of Public prosecutions cannot be said to suffer any loss if the applicant is delayed from being prosecuted since it took them a period of over four months to align the applicant before the anti-corruption court from the date the charges were consented for by the Director of public prosecutions and it was an afterthought in fact after being served with an application for judicial review, this ground is supported by paragraph 10 of the affidavit in support of the application by the applicant. , we have already submitted that the applicant will suffer irreparable harm. We therefore submit that balance of convenience is in favour of the applicant.

The applicant prayed that a temporary injunction doth issue against the respondent and or her agents restraining her from prosecuting the applicant until the determination of the main suit and taking into account the fact that the

applicant was issued with criminal summons to appear for the intended prosecution on 5<sup>th</sup> October, 2018.

The applicant's counsel has cited several legislations in support of this application for a temporary injunction like section 33 of the Judicature Act and Section 98 of the Civil Procedure Act.

The law on granting an Order of temporary injunction is set out in **section 64(c) of the Civil Procedure Act** which provides as follows;

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed-

(a) .....

(b) .....

(c) *grant a temporary injunction and in case of disobedience commit the person guilty of it to prison and order that his or her property is attached and sold.*

**Order 41 rule 2 of Civil Procedure Rules** provides that in any suit for restraining the defendant from committing a breach of any contract or other injury of any kind.....apply to court for a temporary injunction to restrain the defendant from committing the breach of contract or any injury complained of.....

The applicant's counsel has cited several authorities for the grant of temporary injunction and indeed this court agrees with the said authorities but it should be noted that temporary injunctions against public authorities or entities are treated with caution and circumspection.

Normally injunctions must not be granted against the public authorities or respondent's executing public utilities or implementation of government projects. Public interest is one of the paramount and relevant considerations in either granting or refusing to grant a temporary injunction.

Therefore Courts of law should be loath or slow to grant injunction when a public project for the beneficial interest of the public at large is sought to be delayed or prevented by an order of injunction, damage from such injunction would cause the public at large as well as to a Government is a paramount factor to be

considered. Between the conflicting interests, interest of the public at large and the interest of a few individuals, the interest of the public at large should must prevail over the interest of a few individuals.

In the present case, the applicant wants to stop the Office of Directorate of Public Prosecutions from doing what the Constitution enjoins them to do under Article 120(3) of the Constitution. The DPP exercises the powers conferred by the Constitution in public interest, interest of the administration of Justice and the need to prevent abuse of legal process.

The sum effect of the injunction sought by the applicant is to stop the DPP from; Instituting criminal proceedings against him. This is one of the core functions of the DPP granted by the Constitution and this injunction sought affects the greater public interest that is protected by the Office of Directorate of Public Prosecutions. The court must in exercise of its powers and discretion to grant a temporary injunction be reasonable, judicious and act on sound legal principles.

The applicant must set out a *prima facie* case in support of the right claimed by him. The must equally be satisfied that there is a *bonafide* dispute raised by the applicant, that there is an arguable case for trial which needs investigation and a decision on merits and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him.

The burden is on the applicant to satisfy the court by leading evidence or otherwise that he has a *prima facie* case in his favour. But a *prima facie case* should not be confused with a case proved to the hilt. It is no part of the Court's function at this stage to try and resolve the conflict neither of evidence nor to decide complicated questions of fact and law which call for detailed arguments and mature considerations.

It is after a *prima facie case* is made out that the court will proceed to consider other factors.

The applicant's case as set out in the affidavit in support which is the basis of setting out a *prima facie case* are set out in paragraphs 2,3 as hereunder;

*“2. That the respondent through the Director of Public Prosecutions instituted charges against me without any scintilla of evidence and on directions of a third party which led to my suspension.*

*3. That through my lawyers M/s Nakachwa and Partners Advocates, I instituted an application for Judicial review vide Miscellaneous cause No. 212 of 2018 against the respondent challenging its decision on grounds of it being arbitrary, unreasonable, and contrary to public interest and an abuse of court process and the law”*

The applicant has not availed any evidence to support his case for a temporary injunction. He has only stated in paragraph 2 of his affidavit that there was no evidence to support the sanction on the charges. In reply to this paragraph, the respondent stated that;

*“The DPP perused case file Ref. AVPOL CRB 047/2018 involving the applicant and determined the evidence was sufficient to instituted criminal proceedings against him on the preferred charges of abuse of office, conspiracy to defraud, kidnapping or abducting with intent to confine and conspiracy to commit a felony as contained in the charge sheet.”*

The applicant has suppressed material facts and left this court in limbo to know, understand and appreciate the applicant’s case. The sum effect is that he has failed to make out a prima facie case that would have moved court to exercise its discretion to grant a temporary injunction.

The court should always be willing to extend its hand to protect a citizen who is being wronged or is being deprived of property without any authority of law or without following procedures which are fundamental and vital in nature. But at the same time, judicial proceedings cannot be used to protect or perpetuate a wrong committed by a person who approaches the court.

The court’s power can be exercised judicially and in public interest, no injunction causing administrative inconvenience or resulting in public mischief should be granted

In the result for the reasons stated herein above this application fails and is hereby dismissed with costs.

It is so ordered.

**SSEKAANA MUSA**

**JUDGE**

**11<sup>th</sup>/10/2018**