

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS APPLICATION NO.547 OF 2018
(ARISING FROM MISCELLANEOUS CAUSE NO.230 OF 2018)

HON. KIPOI TONNY NSUBUGA----- APPLICANT

VERSUS

ATTORNEY GENERAL ----- RESPONDENT

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application by way of Notice of Motion against the respondent under Article 50, 126 & 139 (1) of the Constitution, Section 33 and 38 of the Judicature Act cap 13 and Section 98 of the Civil Procedure Act, Rule 3 of Judicature (Fundamental Rights and Freedoms)(Enforcement Procedure) Rules 1992 for orders that;

1. An Interim Order doth issue for stay of proceedings against the applicant in the General Court Martial vide Criminal case No. UPDF/GCM/2018 pending hearing and final determination of Miscellaneous Cause No. 230 of 2018 which is before this Court.
2. Costs of the application be provided for.

The grounds in support of this application are set out in the affidavit of Hon. Kipoi Tonny Nsubuga dated 19th September 2018 which briefly states;

1. That the applicant filed Miscellaneous Cause No. 230 of 2018 for enforcement of his rights to a fair hearing and the right to liberty before this Honourable Court on 28th August 2018 is pending hearing.
2. Owing to the busy schedule of this court, and considering the fact that the Respondents have not yet filed a reply to Miscellaneous Cause 230 of 2018, hearing and determination may take long to be heard and determined.
3. Hearing of Criminal case No. UPDF/GCM/015/2018 which is before the General Court commenced and the Continuing proceedings in this matter is greatly prejudicing the applicant by being subjected to an unconstitutional and illegal trial.
4. That Miscellaneous Cause No. 230 of 2018 has a prima facie case with a very high chance of Success.
5. That if case No. UPDF/GCM/015/2018 in the General Court Martial is not stayed, the applicant shall continue to suffer irreparable injury.
6. If this application is not granted, Miscellaneous Cause No. 230 of 2018 shall be rendered nugatory.
7. That the hearing of Criminal Case No. UPDF/GCM/015/2018 commenced and is ongoing that prosecution has so far arraigned three witnesses who have testified and the case was adjourned to 29th October 2018 with further hearing.

In opposition to this Application the Respondent through Col. Dr. Gordard Busingye- Deputy Chief of Legal Services of the Uganda Peoples Defence Forces filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. The General Court Martial has jurisdiction has the jurisdiction to try the offences that the Applicant was charged with and that all the rights of the applicant have been observed.
2. The applicant's application for and Order of Habeas corpus was dismissed by the High Court on grounds that he was produced in court and his detention was lawful.
3. That it is not true that DPP did instituted charges at the General Court Martial against the applicant instead the Director of Prosecutions of Uganda People Defence Forces did.
4. That the *Nolle Prosequi* that was entered by the DPP clearly indicated that the offences were not triable by the High Court but at the General Court Martial and that was not a bar to further proceedings from the court with a competent jurisdiction.
5. That this is not a proper case in which this Honourable Court can grant the orders sought.
6. 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 Iduuli Ronald* whereas the respondent was represented by *Mr. Jeffry Atwine*.

Whether the application is competently before the court?

The respondent's counsel submitted that, there is no substantive application upon which the present interim application can be premised. He argued that there are only two applications that were filed in this court. Miscellaneous Cause 230 of 2018 and Miscellaneous application for Interim 574 of 2018.

It is therefore clear that there is no substantive application for a temporary injunction upon which the present application could be premised.

It is true that there is no main application for a temporary injunction for stay of proceedings and the current application for interim cannot be premised on the Main Cause which is like a main suit.

The authorities cited by the applicant's counsel indeed confirm that the application filed for all intents and purposes was for an interim order and the same ought to be made pending the main cause determination.

In the case of ***Horizon Coaches Limited vs Mbarara Municipal Council, Mbarara District Land Board & Attorney General Constitutional Application No. 7 of 2014***, it was held that;

“It is now trite law that a party seeking an interim order of injunction as this has to satisfy court that the main application and the Cause are not frivolous or vexatious and that prima facie they have a likelihood of success.....”

It can be deduced from the above decision that the conditions for the grant of an interim order are thus;

1. That there is a bonafide main application for a temporary injunction.
2. That there is imminent danger that of the order is not granted it will render the orders sought in the main application nugatory.
3. Irreparable loss/ injury

On this preliminary objection, the application is incompetently before this court and is struck out.

In the interest of justice and for completeness, I will consider the rest of the issues that were raised for determination.

Whether an interim order or a temporary Injunction should issue against the respondent?

The applicant's counsel submitted that the applicant seeks an order of an interim injunction to be issued against the respondent staying of criminal proceedings at the general court martial against the Applicant until the main cause/application is heard and determined on its merit.

The applicant' counsel submitted that, he objected to the applicant's trial in a military Court and when his objection was overruled, he filed Miscellaneous cause No. 230 of 2018 under Article 50 of the Uganda Constitution for enforcement of his right to a fair hearing which is before this Honorable Court. The applicant then filed this interim application for stay of proceedings against him in the General Court Martial Vide Criminal case **No. UPDF/GCM/015/2018** pending hearing and final determination of Miscellaneous Cause No. 230 of 2018.

In the case of **Grace Matovu Vs Teopista Nabbale & Anor M.A. No. 471 of 2013** Justice Mulangira quoting the case of **Kiyimba Kagwa vs Haji Abdu Nasser Katende [1985] HCB 43** held that; ***“considering the object of an interim injunction and the nature of Proceedings at which it is considered, a more realistic and fair condition would be to satisfy the court that there is a serious question to be tried rather than a prima facie case with a probability of success”***.

From the above persuasive ruling, it is clear that what is important in an application for an interim order for stay of proceedings is for the applicant to satisfy the Court that there is a serious question to be tried. The applicant in his Notice of Motion and affidavit attached to Miscellaneous Cause No.230 of 2018 labored to satisfy the court that indeed there are serious questions which require determination of this honorable court and indeed he has high chances of success.

The applicant stated that after being indicted with treason related offences in the High Court of Uganda, the Director Public Prosecutions (DPP) entered a *Nolle Prosequi* in relation to the offences he was indicted with. Surprisingly, in the *Nolle*

Prosequi, the DPP directed that the applicant be tried in the General Court Martial.

The DPP is a Constitutional office which derives its mandate from Article 120 of the Constitution of the republic of Uganda. According to Article 120(3)(b); the DPP has powers to institute criminal proceedings in any Court of competent jurisdiction other than a Court Martial. While entering a Nolle Prosequi, the DPP stated ***“TAKE NOTICE that the Government of Uganda intends that proceedings against Hon. Kipoi,shall not continue. They should be charged in a Court martial”***.

By implication, while the DPP undertook his Constitutional mandate to discontinue criminal proceedings against the applicant and his co- accused, he went beyond his constitutional mandate when he directed that the applicant be charged in the Court martial. And indeed, he was charged there. This is a serious legal issue which requires serious consideration by this honorable Court.

Secondly, the applicant is being charged on an incurably defective charge sheet. According to the charge sheet in the general Court Martial, the applicant was charged with the offence of ***offences related to security c/s 130 of the UPDF Act (See charge sheet on record)***. However, when one reads the particulars of this charge, they do not disclose offences related to security as defined under Section 130 of the UPDF Act but the offence of treason which the DPP discontinued and which the General Court Martial has no jurisdiction to try.

Thirdly, by looking at the Charge sheet, the applicant is being charged with an offence with similar facts to the offence of treason which DPP discontinued. Whereas the respondent contends in Paragraph 14 of his affidavit in reply to Miscellaneous cause that the General Court Martial is not a subordinate Court to the High Court, we re-affirm our assertion that the General Court Martial is a subordinate Court to the High Court with no mandate to hear a matter with similar or related facts to the one which DPP discontinued and which the High Court discharged the applicant. This too, is a matter which requires determination in Misc. cause No.230 of 2018.

Considering the above points, and without divulging into the merits of Misc. Cause No. 230 of 2018, we have ably satisfied this Honorable Court that there are serious questions of law which require hearing in Miscellaneous Cause No. 230 of 2018 with very high chances of success by the applicant.

It is therefore not true as stated by the respondent in paragraph 15 of his affidavit in reply to this application that this application is misconceived, baseless and with no chances of success.

In the case of **Alcon International Ltd Vs The New Vision Ltd & Anor Supreme Court Civil Application no.04 of 2010**; Okello JSC stated; “ *...for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the pending substantive application.*”

Whereas this application has been fixed for hearing, it is not known when it will be determined. Yet General Court martial criminal case no. **UPDF/ GCM/015/2018** is ongoing (see annexure E) which is the General Court Martial Cause list. Hearing of the matter commenced on 18 March 2018 and is ongoing. Three witnesses have already been produced in this matter. There is therefore, a danger of the applicant being convicted, sentenced and imprisoned. Yet miscellaneous cause no. 230 of 2018 has very high chances of success. If Criminal Case No.**UPDF/GCM/015/2018** is not stayed and the applicant is convicted and sentenced, the applicant will suffer irreparable injury having suffered under illegal detention in a military court, having served an illegal sentence and having suffered psychological torture in prison. All this may not be atoned in damages yet they can be avoided by ordering for a stay. In the unlikely event that the applicant loses the main application after grant of a stay, trial in the General Court Martial would just commence with no injury occasioned to the respondent.

The applicant submitted that in the interest of justice, this application be allowed with costs against the respondent and this Honorable court be pleased to Order for an interim stay of proceedings in Criminal case No. UPDF/GCM/015/2018, pending determination of the main application.

The respondent's counsel submitted that; in the case of ***Hon Jim Muhwezi vs Attorney General and IGG Constitutional Miscellaneous Application No. 18 of 2007***; Justice Twinomujuni noted as follows:-

“However the main considerations for granting this application are the same as those for granting and rejecting the main application, namely:-

- a) That the court has jurisdiction to grant and not to grant the order sought for.
- b) That the suit from which the application arises discloses triable issues and is not frivolous and/ vexatious.
- c) That failure to grant would render the disputed matter nugatory in a manner that cannot be redressed through an award of damages.

The applicant is charged jointly with 7 seven UPDF officers for an offence under the UPDF Act, specifically stipulates under Section 130(f) that; any person who does anything with intent to prejudice the security of the Defence Forces or cooperating with the Defence Forces.

The respondent submitted that the applicant being charged along with the military officers for offences relating to security is subject to military law and he is rightfully facing trial at the General Court Martial and the Court has jurisdiction.

Secondly, the applicant contends that he is being charged with same offence in the General Court Martial with the same offences based on the same facts as those withdrawn by the DPP through a *Nolle Prosequi*.

In the case of ***Kaitale Julius & 3 Others vs Uganda Constitutional Reference No. 11 of 2014*** court noted that Under section 134 of the Trial on Indictments Act, that this provision makes it clear that the discharge of the accused person following a *Nolle Prosequi* is not a bar to subsequent proceedings against the accused on the same facts.

Therefore the applicant has never been tried for the matter he is currently facing at the General Court Martial and therefore the claim for double jeopardy is completely without basis.

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.

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.

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 his prosecution in the General Court Martial. The prosecutions in the General Court Martial are instituted in accordance with the UPDF Act by Director of Prosecutions Uganda People's Defence Forces and this role is mandated by the law. The Director of Prosecutions exercises the powers conferred by the UPDF Act as provided by the Constitution under Article 210 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 Director of Prosecutions in UPDF from; instituting criminal proceedings against him. This is one of the core functions of the Directorate of Prosecutions of UPDF granted by UPDF Act and 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* or serious issues to be tried. The applicant is challenging the prosecution in the General court Martial on the basis that after the DPP entered a *Nolle Prosequi*, then it was erroneous for DPP to recommend his prosecution in the General Court Martial.

According to applicant's counsel, the applicant will not receive a fair trial and the proceedings have already commenced in the General Court Martial with 3 witnesses who have already testified.

It is clear as submitted by the respondent's counsel that if the office enters a *Nolle Prosequi* it does not mean that a person cannot be tried again in the General court Martial. ***Kaitale Julius & 3 Others vs Uganda Constitutional Reference No. 11 of 2014***

The applicant has not set out any facts that are making him believe that he will not receive a fair trial and no material facts have been presented in court to support this preposition.

The applicant has set out other factors to support his submission on a prima facie case i.e Defective charge sheets and being charged with similar facts to the offence of treason with which the DPP discontinued.

The said triable issues being raised in this matter are criminal issues that are best addressed in a criminal trial proceedings and it would be very erroneous to raise them in civil proceedings of this nature and above all the court granting a temporary injunction on this basis.

In the cases of ***Dr. Tiberius Mehebwa vs Uganda Constitutional Petition No. 9 of 2012 and Jim Muhwezi & 3 Others vs Attorney General Constitutional Petition No. 10 of 2008***: The Constitutional Court has reiterated that, courts of law should not stop criminal trials on allegations that the trial of an accused person would not be free and fair.

The applicant will be able to challenge the proceedings by way of appeal, to Court Martial Appeal Court, then to the appellate courts of Judicature, namely the Court of Appeal and the Supreme Court.

The sum effect is that the applicant has failed to make out a prima facie case that would have moved court to exercise its discretion to grant a temporary injunction. The applicant has available remedies through the appellate procedures and it will be unlikely that all these courts will be unfair.

In addition, the prosecution of the applicant in the General Court Martial has already commenced and the prosecution has presented three witnesses. There is no status quo to preserve and this will only delay the determination of the criminal trial which would not serve the ends of justice.

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

It is so ordered.

SSEKAANA MUSA
JUDGE
11th/10/2018

