**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**MISCELLANEOUS APPLICATION 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 20, 21, 40(1), 45,50, 126 & 139 (1) of the Constitution, Section 33 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;

a) A declaration that the institution of Criminal proceedings against the Applicant in a Court Martial by the Director of Public Prosecutions was illegal and unconstitutional;

b) A declaration that the General Court Martial lacks jurisdiction to try the Applicant, a civilian who is not subject to military law;

c) A declaration that the trial of the Applicant on an incurably defective charge sheet contravenes his right to a fair trial.

d) A declaration that the General Court martial lacks jurisdiction to try the applicant with the offence of offences related to security c/s 130 of the UPDF Act;

e) A declaration that the General Court Martial, a subordinate Court to the High Court, does not have jurisdiction to try the Applicant, for offences which the Director Public Prosecutions entered a Nolle Prosequi and for which the High Court discharged the Applicant;

f) An Order permanently staying the proceedings against the Applicant in the General Court martial or in any subordinate court to the High Court in any matter similar or related to the offences that were discontinued in the High court and directing the respective courts seized of the said proceedings and charges to immediately discharge the applicant;

g) An order to release the applicant forthwith;

h) An order to the security agencies to return the applicant his passport and other travel documents.

i) An order for the award of general and aggravated damages for the illegal detention and for the stress, embarrassment and inconveniences caused to the applicant.

j) An order awarding costs of this application.

The grounds in support of this application are set out in the affidavit of Hon. Kipoi Tonny Nsubuga dated 25th August 2018 which briefly sets out the background of the applicants case.

***Background***

The facts surrounding this case are that on the 23 December 2012, the applicant who by then, was a Member of Parliament representing Bubulo West Constituency, Manafa district was arrested on allegations of treason against the Government of the Republic of Uganda and detained in various places.

On 22/07/13 he, together with five soldiers of the Uganda Peoples' Defence Forces, was arraigned before the High Court of Uganda and indicted with the

offence of Treason C/S 23 of the Penal Code Act Cap 120 and two other offences of Concealment of Treason C/S 25 of the Penal Code Act Cap 120 whereof, he pleaded not guilty and was remanded to Luzira upper prison. Around August 2013, the applicant was granted bail by the High Court of Uganda.

On 18 December 2013, the Director of Public Prosecutions (DPP) entered a *Nolle Prosequi* in relation to the offences for which the applicant was indicted and On 19 September 2014, basing on the said *Nolle Prosequi*, the High Court discharged the applicant. Surprisingly however, on the same *Nolle Prosequi*, the DPP directed that the applicant should be charged in the Court Martial.

Around the months of September 2013, fearing for his life, the applicant fled to the Democratic Republic of Congo where he sought and was granted Political asylum. He subsequently relocated to Botswana where he settled with his family.

Around 3rd February 2018, the applicant was arrested in Botswana and on 3rd March 2018, he was extradited back to Uganda. On 19 March 2018, the applicant was arraigned before the General Court Martial and Charged with the offence of ***"offences related to security c/s 130 (1)(f)of the UPDF Act*****,** an offence whose particulars are based on similar and related facts to the offence for which a *Nolle Prosequi* was entered by the DPP.

On the same day 19 March 2018, the applicant was remanded to Luzira Upper Prison but the Chairman General Court Martial subsequently, ordered for his transfer to Makindye Military Detention facility.

On **25 May 2018** the applicant applied to the High Court of Uganda for an Order of *Habeas Corpus* challenging his detention in a Military detention facility and the lack of jurisdiction of the General Court Martial to try him but before the application could be heard, the applicant was transferred back to Luzira Maximum Prison.

After the High Court had dismissed the application for an order of Habeas Corpus, the applicant was again removed from Luzira back to Makindye. Right now, the Applicant is detained in Makindye military detention facility and the trial in the General Court Martial is ongoing.

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.

**ISSUES FOR DETERMINATION**

The applicant raised the following issues for determination by this Court:

**a) Whether the applicant is a person subject to military Law?**

**b) Whether the General Court Martial has competent jurisdiction, independence and impartiality to try the applicant?**

**c) Whether there are any remedies available to the applicant?**

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 applicant is a person subject to military Law?**

The gist of the submissions of the applicant is that he is wrongly being charged charged in a military court and yet he is a civilian. He has cited several constitutional cases and his conclusion is that for a person not otherwise subject to military law to be subject to military Law under S.119(1)(g) of the UPDF Act under which the applicant was charged, the particulars of the charge sheet should indicate both ***the principle offender*** who should be a person subject to military law ***and also*** the acts that the civilian did to aid or abet the principle offender before the civilian can be said to be subject to military law. Without that link, the Court Martial will lack jurisdiction to subject that person to military law and the charge sheet will be incurably defective.

Considering the above section, read together with S. 204 of the UPDF Act which upholds the jurisdiction of civil courts; ***"Nothing in this act shall affect the jurisdiction of any civil court to try a person for an offence triable by that court";*** a court martial cannot have jurisdiction in a case where the principle offender is assumed to have been a civilian as in Kipoi case.

For a court martial to assume jurisdiction over a civilian, the principle offender should be a soldier and the civilian an aider or abettor not the reverse. In light of the above, the General Court martial has no jurisdiction over Hon. Kipoi and the Charge sheet is incurably defective. This is so because, the rules of Natural justice of a fair hearing as enshrined in Articles 28, 44(c) and 128 of the Constitution are not being adhered to as directed by Justice Kikonyogo in the case of **Uganda Law Society Vs Attorney General Constitutional Petition No. 2 of 2005** cited above.
Section 119 (1) (g) of the UPDF Act brings under the jurisdiction of the GCM any person not otherwise subject to military law:

The respondent's counsel contends that the applicant is subject to military law by virtue of *Section 119(1) of the UPDF Act which provides as follows.*

***"119. Persons subject to military law***

***(1) The following persons shall be subject to military law***

***(g)Every person, not otherwise military, who aids and abets a person subject to military law in the commission of a service offence; and***

***(h) Every person found in unlawful possession of -***

***i. arms, ammunition or equipment ordinarily being the monopoly of the Defence Forces; or***

***ii. other classified stores as prescribed*.”**

According to the above provision, civilians who find themselves in the circumstances described in the above Section will be subject to military law.

Section 2 of the Act defines a **“service offence” as “an offence under this Act or any other Act for the time being in force committed by a person while subject to military law”.** Therefore, any civilian who is subject to military law can commit a service offence whether under the UPDF Act or any other Act.

Section 130 (f) of the UPDF Act stipulates that, any person who does anything with intent to prejudice the security of the Defence Forces or cooperating with the Defence Forces.

In the instant case, the Applicant is charged along with 7 military officers for offences relating to security he is therefore subject to military law and he is rightfully facing trial at the General Court Martial and the Court has jurisdiction.

The Constitutional court has warned against challenging criminal proceedings in a civil court.

Similarly in the case of ***Dr. Tiberius Muhebwa vs Uganda*** *Constitutional Petition No. 09 of 2012* and also in *Constitutional Petition No. 10 of 2008* ***Jim Muhwezi & 3 Others vs Attorney General and Inspector General of Government***, *the court cautioned against the stopping of criminal trials on allegations that the trial would not be free and fair*. In the latter case, court noted further as follows;

*" 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 providing a remedy. Was it to be otherwise, a situation would arise whereby anyone charged with an offence would 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 of the administration of the criminal justice system and affect the smooth operation of the Constitutional Court"*

It can be deduced from the above cases and by analogy, challenging criminal trials in a civil court will likely cause confusion in the criminal justice system.

In the case **Hussein Badda vs Iganga District Land Board & 4 others HCMA No. 479 of 2011** court noted that; *This court cannot, under the guise of an interim order interfere with the organs of state in executing their mandate in the administration of Criminal Justice.*
Citing High Court Miscellaneous Application No. 348 of 2001 ***Arthur Rukikeire vs Uganda Telecom Ltd*** Justice Mwangusya (as he then was) court further noted;
"*I do not know how this court would determine that an arrest is unlawful or that prosecution is false unless the criminal culpability of the applicant is being determined by this court which would not be the case. I also do not know whether even if it was possible for this court to grant the prayer the applicant would be discharged of any criminal liability. The only pleas that I know of that would prevent a person from being prosecuted are pleas of autrofois convict or acquit and not an order arising out of a trial in a civil suit."*

In another case of ***Sarah Kulata Basangwa vs Inspectorate of Government in Miscellaneous No. 465 of 2011*** the said judge held;
"*In my view it is not proper for a court sitting in a civil matter to bar proceedings in a criminal trial because the circumstances under which a person is brought before a criminal court and the defences available for the accused before that court should be handled by the same court which can ably investigate them and determine them in one way or the other rather asking another Court to bar the proceedings. This application arises out of an application that seeks to bar proceedings in a criminal trial and I decline to grant it*."

I entirely agree with the views espoused in the above authorities. This court being a civil court cannot delve into propriety of criminal proceedings in a criminal court or military court martial.

There is an appeal system in criminal trial system through which the applicant can raise his grounds of a mistrial or defectiveness of charge sheet or challenge of proceedings in Military Court Martial after DPP had entered a *nolle prosequi.*

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.

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**
**09th/02/2019**