

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO.466 OF 2022
(ARISING FROM MISCELLANEOUS CAUSE NO.174 OF 2022)

KALULE AHMED MUKASA----- APPLICANT

VERSUS

NATIONAL SOCIAL SECURITY FUND----- RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this application by way of Chambers summons against the respondent under Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act cap 13 and Order 41 r 2, & 9 of the Civil Procedure Rules, for orders that;

- a) A temporary injunction be issued staying proceedings of the Chief Magistrate's Court of Nakawa vide Criminal Case No. 338 of 2020 pending the hearing and determination of the substantive application for judicial review application challenging the said proceedings.
- b) The warrant of arrest issued against the applicant by the Chief Magistrate's court of Nakawa be stayed till the determination of the substantive application for judicial review.

c) Costs of this application be provided for.

This application is based on grounds set out in the affidavit of Kalule Ahmed Mukasa which briefly states;

1. That the applicant is the Managing partner of Crane Associated Advocates, a law firm engaged in providing legal services established in 2010 with 4 partners namely *Mwesigwa Rukutana, Charles Beisa, Nsamba Abbas Matovu and Jim Katugugu Muhwezi*.
2. That the respondent carried out a compliance audit on the firm for the period between June 2011 to April 2018 and established that the firm owed them Ugx 39,625,550/= as standard contributions, Ugx 9,897,553/= as interest and 100,505,040/= as penalty accruing totalling to a colossal sum of Ugx 150,029,143/=.
3. That unknown to the applicant, the respondent instituted criminal charges vide Criminal Case No. 338 of 2020 at the Chief Magistrates Court of Nakawa for failure to pay contributions.
4. That the applicant is currently a subject of an arrest warrant issued on 29th June 2022 issued in criminal charges vide criminal case No. 338/2020 at Chief Magistrates Court of Nakawa instituted by the respondent for failure to pay contributions contrary to sections 11(1) 14(1) and 44(1)(f) of the National Social Security Fund Act.
5. That on 29th June 2022, a warrant of arrest was issued by the Chief Magistrate's court of name requiring his appearance and take a plea on 24th August 2022.

6. That the applicant has instituted a substantive judicial review application in this court challenging the legality of the warrant of arrest as well as the process leading to the institution of the said criminal charges against the applicant.

In opposition to this Application the Respondent through Simon Hector Ocen filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. The respondent is mandated by law to receive contributions from eligible employers, invest them and pay out benefits in accordance with the National Social Security Fund Act.
2. That on 29th September 2020, the respondent under its mandate commenced criminal proceedings vide Criminal Case No. 338 of 2020: Uganda vs Crane Associated Advocates (A1) and Kalule Ahmed Mukasa (A2) in the capacity of Contributing employer and Principal Officer respectively to recover the unremitted social security contributions inclusive of arrears and statutory penalty.
3. That on the same day the Chief Magistrates Court of Nakawa issued criminal summons for the applicant to appear before the court on 26th October 2020 to answer to the criminal charges. The summons were duly served upon the applicant on 20th October 2020
4. The criminal matter against the applicant and Crane Associated Advocates came up before Court on various dates in absence of the applicant which prompted the court to issue a warrant of arrest for the arrest of the applicant and the same is pending execution.

In the interest of time the respective counsel were allowed to file written submissions and i have considered the respective submissions. The applicant was represented by *Mr. Jude Byamukama* whereas the respondent was represented *Mr. Simon Ssemaganda*.

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-

(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 main purpose of a temporary injunction is to preserve the status quo and avoid further damage, danger or loss or violation of rights as was elucidated in the case of ***Humphrey Nzeyi vs Bank of Uganda and Attorney General Constitutional Application No.01 of 2013***. Honourable Justice Remmy Kasule noted that an order to maintain the status quo is intended to prevent any of the parties involved in a dispute from taking any action until the matter is resolved by court. It seeks to prevent harm or preserve the existing conditions so that a party's position is not prejudiced in the meantime until a resolution by court of the issues in dispute is reached. It is the last, actual, peaceable, uncontested status which preceded the pending controversy.

This court has wide discretion at this stage to consider any factor which would have a bearing on the issue whether the injunction ought to be granted. It is for the court to determine the weight to be accorded to a particular factor weighed in balance and where they appear to be balanced the court ought to consider and strive to preserve the status quo. For a temporary injunction to be granted, court is guided by the following as was noted in the case of *Shiv Construction vs Endesha Enterprises Ltd Civil Appeal No.34 of 1992*

1. The Applicant must show that there is a substantial question to be investigated with chances of winning the main suit on his part;
2. The Applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and the *status quo* not maintained; and
3. The balance of convenience is in the favour of the Application.

If the court believes that there is a serious issue to be tried, it will prospectively consider the parties' respective positions according to whether an injunction is granted or refused. In doing so, the court will gauge the hardship which would be caused to the applicant if she is refused relief and balance it against the hardship which would be caused to the respondent if the injunction is granted. If neither party would be adequately compensated, the court would ascertain where the balance of justice lies.

The jurisdiction to grant a temporary injunction is an exercise of discretion and the Discretionary powers are to be exercised judiciously as was noted in the case of *Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29*.

It should be noted that where there is a legal right either at law or in equity, the court has power to grant an injunction in protection of that right. Further to note, a party is entitled to apply for an injunction as soon as her

legal right is invaded. *See Titus Tayebwa v Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009.*

The applicant contends that his rights are about to be violated by the arrest and prosecution for failure to remit NSSF contributions which accumulated for a period between 2011 to 2018. A warrant of arrest has been issued and is due for execution This is the eminent danger that the applicant will suffer unless she is granted a temporary injunction to preserve her rights.

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 her claim discloses a serious issue to be tried. The applicant has satisfied this court that there is a *prima facie* arising out of possible violation of his constitutional rights and freedoms contending that the charges are brought in bad faith and in abuse of judicial process of criminal law as well as abuse of statutory powers under the NSSF Act.

The burden is on the applicant to satisfy the court by leading evidence or otherwise that she has a *prima facie* case in her 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.

This application raises serious issues to be tried in the main cause and or a *prima facie* case on legality of actions of National Social Security Fund to use criminal prosecution in order to recover a debt without recourse to

other available avenues for recovery of a debt. The law generally prohibits using criminal laws processes for improper purposes. Using criminal law for debt recovery is considered an improper purpose.

The court should always be willing to extend its hand to protect a citizen who is being wronged or whose rights are being violated or threatened to be violated 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 to grant a temporary injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of temporary injunction being equitable remedy, it is in discretion of the court and such discretion must be exercised in favour of the plaintiff or applicant only if the court is satisfied that, unless the respondent is restrained by an order of injunction, irreparable loss or damage will be caused to the plaintiff/applicant. The court grants such relief *ex debito justitiae*, i.e to meet the ends of justice. See *Section 64 of the Civil Procedure Act*.

The actions of the respondent agents are a threat to the applicant's constitutional rights, this court as a custodian of the Constitution ought to issue orders that would ensure that the Constitution is not violated since the alleged violation will not be atoned for in damages or be adequately compensated with any amount of money or earthly possessions. See *Hon Jim Muhwezi vs AG & IGG Constitutional Court Miscellaneous Application No. 18 of 2007*.

The respondent's statutory mandate and powers to institute criminal charges under the NSSF Act Cap 222 do not amount to a permissive licence for the respondent to abuse criminal law and use it capriciously against

individuals with whom it has disputes over statutory payments under the National Social Security Fund Act.

There is need for rigorous adherence to the applicable statutory procedures and legal principles when making decisions that affect individuals. The decision to prefer criminal charges against an individual has grave consequences and as such, due regard to the law and proper procedure and legal principles must be exercised without discrimination. Why has the respondent preferred charges against the applicant only and yet there are other four partners at the time the alleged offence was committed?

Criminal prosecution should never be used to arm-twist persons who may not be directly involved in the commission of crimes. Persons who are holding high offices may be dragged to courts of law unfairly in order to enforce recovery.

Criminal proceedings have serious implications to persons' reputation and personality and it should never be taken lightly even though a person may be acquitted after the due process. *See Rutayisire Alphonse & Another v URA (Commissioner Customs) HCCM No. 236 of 2020*

In the result for the reasons stated herein above this application succeeds and is allowed with costs in the cause. The order granted is in the following terms;

- a) *A temporary injunction be issued staying proceedings of the Chief Magistrate's Court of Nakawa vide Criminal Case No. 338 of 2020 pending the hearing and determination of the substantive application for judicial review application challenging the said proceedings.*

b) The warrant of arrest issued against the applicant by the Chief Magistrate's court of Nakawa be stayed till the determination of the substantive application for judicial review.

It is so ordered.

SSEKAANA MUSA
JUDGE
21st September 2022