

UGANDA / JUDGMENT

Kazinda v Attorney General

(Constitutional Application 16 of 2020)

[2024] UGCC 22 (15 November 2024)

[2024] UGCC 22

COURT

Constitutional Court of Uganda

BEFORE

Gashirabake, JCC, Eva K. Luswata, JA/JCC, Kihika,
JA /JCC, Kazibwe, JCC, Asa Mugenyi , JA/JCC

CASE / FILE NUMBER

Constitutional Application 16 of 2020

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT IAMPALA CONSTITUTIONAL APPLICATION 0016 OF 2020 OUT OF NATIONAL PETITION 30 OF 2014

GEOFFREY I(AZINFI) \⁼=====

APPLICANT

v

ATTORNEY GENERAL ===== RESPONDENT

CORAM HON. JUSTICE CHRISTOPHER GASHIRABAKE JCC, HON. JUSTICE EVA LUSWATA JCC,
HON. JUSTICE OSCAR KIHII(A JCC, HON. JUSTICE MOSES I(AZIBWE I(AWT'MI JCC, HON.
JUSTICE ASA MUGENYI JCC

RULING OF CONSTITUTIONAL COURT

1. INTRODUCTION

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This application is brought under Articles 137(1), 50(2) of the Constitution of Uganda, Sections 16(1)(b) and L6(21) of the Human Rights Enforcement Act 2009, Section 30 of the Civil Procedure Act, Rules 2(21), 42(L1 & (21 and 43 of the Judicature (Court of Appeal Rules) Directions.

2. BACKGROUND

2.r Prior to 2012, the applicant was as a principal accountant deployed by the Accountant General in the office of the Prime Minister of Uganda. He was arrested and charged in the Anti-Corruption Division, High Court under the Anti-Corruption Act in the following cases: Criminal Case 105 of 2012 in August 2012, Criminal Case 138 of 2012 in October 2012, and Criminal Case 47 of 2013 in April 2013. On 12th March 2014 Criminal Case 105 of 2012 which was part heard was withdrawn and after amendments it was converted to Criminal Case 101 of 2014.

2014- In 2018, the applicant was charged in Criminal Case 059 of 2016 with obtaining illicit wealth contrary to the Anti- corruption Act.

- 2.2 On 3'd October 2014, the applicant filed Constitutional Petition 30 of 2014 seeking for orders that the Constitutional Court permanently prohibits the State from initiating and prosecuting him for any offences similar in character or founded on the same facts arising out or in connection with his employment as Principal Accountant in the office of the Prime Minister. On 7th Aug; 11st 2020, the Constitutional Court delivered its judgment granting the orders the applicant sought. The court permanently stayed the proceeding in Criminal Case 47 of 2013 and 62 of 2014 which now was 101 of 2014. The respondent being aggrieved by the judgment of the Constitutional Court lodged an appeal in the Supreme Court and applied for stay of execution of the orders of the Constitutional Court. On 12th February 2021 the Supreme Court granted an order of stay of execution.
- 2.3 The applicant is aggrieved by the fact that despite the decision of the Constitutional Court the respondent has continued to prosecute him in some cases such as Criminal Case 47 of 2013 and has refused to discharge him in other cases such as Criminal Case 59 of 2016. The stay of execution from the Supreme Court was obtained after the applicant had been discharged from some cases. The applicant being aggrieved filed this application.

3. ISSUES

We have summarized the issues raised by the parties to three.

- 1. whether this application is properly before this court?
- 2. Whether the respondent is in contempt of the orders of the Constitutional Court issued on 7th August 2020?
- 3. What remedies are available to the parties?

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Representation

At the hearing of the application on 10th June 2024, the applicant represented himself. The respondent was represented by Mr. Richard Adrole, Assistant Commissioner Civil Litigation and Mr. Brian Musota, State Attorney.

PARTIES SUBMISSIONS

At the hearing of the application on 19th June 2024, the court directed that the applicant files an affidavit in rejoinder by 18th June 2024 and an updated submission by 4th July 2024. The respondent was directed to file a reply to the submission by 12th July 2024. The applicant was to file a rejoinder by 22nd July 2024. Both parties filed their submissions and other relevant documents.

4. Applicant's submissions

- 4.1 The applicant submitted that he was successful in Constitutional Petition 30 of 2014 where the court found that "The numerous trials for offences similar in character amount to a deprivation of a right to a fair hearing and contravene Articles 28(1) and 28(9) of the Constitution." He brought the findings of the Constitutional Court to the attention of the trial courts. He stated that the courts responded to the constitutional court decision as follows:
- (i) On 10th August 2020, the trial court in Criminal Case 59 of 2016 declined to stay the hearing of the case reasoning that the case was outside the operation of the orders of the Constitutional court. The respondent continued prosecuting it after securing a stay of execution.
- (ii) On 11th August 2020, the trial court in Criminal Case 47 of 2013 paused the applicant's trial and resumed after the respondent secured a stay of execution on 12th February 2021.
- (iii) On 19th August 2020, the trial court stayed proceedings in Criminal Case 56 of 2018 but it was on condition of the outcome of the respondent's application for stay of execution.

4.2 The applicant submitted that on page 42 of the judgement in the Constitutional Petition Justice Musota included Criminal Case 59 of 2016 which commenced on 26th March 2016 as among the cases whose prosecution should be halted. He submitted that successive trials against him, deny him a right to a speedy trial. Justice Cheborion Barishaki concurred that "Deliberate protracted piecemeal trials without reasonable explanation why it is being done offends Article 28(1) of the Constitution." Justice Geoffrey Kiryabwire agreed with Justice Musota and had nothing useful to add. The applicant contended that the majority view of the court was that Criminal Case 59 of 2016 contravened Articles 28(3)(a)(c)(d) and 44(c) of the Constitution. He cited *Muuanga Kirrumbi v Attorney General* Constitutional Appeal 6 of 2011 where the court stated:

> where the court determining a matter is a panel bench, the view of the majority regarding the issue constitutes the decision of the court - as would be the case to other matters calling for the court's resolution (Emphasis added)."

The applicant argued that courts use a general and purposeful approach to give an individual the full benefits of his right under the Constitution. He concluded that the Constitutional Court intended that Criminal Case 59 of 2016 should be stayed. Despite that, the respondent continued to prosecute the said case to his detriment.

4.3 The applicant submitted that in Criminal Case 59 of 2016 the trial court overruled his application to discontinue the trial in the following words.

"The constitutional judgment at paragraph 9 specifically place this case outside the operation of the orders... The application to discharge the accused is therefore rejected. Let the hearing proceed."

The applicant submitted that the Inspector General of Government responded to the constitutional court decision by insisting that it will continue to proceed with the prosecution of Criminal Case 59 of 2016. He was aggrieved that the respondent does not wish to apply the findings of the Constitutional petition to Criminal Case 59 of 2016 where he was charged with obtaining illicit wealth. He contended that the respondent misapplied the finding by stating that "Article

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28(91) of the Constitution doesn't affect the charge of illicit enrichment because it is not of the same character as the charges discussed." The applicant contended that prosecution of the offences which were similar in character contravened Articles 28(L) and 28(3) of the Constitution while those dissimilar in character contravened only Article 28(91) of the Constitution.

4.4 The applicant further submitted that prosecution of Criminal Case 59 of 2016 contravened Article 28(91) of the Constitution as it was founded as it arose out of facts that were in connection with his former employment as Principal Accountant in the office of the Prime Minister. He submitted that the wordings of the second order of the court were framed as:

> "An order to permanently prohibit the state from using any process of any court so as to initiate and prosecute the petitioner for any offences similar in character or founded on the same facts whatsoever arising out of or in connection with his former employment of the Prime Minister." (Emphasis added).

The applicant contended that the use of the word "or" meant that the prohibition was not limited to 'offences similar in character'. The order contained ^a prohibition against offences founded on same facts. The applicant stated that Criminal Case 59 of 2016 was founded on the same facts as those of the other criminal cases where he was employed as Principal Accountant in the Office of the Prime Minister.

4.5 The applicant submitted that the order also contained the phrase "in connection with". He argued that the words should be given their ordinary meanings. He cited *United Sfafe v Brannan* 448 453 (3d CIR, 1996) where the court relied on the dictionary definition of "connection" to arrive at the meaning of "in connection with". The applicant argued that before a connection between two things can be inferred, a relationship between them must exist. He submitted that Criminal Case 59 of 2016 satisfied the relationship in respect of "in connection with" the conditions in the prohibition order. The applicant cited Section 3 1(1) of the Anti-Corruption Act which reads:

"31. Illicit Enrichment

- (1) The Inspector General of Government or the Director of Public Prosecution or an authorized officer may investigate or cause an investigation of any person where there is reasonable ground to suspect that the person.
- a. Maintains a standard of living above that which is commensurate with his or her current or past known sources of income or assets.
- b. Is in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources of income or Assets. [Emphasis added]."

The applicant argued that the use of the words "above that which is commensurate" and "disproportionate" were used in respect of the relationship between his earnings or his salary and allowances in his former employment as Principal Accountant with his standard of living. He submitted that the court was aware of the relationship. He invited the court to find that the prosecution for the offences in Criminal Case 59 of 2016 is in connection with the conditions in the prohibition order of Constitution Petition 30 of 2014.

- 4.6 The applicant also contended that the charge of illicit enrichment was "arising out of" his employment. He cited *Harden v Furniture Co*, 1999 NC 733, 155Se 728 where the court noted that the phrase "arising out of" meant "it must appear to have had its origin in a risk connected with the employment." The other phrases the applicant relied on to further his arguments were "offences founded on the same facts whatsoever". He cited *R v Barrrel and Wilson* (1979) 69 Cr. App. R. 250 *Mohammed Shakeel Wahid v State of Maharashtra and others* 1980 Cril J 762 where the court observed that the word 'whatsoever' as a rule excludes any limitation or qualification. The applicant contended that the charges in criminal case 59 of 2016 were therefore included in the prohibition order of the Constitutional Court.
- 4.7 The applicant submitted that the conduct of the trial courts in Criminal Cases 56 of 2018 and 47 of 2013 was inconsistent with the order of the constitutional court. The order of the Constitutional Court was to permanently stay proceedings against the applicant. He submitted that in Criminal Case 56 of 2018 the trial

court substituted the constitutional court's will of permanently staying the trials into temporary arrangements by including a speculative clause in its discharge order which read:

"for the avoidance of doubt, should the Supreme Court stay the orders of the judgment of the constitutional court the applicant will be brought back to these proceedings. "

He argued that this was in contempt of the order of the Constitutional court. The applicant cited Housing Finance Bank Ltd and another v Edward Musisi CA 158 of 2010 where the court observed that:

"A party who knows of an order regardless of whether in the view of the party the order is null or void, or irregular cannot be permitted to disobey it by reason of what the party regards the order to be. It is not to the party to choose whether to comply or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned, subject to the party's right to challenge the order in issue in such a lawful way as the law permits (Emphasis added)."

The applicant submitted that in criminal case 47 of 2013, he was discharged on 11th August 2020. He submitted that the order of the constitutional court to immediately discharge him was not optional. He submitted that the trial court acted on the order, 75 days after the order was issued, which was contrary to the spirit of the order. The trial court however relied on the Magistrate's Court Act to invoke the stay of execution to resume trial of the applicant. The trial court in Criminal Case 2 of 2019 refused to discharge him. The applicant submitted that trial court's conduct was in total conflict with the orders of the constitutional court. In Criminal Case 59 of 2016 the trial judge kept the applicant on remand reasoning that "the case was placed outside the orders of the constitutional court".

4.8 The applicant challenged the decision of the Supreme Court to stay execution of the orders of the Constitutional Court. He submitted that the Supreme Court could not have issued orders which render Section 84 of the Trial on Indictments Act and Article 44 of the Constitution of no useful effect. He submitted that Section 84 of the Act is to the effect that the production of a copy of order of acquittal shall be a bar to any subsequent proceedings for the same matter against the same accused person. Article 44 deals with the prohibition of derogation from particular human rights and freedoms. He argued that the stay of execution has no retrospective application to the already discontinued trials. He submitted that the Supreme Court observed that Criminal Cases 47 of 2013 and 56 of 2018 had been permanently stayed following the order of the Constitutional Court. He contended that there was no execution to stay by the Supreme Court because by the time the order of the constitutional court was stayed, execution had been completed and the applicant had got the relief. The applicant cited *Jeffrey Mark Brenner v Her Majesty's Revenue and Customs* [2011] EWHC 1611 where it was observed that:

"The word "execution" is not defined in the Act. It is of course, a word familiar to lawyers. "Execution" means quite simply, the process of enforcing or giving effect to the judgment of the court and is "completed" when the judgment creditor gets the money or thing awarded to him by the judgment (Emphasis added)."

The applicant invited the court to find that the respondent's agents, the DPP and the anti-corruption court fell short of consideration of the rules governing stay which were of no retrospective application. The stay of execution of the Supreme Court did not serve to set aside the discharge order. The applicant cited *Keuythali Design Ltd. v ICE Associates Ltd.* [2009] EWHC 3676 (TCC) 26 at 98, 100 where the court said, "If for instance, execution has already taken place, in part or in full, it does not mean to say that really the execution is in some way set aside."

- 4.9 The applicant prayed for the following orders.
- 1) Firstly, he prayed for a declaration that the Attorney General, Director of Public Prosecutions, Inspectorate of Government and High Court Anti-Corruption Division are found jointly and severally in contempt of court orders in Petition 30 of 2014.
- 2) Secondly, he prayed for an order to nullify or set aside all decisions, orders and warrants against the applicant in respect of criminal cases 47 of 2013, 59 of 2016, 56 of 2018 and all matters arising therefrom.
- 3) Thirdly, he prayed for general, aggravated and exemplary damages.

5 Respondent's submissions.

- 5.1.1 The respondent submitted that the Constitutional court does not have jurisdiction to entertain interlocutory applications. It stated that it is trite law that jurisdiction is a creature of statute. It cited *Desai v Warsaw* (1967) EA 351 where the court held that any judgment or an order arising from proceedings of a court acting without jurisdiction is a nullity.
- 5.1.2 The respondent submitted that the jurisdiction of the Constitutional Court is provided for under Article 137 of the Constitution of Uganda which provides.
- "(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.
- (2) When sitting as a constitutional Court, the Court of Appeal shall consist of five members of that Court.
- (3) A person who alleges that-
- (a) An Act of Parliament or any other law or anything in or done under the authority of any law or;
- (b) Any act or omission by any person or authority is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.
- (4) Where upon determination of the petition under clause (3) the constitutional court considers that there is need for redress in addition to the declarations sought, the constitutional court may (a) Grant an order of redress; or

(b) Refer the matter to the High Court to investigate and determine the appropriate redress."

The respondent submitted that this application is incompetent before this Court as it has nothing to do with interpretation of the Constitution as provided for under Article 137. It submitted further that the Constitutional Court has on several occasions held that its jurisdiction is limited to ascertainment of whether the subject of constitutional litigation, be it an act of Parliament, or any other law or act or omission done under the authority of any law, or by any person or pc. 9 authority, is or is not inconsistent with the constitution. The Constitutional Court exclusively adjudicates matters requiring interpretation of the Constitution.

5. 1.3 The respondent cited /smail sentgo u KCC and Attornea General, constitutional Appeal 2 ol 1998 pages 3 and 4 where Justice Remmy Kasule stated that:

> "A Constitutional question that has to be interpreted by the Constitutional Court arises when there is an issue, legal or otherwise requiring an interpretation of the Constitution for the resolution of the cause out of which that issue arises from. Further, the dispute where the apparent conflict exists must be such that its resolution must be only when and after the Constitutional Court has interpreted the Constitution. The Constitutionality of statute or some law, or the act or omission of a person or authority must be brought forth for determination."

The respondent submitted that there is no provision nor does the construction of Article 137 of the Constitution of Uganda a-llow the constitutiona-l court to entertain civil applications like this one. It further submitted that it is only the constitution of Uganda that sets out the jurisdiction and composition of the Constitutional Court. Other statutes, particularly the Judicature Act, Court of Appeal Rules which confer powers on the Court of Appeal to entertain interlocutory matters apply to other Courts of Judicature, i.e. High Court and court ofAppeal respectively. They do not provide explicitly for applications to the Constitutional Court. Therefore, this Court cannot be seized with jurisdiction provided under other laws, except under the constitution. It submitted the constitutional court exercising powers granted under the Judicature Act to entertain constitutional applications like this one is erroneous and a nullity, regardless of whether the applications are heard by a full bench of the court or not. The respondent contended that the framers of the Constitution intended the Constitutional Court to entertain matters requiring Constitutional interpretation and not any matters which do not require any interpretation of the Constitution.

5. 1.4 The respondent cited Ismael serugo u. Kampala citg council, constitutional Appeal 02 of 1998, where the Supreme Court (Kanyeihamba, JSC) stated:

"Nevertheless, when it comes to the court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional Court has no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions."

The respondent also cited the Supreme Court (Wambuzi, CJ) in *Attorney General v. Tinyefuza* Constitutional Appeal 1 of 1997 which set out the limits of the jurisdiction of this Court as provided for in Article 137 of the Constitution, as follows:

"In my view, jurisdiction of the Constitutional Court is limited in Article 137(1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from, interpretation of the Constitution is given. In these circumstances, I would hold that unless the question before the Constitutional Court, depends for its determination on the interpretation of the Constitution or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction."

The respondent submitted that the application is for enforcement of rights which should have been filed before a competent court other than the Constitutional Court. It also cited *Springs International Hotel Limited v Hotel Diplomat Limited & Bonneg Katafitmba Civil Suit 227 of 2011* at page 11 of the decision, where the Court held filing a multiplicity of suits well knowing other suits are pending in the court with substantially the same issues amounts to an abuse of court process. The respondent prayed that the application is dismissed with costs.

- 5.2.r On, the merit of the application, the respondent submitted that the continuous prosecution, hearing and determination of Criminal Case 47 of 2013, Criminal Case 59 of 2016 which was conducted as Session Case 04 of 2016 and Criminal Case 056 of 2018 which was conducted as Session Case 02 of 2019 against the applicant was proper and not in contempt of Court. It submitted that it lodged an appeal in the Supreme Court and obtained a stay of execution of the orders of the Constitutional Court on 12th February 2021, which are to the effect that:
 - "a) The execution of the majority judgment and orders of the Constitutional Court dated 7th August 2020 in Constitutional Petition No. 30 of 2014 be and is hereby stayed pending the hearing and determination of the intended Appeal by the applicant.
 - b) The applicant shall institute the intended Appeal without delay.
 - c) As this matter is of great public importance, each party shall bear its costs of the application."

The respondent submitted that in light of the above Supreme Court ruling, the orders of the Constitutional Court were stayed. The stay of the above cases was proper and not in contempt of court. The respondent cited *Black's Law Dictionary 10th Edition* page 1639, which defines a stay of execution as "an order to suspend all or part of judicial proceedings or judgment resulting from that proceedings also known as suspension of judgment." The respondent submitted that the Attorney General was under no obligation to comply with the orders issued by the Constitutional Court until the order of stay is vacated or set aside or the appeal is disposed of by the Supreme Court. The respondent submitted that a stay of execution of a judgment does not operate to maintain the status quo prevailing at the time but rather stop the execution of the orders of the court.

5.2.2]ne respondent relied on the principles governing grant of temporary injunctions, which it argued are also applicable with necessary modification to applications of stay of execution pending hearing and determination of an appeal. It submitted that a stay of execution is directed by a court to stop some form of enforcement or action. In the instant case, the respondent sought the stay of execution of the orders of the Constitutional Court which were: to permanently stay proceedings against the petitioner in Criminal Cases 47 of 2013, 62 of 2014, now 101 of 2014 and directing the Anti-Corruption Court to immediately discharge the petitioner in the above cases and any future cases whose offences are founded on the same facts. The respondent submitted that it was not bound by the Constitutional Court orders upon obtaining the stay of execution from the Supreme Court. It invited this Court to find that the Attorney General, Inspectorate of Government, Director of Public Prosecution and the High Court Anti-Corruption Court Division are not in contempt of the Constitutional Court orders in Constitutional Petition 30 of 2014.

5.2.3 The respondent submitted that the orders of the Constitutional Court excluded Criminal Case 59 of 2016 obtaining to charges of illicit wealth, contrary to Sections 33(i) and (ii) of the Anti-Corruption Act. It argued that Article 28(9) of the Constitution does not affect the charges of illicit wealth, because it is not of the same character as the other charges discussed above. The respondent submitted that the applicant could not be released since he was still on remand in Criminal Case 59 of 2016.

6 DETERMINATION OF COURT

- 6.1 The applicant was a Principal Accountant in the office of the Prime Minister. He was arrested and subsequently charged with offences under the Anti-Corruption Act in Criminal Case 105 of 2012 (later converted to 101 of 2014), Criminal Case 138 of 2013, Criminal Case 105 of 2012, Criminal Case 047 of 2013 and Criminal Case 059 of 2016. On 3rd October 2014, the applicant filed Constitution Petition 30 of 2014 seeking for orders that the Constitutional Court permanently prohibits the State from prosecuting him in offences similar in character founded on the same facts arising in connection with his former employment as Principal Accountant as it infringed inter alia on his right to a fair hearing. On 7th August 2020, the Constitutional Court allowed the applicant's petition and the prayers sought. The respondent being aggrieved by the decision of the Constitutional Court filed an appeal to the Supreme Court and obtained a stay of execution of the orders of the Constitutional Court. The applicant filed this application contending that the respondent has continued to prosecute him in Criminal Case 59 of 2016 and in other Criminal cases in contempt of the orders of the Constitutional Court.
- 6.2 The court will first address the preliminary point as to its jurisdiction to entertain this application. If the court finds it has jurisdiction it will address the second issue. In order to address the second issue, the court will look at the law in respect of contempt of court orders and then the orders and indictments which pg. 13

are the subject of this dispute and then determine whether the respondent was in contempt.

- 6.3 Jurisdiction of a court is a creature of statute. In this case, the court of Appeal is sitting as a constitutional court. In order to determine its jurisdiction, one needs to look at the Constitution. Article 137 of the Constitution of Uganda reads:
- "(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.
- (2) When sitting as a constitutional Court, the Court of Appeal shall consist of five members of that Court.
- (3) A person who alleges that-
 - (a) An Act of Parliament or any other law or anything in or done under the authority of any law or;
 - (b) Any act or omission by any person or authority is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate'
- (4) Where upon determination of the petition under clause (3) the constitutional court considers that there is need for redress in addition to the declarations sought, the constitutional court may (a) Grant an order of redress; or
- (b) Refer the matter to the High Court to investigate and determine the appropriate redress."

The Article has to be read as a whole. In *Attorney General v Major General David Tingefuza* Constitutional Appeal 1 of 1997 Oder JSC said:

"With regard to principles of constitutional interpretation, the first one, I think is that where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary meaning. The language used must be construed in its natural and ordinary sense. The sense must be that which the words ordinarily bore at the time the statute or constitution was passed."

Article 137(1) of the Constitution is clear that the Constitutional Court can determine any question as to the interpretation of the constitution. Article 137(2) provides for the quorum. Article 137(3) allows the Court to make declarations that an act or omission is inconsistent with a provision of the constitution. However, it also allows the court under Article 137(3)(b) to make redress where appropriate. Article 137 (4) states that upon determination if the court considers there is need to make redress in addition to the declarations sought the court may grant an order of redress, or refer the matter to High Court to investigate and determine the appropriate redress. A reading of Article 137 of the Constitution shows that in addition to the Constitutional Court making declarations that an act or omission is inconsistent with the Constitution, it may give an order of redress.

6.4 The respondent cited Supreme Court (Wambuzi, CJ) in *Attorney General v. Tingefuza* (supra) where the court stated.

> "I would hold that unless the question before the Constitutional Court, depends for its determination on the interpretation of the Constitution or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction.

In *Ismael Serutgo u. Kampala Citg Council*, Constitutional Appeal 02 of 1998, the Supreme Court (Kanyeihamba, JSC) stated:

the Constitutional Court has no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions."

In *Attorney General u Tingefuza* (Supra) it was stated:

"The Constitutional court has no jurisdiction in any matter which does not involve the interpretation of a provision of the Constitution. Also for the Constitutional Court to have jurisdiction, the petition must show on the face of it that the interpretation of a provision of the Constitution is required. An application for review of the Constitutional Court only in the context of a petition under article 137 of the Constitution... (Emphasis added)"

The above decision was also cited in Constitutional Petition 30 of 2014 in the judgment of Justice Stephen Musota page 18. Here we are not dealing with breaches of constitutional rights, but with enforcement of constitutional court awards, after the court has already made a declaration involving interpretation of the constitution. The Constitutional Court in addition to declaratory orders may make orders of redress. Black's Law Dictionary 9th Edition page 1392 defines 'redress' as "1. Relief, remedy... 2. A means of seeking relief or remedy." Where the Constitutional Court is listening to constitutional petitions which pg. 15

revolve around declaratory or enforcement of constitutional rights the constitutional court's mandate is limited to interpretation of the constitution. However, a careful reading of Article 137 of the Constitution, shows that the court is clothed with power to make an order of redress, where after determining the constitutionality for an act there is need for such. The applicant's application is concerned with constitutional court orders where there is non-compliance with them after the court has made declarations.

6. If a party were to say that the declarations, the court made are not being complied with, should the court turn a blind eye and say its job is simply to make declarations? A court that cannot have its orders enforced or complied with, is toothless. It is redundant. In *Housing Finance Bank Ltd & Another u Edward Musisi* (supra) at page 11, it was held that;

> "The principle of law is that the whole purpose of litigation as a process of judicial administration is lost if orders issued by Court through its set judicial process, in the normal functioning of the Courts; are not complied with in full by those targeted and or called upon to give due compliance."

In *Ekau u Dr. Aceng* Misc. Application 746 of 2018 [2019] UGHCCD 134 the court stated:

"The reason why courts will punish contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with ^a court order in his hands must be assured that the order will be obeyed by those to whom it is directed."

In *Kizito u Nsubuga & 6 others* (Civil Application 25 of 2021, Civil Application 26 of 2021) 120221 UGSC 6 (6 June 2021) the court quoted *Florence Danlantu Angumale Albino & Anor HC MA 0096 of 2016* which stated:

"There is a clear line of distinction between proceedings for civil contempt which is regarded as a form of execution and enforcement of the order alleged to have been violated to the detriment of the party. It is in the nature and form of an appeal for execution and enforcement of the court's order for the benefit of the party. The right of a private party to move the court for civil contempt is therefore regarded as remedial."

Contempt of court can only arise after a court has made its orders. The applicant's application is one for a consequential order. A consequential order follows from a primary judgment or decision detailing specific action that needs to be taken to implement the court's ruling. Orders for redress are essential for ensuring that court's decisions are effectively carried out and may include directives depending on the nature of the case. These may involve 1. restitution or compensation 2. Directing policy changes 3. Ordering specific actions like the release of a prisoner whose rights are being violated. The applicant is seeking for compensation and other specific orders because he feels that the respondent is in contempt of the court declarations in Constitutional Petition 30 of 2018. Therefore, where a party is seeking for redress, this court has to determine whether it is appropriate. In order to do so, the Court has to clothe itself with jurisdiction under Article 137(3)(b) of the Constitution. The kind of relief the petitioner seeks can be granted by the Constitutional Court even after judgment if the remedial action sought relates directly back to the judgment i.e. the failure of the respondent to respect orders of the Constitutional Court. Therefore, the court has jurisdiction to entertain this application.

6.6 Having found that the Constitutional Court has jurisdiction to entertain this application, this court asks itself is, what is contempt of court? In *Uganda Super League u Attorney General Constitutional Application 73 of 2013* Justice Kiryabwire cited *Black's Law Dictionary 7th Edition* that defines 'contempt of court' as "conduct that defies the authority or dignity of court." He cited with approval *Halsbury's Laws of England Volume 9, 4th Edition* where contempt of court was classified in two categories:

> "Criminal contempt which is committed by words or acts that impede Administration of Justice and Civil contempt which arises when there is disobedience to judgment, orders or other court process and involves private injury."

In Prof. Frederick Ssempebwa and 2 others u Attorneg General Civil Application 5 of 2019 the Supreme Court noted:

"Contempt of court is in two categories.

Criminal contempt is defined by Black's Law Dictionary 9th Edition at page 385 as "An Act that obstructs justice or attacks the integrity of the court the criminal contempt proceedings are punitive in nature." The offence is recognized by Article 28(12) of the Constitution. Which states; "Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law." This offence has its origins in Common Law and according to Lord Denning, in *Re Bramblevale Ltd.* 119691 3 ALL. E. R 1062 for one to be convicted of contempt of court the case has to be proved beyond reasonable doubt just like in other criminal cases."

In this case, the applicant contends that the respondent disobeyed a court order which is civil contempt. Civil Contempt was also discussed in Prof. Frederick Ssempebwa and 2 others u Attorneg General (supra) as follows:

"Civil Contempt is defined by Black's Law Dictionary 10 edition on page 385 as follows:

"The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he complies with the court order."

In *Kizito u Nsubuga & 6 Others* (supra) the court stated:

"It is thus clear that criminal contempt involves a "public injury" which in essence means acts deliberately premeditated to diminish public respect due to the courts. Criminal contempt takes place when the contemnor interferes with the court's ability to function properly. It may take the form of yelling at a judge presiding over a case, insolent language, assaulting persons in the courts (court officers or not) etc.

Civil contempt on the other hand, occurs outside the court's close realm. It usually takes the form of disregarding court orders and judgments. This, therefore, means that civil contempt must be brought to the court's notice the conduct alleged to constitute the contempt of court."

The remedies the applicant is seeking as stated in his application are civil in nature.

6.7 Contempt of court has been discussed in other court decisions, some of which are from the lower courts and not from the constitutional court, hence are merely persuasive. In *Stanbic Bank (U) Ltd and Jacobsen Uganda Power Plant Company Ltd. u The Commissioner General Uganda Revenue Authority Misc. Application 0479 of 2019* Irene Mulyagonja Kakooza J. noted that the general principle regarding respect of court orders was stated in *Chuck u Cremer* (1 Coop Tempt Cott 342) which cited *Romer, LJ in Hadkinson u Hadkinson* as:

> "A party who knows of an order, whether null or regular or irregular, cannot be permitted to disobey it . . . it would be most dangerous to hold that suitors, or their solicitors, could themselves judge... they should come to the court and not take (it) upon themselves to determine such a question. That the course of a party knowing of an order, which was null and irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

Romer LJ at page 571 stated that "Disregard of an order of court is a matter of sufficient gravity, whatever the order may be". In *Jack Erasmus v Ilangirano* ^u Col. Kaka Baggenda and Attorney General Misc. Application 671 of 2019 Justice Sekana said:

"A.ry course of conduct which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice is contempt of court. The rationale is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed."

In *Meadow Glen Homeowners Association v City of Tshwane Metropolitan Municipality* (767 /2013 (2014) ZASCA 209 the court stated that "Contempt of court is not an issue inter parties; it is an issue between the court and the party who has not complied with a mandatory order of court." It cited the *Victoria Ratepayers case* (51103) [2000] ZAECHC 19 (11 April 2003) where it was stated that contempt of court has obvious implication for the effectiveness and legitimacy of the legal system.

6.8 The ingredients of what amounts to civil contempt of court were stated by the Supreme Court in *Prof. Frederick Ssempebuta and 2 others v Attorney General Civil Application 5 of 2019* where the court stated that:

> "... the applicant must prove the requisites of contempt (the order, service or notice; non-compliance; and willfulness and mala fides) beyond reasonable doubt. But once the applicant has proved the order service, and non-compliance, the respondent bears the evidential burden in relation to willfulness and mala fides: should the respondent fail to advance evidence that establishes ^a reasonable doubt as to whether non-compliance was willful and mala fide, contempt will have been established beyond a reasonable doubt."

In *Kizito v Nsubuga & 6 Others* (supra) the court cited *Careg v Laiken*, 2015 SCC 17 at paragraphs 32-35 which spelt out 3 elements that must be established by an applicant in a civil contempt proceeding to be:

- "(1) The order alleged to have been breached must state clearly and unequivocally what should and should not be done.
- (2) The party alleged to have breached the order must have had actual knowledge of it.
- (3) The party allegedly in breach must have intentionally done the act the order prohibits or intentionally failed to do the act that the order complies."

Willfulness is defined by Oxford Advanced Learner's Dictionary 8th Edition page L722 as "1... done deliberately, although the person doing it knows that it is wrong. 2. Determined to do what you want." Black's Law Dictionary 10th Edition page 1100 defines mala fides as "in or with bad faith.

- 6.9 Taking the above into consideration, the conditions the applicant has to prove to hold the respondent liable for contempt of court are
- 1. The existence of a lawful order by a court whether it is regular or irregular.
- 2. The order alleged to have been breached must state clearly and unequivocally what should and should not be done
- 3. The respondent had knowledge of the order obtained through service.
- 4. The respondent failed to comply with the order.
- 5. The act complained of was done willfully or with mala fides

The existence of the order in Constitutional Petition 30 of 2014 is not in doubt. It is also not in dispute that the respondent had knowledge of the order. What seems to be in contention is that the respondent failed to comply with the order. Also the Act complained of was done willfully or with mala fides.

6. 10 In order to determine whether the respondent was in civil contempt of the decree of the Constitutional Court in Constitutional Petition 30 of 2014, we need to look at the relevant extract of the decree which the respondent is alleged to have defied. It reads:

"IT IS HEREBY DECREED THAT

- 1. An order permanently staying the proceeding against the petitioner in the pending criminal cases 47 of 2013, No. 62 of 2014, now 101 of 2014 and directing the Anti-Corruption Court to immediately discharge the petitioner in the above cases and any future cases whose offences are founded on the same facts doth issue.
- 2. An order permanently prohibiting the state from using any process of any court so as to initiate and prosecute the petitioner for any offences similar in character or founded on the same facts whatsoever arising out of or in connection with his former employment as Principal Accountant, office of the Prime Minister.
- 3. Each party will bear [sic] its own costs"

The implementation of the order in respect of criminal cases 47 of 2013 and 101 of 2014 is clear. Criminal Case 56 of 2018 was not specifically or explicitly included.

6.1 1 There are three controversies which arose from the implementation of the above order. The first controversy arose from the prosecution of Criminal Case 59 of 2016. There was an issue as to whether it was catered for under the above decree. The applicant contended that the respondent insisted on further prosecution of it despite the court decree. The second controversy arose from

the order of stay of execution of the decree of the Constitutional Court in Petition 30 of 2014 issued by the Supreme Court. The petitioner contends that the Supreme Court cannot stay the order of the Constitutional court. If so, the stay of pc.21

execution did not mean that the respondent would continue with the prosecution of the criminal cases while the appeal in the Supreme Court was pending. The third controversy arose from matters where the applicant was discharged before the order of stay of execution was issued. At the time the stay of execution was obtained in the Supreme Court, the petitioner had been discharged in some criminal cases. He argues that execution of the order of the Constitutional Court was complete and the respondent cannot reverse it.

6.12 The first controversy was in Criminal Case 59 of 2016, where the applicant was charged with illicit enrichment. In a letter to the applicant dated 27th August 2020, the office of the Inspectorate of Government (IG) stated:

"DECREE IN CONSTITUTIONAL PETITION IIIO. 30 OF 2014 KAZINDA GEOFFREY V ATTORNEY GENERAL"

We are in receipt of the Decree in the above Petition which we have carefully reviewed together with the judgement in respect of the same Petition.

This is to advise that the Inspectorate of Government (IG) case against you is of Illicit Enrichment contrary to Section 31 of the Anti-Corruption Act, registered under Criminal Case Number 59/2016. Please be informed that their Lordship's [sic] were very clear on the effect of their findings on the case prosecuted by IG, thus at page 34 of the judgment decreed as follows:

"This finding however, excludes Criminal Case No. 59 of 2016 on charges of illicit wealth, contrary to section 33(i) and(ii) of the Anti-Corruption Act, Article 28(0) of the Constitution does not affect the charges of illicit wealth because it is not of the same character as the charges discussed above."

We therefore confirm that the Inspectorate of Government will proceed with the prosecution of Criminal Case Number 59 /2016 to its logical conclusion."

The applicant was aggrieved by the respondent's persistence to prosecute Criminal Case 59 of 2016 despite the decree of the Constitutional Court in Constitutional Petition 30 of 2014. He insisted that the said Criminal case was included in the second portion of the decree.

- 6.13 In order to determine whether Criminal Case 59 of 2016 was included in the order of Constitutional Petition 30 of 2014 one has to look at the lead judgment of Justice Stephen Musota. Issue 1 was:
- "1. Whether the respondents' act of successively prosecuting the petitioner after the first conviction contravenes and is inconsistent with Article 28(9) of the Constitution?"

The court found on issue 1 that the continuous prosecution of the accused infringed on his right to a fair hearing under Article 28(9) of the Constitution. The court went on to say:

"This finding, however, excludes Criminal Case No. 59 of 2016 on charges of illicit wealth, contrar5r to Section 33(i) and (ii) of the Anti-Corn:ption Act. Article 28(9) of the Constitution does not affect the charges of illicit wealth, because it is not of the same character as the charges discussed above."

The court went on to address issue 4 which read:

"4. Whether the respondent's acts of successively prosecuting the petitioner after the first conviction contravenes and is inconsistent with Articles 28(1), 28(3)(a), (c), (d) of the Constitution?"

Article 28(1) dea-ls with a fair, speedy and public hearing. Article 28(3)(a) deals with presumption of innocence. Article 28(3)(c) provides that an accused shall be given adequate time and facilities for the preparation of his or her defence. Article 28(3Xd) provides for representation ofthe accused. On issue 4, the court stated.

"... The petitioner argued that he is being tried again in six other trials at the Anti-Cormption Court in successive prosecutions.

These include inter alia Criminal Case No. 105 of 2012 which was prosecuted by the DPP on 96 August 2012 and withdrawn on 12th march 2014; Criminal Case No. 047 of 20 13 which was commenced on 291h March 20 13 and is ongoing before Justice Margret Tibulya at the stage of hearing defence witnesses. Criminal Case No. 62 of 2014 commenced on 12th March 2014 and it replaced Criminal Case No. 105 of 2012 but was also part heard and withdrawn on 12rh June 2014. Criminal Case No. 101 od 2014 replaced Criminal Case 062 of 2014 and Criminal Case O59 of 2016 commenced on 26th March 2016 which is still on going."

"I reiterate my earlier finding while resolving issue I of the petition that the successive trials against the petitioner deny him a right to a speedy trial and consequently, he cannot have adequate time to prepare his defence. This has caused irreparable prejudice to the petitioner in that he was not accorded ^a hearing at his place of work nor was he heard by either the Auditor General or the Public Accounts Committee. Issue 4 is also resolved in favor of the petitioner."

While issue 1 dealt with a right to a fair hearing, issue 4 dealt inter alia with a speedy trial. A casual reading of the above portion underlined shows that Criminal Case 59 of 2016 was included among the cases affected by the need for a speedy trial. One wonders whether successive prosecution of the applicant including Criminal Case 59 of 2016 would not affect a speedy trial. The said finding may fall under the second portion of the decree which read:

"2. Art order permanently prohibiting the state from using any process of any court so as to initiate and prosecute the petitioner for any offences similar in character or founded on the same facts whatsoever arising out of or in connection with his former employment as Principal Accountant, office of the Prime Minister."

The second portion of the decree dealt with offences similar in character or founded on the same facts arising out of or in connection with former employment as Principal Accountant. In Criminal Case 59 of 2016 the applicant was charged with obtaining illicit wealth. The respondent does not explain how it is going to sever the illicit wealth the applicant allegedly got from his job as Principal Accountant, office of the Prime Minister from the illicit wealth he allegedly got elsewhere. The respondent also did not explain how if it is prosecuting a number of cases against the applicant how the case on obtaining illicit wealth will not be affected by the need of a speedy trial. Nor does the respondent explain how if the applicant is battling several criminal cases, he will get adequate time to prepare his defence on the charge of illicit wealth.

6.14 The second controversy is in respect of the stay of execution. The respondent obtained an order of stay of execution of the decree of Constitutional Court from the Supreme Court in Constitutional Application 27 of 2020. The order of the Supreme Court read:

- "(a) The execution of the majority judgment and orders of the Constitutional Court (Kiryabwire, Cheborion and Musota JJA/JCC) dated 7th August 2020 in Constitutional Petition No. 30 of 2014 be and is hereby stayed pending the hearing and determination of the intended appeal by the applicant.
 - (b) The applicant shall institute the intended appeal without delay.
- a
- (c) As this matter is of great public importance, each party shall bear its/his costs of the application."

Among the orders of the Constitutional Court the respondent sought to stay included, in addition to those stated above was:

"A declaration nullifying sections 29, 30 and 59 of the Trial on Indictment Act and sections 89, 90 and 91 of the Magistrate Court Act for being in contravention of Article 28(9) of the Constitution."

Though it was an issue that was determined by the Constitutional Court it was not captured in the decree issued by it. The court in granting the stay found that the applicant had established the intended appeal involved matters of significant public importance and raised several legal and constitutional issues that warrant consideration and final determination of the court. However, what is important to the applicant was the stay of the execution of orders on his constitutional rights to a fair hearing and speedy trial. The controversy arose from how the stay of execution would be implemented.

6.15 The contention between the parties revolves around whether the respondent after obtaining the stay of execution could continue to prosecution or initiate new prosecution against the applicant. The applicant cited Jeffreg Mark Brenner ^uHer Majestg's Reuenu [2005] EWHC ¹⁶1 1 where it was observed that:

> "The word "execution" is not defined in the Act. It is of course, a word familiar to lawyers. "Execution" means quite simply, the process of enforcing or giving effect to the judgment of the court and is "completed" when the iudprnent creditor sets the money or thine awarded to him by the iudsment (Emphasis added)."

Black's Latu Dictionary (supra) page 650 defines 'execution' as "1. The act of carrying out or putting into effect (as a court order or a securities transaction) <execution of the court's decree>..." Black's Laut Dictionary (supra) page 1548 dehnes 'stay'at page 1548 as "1. The postponement or halting of a proceeding, p9.25

judgment or the like. 2. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding." So the question is: what did the Supreme Court stay? The Supreme Court stayed the discharge of the applicant from the Criminal Cases mentioned in the decree in Constitutional Petition 30 of 2014 which we mentioned above. The court also stayed the implementation of the order nullifying Sections of the Trial on Indictment Act and the Magistrate's Court Act.

- 6. 16 A stay of execution by the Supreme Court renders the order of the lower court ineffective. It is not stated ipso facto in the order of the Supreme Court that the respondent should continue the prosecution. If the Supreme Court had intended that the respondent should continue prosecuting the applicant it would have explicitly stated so. If we were to say that prosecution should proceed until the criminal matters are determined, this would mean that the order for stay of execution would have resolved the intended appeal to the Supreme Court by the respondent. There would be no need for the respondent to pursue its appeal, as it would be fait accompli. Our understanding of the order of stay by the Supreme Court would be that the applicant should not be discharged from the said criminal cases until the determination of the appeal by the Supreme Court.
- 6.17 The third controversy arose from the fact that in come criminal cases, the applicant had been discharged. When the respondent obtained the stay of execution from the Supreme Court, the High court had in some cases discharged the applicant. In Criminal Case 47 of 2013, the applicant was discharged on 11tn August 2020. T};e discharge order read:

"IT IS HERTBY ORDERED that:

¹. The proceeding against A I (KAZINDA GEOFREYI are hereby discontinued in accordance with the Constitutional Court order in Constitutional Petion [sic] No. 30 of 2014 of 7th August 2020. He is hereby set free unless he is held on other charges."

In respect of Criminal Case 56 of 2018 the applicant was discharged on the 19th October 2020. The court order read:

"IT IS HEREBY ORDERED as follows:

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- 1. The trial of the applicant in Criminal Case No. 56 of 2018 (Session Case No. 002 of 2019) is permanently stayed and the accused who is the applicant is discharged in compliance with the decision of the Constitutional Court of 7th August, 2020.
- 2. Since there are two accused in Criminal Case No. 56 of 2018 (Session Case No. 002 of 2019), the case will proceed against the other accused.
- 3. For avoidance of doubt, should the Supreme Court stay the judgement of the Constitutional Court, then the applicant will be brought back to the proceedings. "

In the second case, it was as if the High Court was anticipating the Supreme Court to stay the order of the Constitutional Court. The applicant is incensed that after he had been discharged, the respondent sought an order staying the discharge which had already occurred. He felt the respondent was acting in contempt of court. There is no evidence that the Supreme Court was aware that the applicant had been discharged in Criminal Case 47 of 2013. In such a case, the order for stay was overtaken by events. However, a discharge from a criminal case does not amount to an acquittal. If in Appeal 5 of 2020 Attorney General v Kazinda the Supreme Court was to reverse the decision of the Constitutional Court, the charges on the applicant may be reinstated.

6.18 So having unwoven the intricacies, we come to the outstanding issue; Was the respondent in contempt of the decree of the constitutional court in Constitution Petition 30 of 2014? The orders of the Constitutional Court were appealed to the Supreme Court which gave a stay of execution. The effect of the order for stay of execution was that the orders of the Constitutional Court are not enforceable. This means that there are no orders the respondent could have been in contempt of. In the absence of orders which are enforceable we cannot say that the respondent acted willfully in disregard of court orders. Therefore, we cannot find the respondent in contempt of the order of the Constitutional Court in Petition 30 of 2014. We would direct the parties to wait for the outcome of the appeal in the Supreme Court. The appeal if disposed of, will have a bearing on the

prosecution of the criminal cases filed and any further criminal case against the petitioner. Each party shall bear its own costs of this application.

rsf,- Dated AO.f at Kampala this. day 2024.

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on. Christophe r Gashirabake

Justice of tutional Court

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Hon. Moses Kazibwe Kawumi

Justice of Constitutional Court

Dr. Asa Mugenyi

Justice of Constitutional Court

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