

UGANDA / JUDGMENT

Kiwanuka and Another v Uganda

(Criminal Miscellaneous Application 14 of 2021) [2021] UGHCCRD 110 (4 August 2021)

[2021] UGHCCRD 110

COURT

HC: Criminal Division (Uganda)

BEFORE

Elubu, J

CASE / FILE NUMBER

Criminal Miscellaneous Application 14 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF KAMPALA AT KAMPALA (CRIMINAL DIVISION)

CRIMINAL MISC. APPL. No. 14 of 2021 (Arising From Makindye Court Case No 206 of 2018)

| 1. Kiwanuka Anthony Mutenza | | |

|-----|-----|-----|

| 2. Ochieng Peter | ::::::::::: | APPLICANT |

Versus

Uganda ::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU RULING

This application is filed under Section 17 of the **Judicature Act**, Sections 48 and 50 of the **Criminal Procedure Act** and Rule 2 of **The Judicature (Criminal Procedure) (Applications) Rules SI 13 – 8**.

The applicant seeks the following orders:

- 1. The decision/order of the Buganda Road Chief Magistrate's Court declining to stay proceedings in Criminal Case No. 206 of 2018 pending determination of the High Court Suits No. 394 of 2018 and HCCS No. 441 of 2018 be called for Revision and Set Aside;

- 2. An order issues staying proceedings in the Buganda Road Chief Magistrates Court vide Criminal Case No. 394 of 2018 and HCCS No. 441 of 2018 between the same parties.

The grounds on which this application is premised are well set out in the Notice of Motion and have been particularised in the accompanying affidavit of Kiwanuka Anthony Mutenza (the 1st applicant).

In sum, he states that the applicants **Kiwanuka Anthony Mutenza** and **Ochieng Peter** were charged at the Buganda Road Court, vide Criminal Case No 206 of 2018, with the offences of Forgery c/ss 342, 345 and 347; Uttering a False Document c/s 351; Obtaining Money by False Pretences c/s 305; and Conspiracy to Commit a Felony c/s 390 all of **the Penal Code Act**. The complainant in these cases is one Matovu Johnson Kamulali. The 1st applicant states that on the 17th of August 2017 he borrowed 80,000,000/- from the complainant, who is a moneylender, and used a certificate of title to land situate in Kayunga as security. At execution of the agreement, the 1st applicant also signed land transfer forms for that land. After a while, the complainant alleged that the certificate of title, against which the complainant had paid the applicants 1.2 billion/-, was a forgery. This the 1st applicant denies. He avers that what he had with the complainant was a money lending transaction. Following arraignment at Buganda road, the 1st applicant filed High Court Civil Suit No 394 of 2018 seeking declarations that the transaction was indeed a money lending one and not a sale of land as alleged. The complainant then responded by also instituting Civil suit No. 441 of 2018, seeking to recover 1,200,000,000/-, basing himself on the sales agreement entered between the applicants and himself. It is stated that this agreement was solely for the purpose of securing the money lending transaction. The applicant affirms that the charges preferred against them allege they received money by false pretences yet he has the certificate of title and it is in his names. In that case decisions in the civil suits would have a direct impact on the criminal case. He goes on to state that when the charges were read to the applicants in the trial court, his counsel raised an objection and prayed for their dismissal. In the alternative, they sought a stay of proceedings pending determination of the civil suits. The objections were dismissed by the trial magistrate. The applicant deposed that if this court does not grant the orders prayed for, there is a danger of the trial court directing that they pay the complainant 1.2 billion shillings which they have never received. It would lead to conflicting decisions but also render the High Court suits nugatory. That it would also result in an abuse of their right to a fair trial since the sale is based on a sale agreement which has been challenged.

The respondent opposes this application. In an affidavit deposed by Ms **Nyamwiza Judith**, a **Resident State Attorney at Buganda Road Court**, it is stated that there was never a decision by the lower court declining to stay proceedings in the lower court. There is therefore no decision to Revise or set aside. Instead the applicants raised an objection that they were charged before an investigation report was made. That also alleged it was wrong for the DPP to direct for the amendment of charges or to prefer charges before a charge and caution statement had been extracted from them. For that reason they prayed that the charges be dismissed.

Submissions

On the 6th of July 2021 the parties were directed to file written submissions which would close on the 23rd of July 2021. It was only the applicant who has complied. The submissions will not be reproduced here but have been closely studied and will be referred to in this ruling.

Determination

I will start with the impugned proceedings in Buganda Road Court Criminal Case No. 206 of 2018. On the 26th of February 2018 the applicants were arraigned before the Chief Magistrate. They pleaded 'Not guilty' and were remanded. An application for bail was made on the 27th of February 2018. On the same day a preliminary objection was put up by counsel for the applicants. It was argued that no charge and caution statements were recorded from the applicants. That the charge was founded on lies and the applicants should not be tried on the basis of a lie. That there was no investigation report given to the applicants in the documents disclosed to them by the prosecution. That the prosecution had amended the charge sheet when there was no new evidence on record. That the amendment was therefore in bad faith and compromised the applicants' right to natural justice and a fair trial.

The trial court considered the objection and found that the DPP has its powers enshrined in Article 120 of **the Constitution of the Republic of Uganda** and they include the mandate to direct investigations and amendment of charge sheets. That Section 132 of **the Magistrates Court's Act** allows for the amendment of charges provided there is no miscarriage of justice occasioned. Regarding the basis for the charge, the Court noted that the applicants enjoy the presumption of innocence and the prosecution bears the duty to

prove the case. It was also held that the Court will evaluate the evidence adduced. It was therefore too early for the Court to pronounce itself at the time. In light of its findings, the trial court found the objection premature and dismissed it.

As a consequence of the ruling this application was made.

The applicants have premised their application on the following provisions of the law:

Section 17 of **the Judicature Act** which states,

- (1) The High Court shall exercise general powers of supervision over magistrates courts.
- (2) With regard to its own procedures and those of the magistrates courts, the High Court shall exercise its inherent powers to prevent abuse of the process of the court by curtailing delays, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice.

Section 48 of the Criminal Procedure Act

The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court.

Section 50 of the Criminal Procedure Code Act

- (1) In the case of any proceedings in a magistrate's court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in those proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 34 and 41 and may enhance the sentence;
 - (b) in the case of any other order, other than an order of acquittal, alter or reverse the order.

It is true that the High Court has general powers of supervision over the Magistrates Court as provided for in Section 17 of the **Judicature Act**. Subsection (2) grants powers to intervene in order to stem delays.

The powers of revision are created under Section 48 and 50 of the **Criminal Procedure Code (CPC) Act**.

The question here is whether this matter was open to Revision by the High Court?

Firstly the applicant questions the prosecutions actions in preferring charges without obtaining charge and caution statements from them; before disclosing the investigation report to the applicants; and amending the charges without stating what additional evidence there was.

It would be instructive here to examine the powers the powers and constitutional functions of the DPP and what effect they have on the complaints made.

Article 120 of the **Constitution** stipulates,

- (3) The functions of the Director of Public Prosecutions are the following—
 - (a) to direct the police to investigate any information of a criminal nature and to report to him or her expeditiously;
 - (b) to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial;
 - (c) to take over and continue any criminal proceedings instituted by any other person or authority;

- (d) to discontinue at any stage before judgment is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority; except that the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.
- (4)
- (5) In exercising his or her powers under this article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process.
- (6) In the exercise of the functions conferred on him or her by this article, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority.

As can be seen, all the complaints raised in the Preliminary Objection are provided for in the functions of the Director of Public Prosecutions who has complete control of the prosecution process. It is up to the DPP to decide which charges to prefer and how to conduct its prosecution. Therefore if in his view the evidence would sustain the charges against the applicants the court has no power to stop the charges. The DPP has a constitutional duty to ensure that the decisions he takes have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process. This duty means that whatever decisions are taken should not lead to a perversion of justice. Investigative control should ensure a scrupulous examination of investigative findings. It includes ensuring that only deserving cases are brought to trial. This decision is not subject to the control of any authority, not even the court. The Court will evaluate the evidence after it is tested in the trial process.

Therefore complaints that preferring charges without obtaining charge and caution statements, before disclosing the investigation report to the applicants, amending the charges without stating what additional evidence cannot be the subject of judicial intervention to stop a prosecution. They should be raised for court to consider as it makes a final decision on merits of the case.

I should add here that an accused person cannot choose what the most appropriate charges in his circumstances would be. It is through the trial process that evidence is adduced and evaluated by Court. It would be an abuse for a court to make a decision of that nature before hearing the evidence.

While the Court will ensure that no miscarriage of justice is occasioned to the parties, it remains the Courts paramount and primary duty to be the neutral arbiter and ensure that justice is not only done but seen to be done. For that reason for the amendment of charges, it is required that the Court grants leave.

Secondly, a question arises whether any party can seek the reversal of an interlocutory ruling of a trial Magistrates Court through an application for revision by the High Court? And also, crucially, whether criminal and civil proceeding arising out of the same subject can proceed concurrently?

On the first question, the court gave an interlocutory ruling on the PO raised by counsel. The 9th Edition of **Black's Law Dictionary** defines interlocutory as,

'(Of an order, judgment, appeal, etc.) interim or temporary; not constituting a final resolution of the whole controversy'.

It is the contention of the applicant that because this essentially is a moneylending transaction and should be handled as a civil case. For that reason the trial court ought to have stayed his trial pending resolution of the Civil Suits he and the complainant had filed.

A look at Section 50 of the **CPCA** shows that the court is meant to examine the record of proceedings where final orders have been made. It may reverse conviction or acquittal or other order of that nature. In some ways [under Section 50 (a), the High Court exercises powers similar to those it has in an appeal]. A Revision is therefore only meant for final orders. That position of the law has been properly stated and followed by Courts before.

In a **Guide To Criminal Procedure In Uganda** by B. J. Odoki 3rd Edition *Law Africa* at page 270, it was observed that,

Like appeals, revision can only be founded on a final order or judgement of the court. It cannot be made against a preliminary or interlocutory order or ruling which does not determine the case.

I will cite two decisions of the High Court that highlight this position.

In Uganda v Dalal [1970] 1 EA 355

It is obvious, as Jones, J., remarked in Cr. Rev. 81/63, *Geresomu Musoke v. Uganda* (unreported), on reading ss. 339 to 341 of the Criminal Procedure Code only a final order can be the subject of a revisional order of this court. At the moment no such order is on the lower court's record. If this were not the case all sorts of magistrates' rulings would be finding their way to this court and I can well imagine a clever accused who likes to avoid a prosecution to conviction delaying such prosecution by making a series of objections, on which a trial magistrate would be compelled to rule and thereafter appeal to this court time and again.

The other decision is **Semuyaga v Uganda [1975] 1 EA 186** where the court held,

Uganda v. Dalal, [1970] E. A. 355 and *Hassan Yusufu v. Uganda* Cr. App. 36/74 (unreported). In those cases it was held that interlocutory decisions made in the course of a trial in a magistrate's court could not be challenged in revisional proceedings; only a final order can be the subject of such proceedings. We do not doubt the validity of those authorities...

In light of the above, this application for revision, challenging the trials court's decision to continue with prosecution, while there is a pending civil suit, cannot be the subject of a revision under Section 50 of the CPCA. Indeed as court noted in **Dalal** (supra) if the contrary were the case it is possible no case would ever be concluded as any decision of the trial court would be up for challenge.

I should also like to point out that filing a civil suit while there is a pending prosecution will not result in a stay of the criminal trial. It appears that was the outcome desired in this case. The two matters proceed on entirely different premises as was considered by the Constitutional court.

In **Nestor Machumbi Gasasira vs Uganda** *Constitutional Petition No 17 of 2011* where the Court held that,

We find that it is fairly settled law that criminal and civil proceedings are distinct from one another. They are not in the alternative and/or necessarily parallel. In the case of **Joseph Zagyenda V Uganda, Criminal Application No. 11 of 2011, Hon Justice Lameck Mukasa** held that:

"Civil proceedings are individualistic in nature while the criminal proceedings are public in nature."*

We are persuaded with these findings. In general, the remedies offered to victims of crimes through criminal proceedings do nothing to get them back to the state in

which they were in, before the crime was committed against them. Similarly, civil proceedings do nothing to prevent future crimes from being committed by a person. In the **Zagyenda case** *(supra)*, the Learned Judge allowed both a criminal case and a civil case regarding the same matter to go forward without either being stayed until the completion of the other. This approach we find is not inconsistent with **Article 28 (9) ...**

In the same way the criminal proceedings against the applicants cannot be stayed simply because they have filed a civil suit. The matters can proceed concurrently. In fact the fears of the applicant listed in para 21 of his affidavit about the likely orders against them, that they may be convicted and directed to refund 1.2 billion shillings, are purely speculative and pre-emptive at this stage. They cannot be the basis of a court decision.

In the circumstances, this application is incompetent and is dismissed.

..... **Michael Elubu Judge**

4.8.2021

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