

UGANDA / JUDGMENT

Ssekikubo & 3 Others v Attorney General & 4 Others (Constitutional Application 6 of 2013) [2013] UGSC 21 (10 October 2013)

[2013] UGSC 21

COURT

Supreme Court of Uganda

BEFORE

Katureebe, CJ

CASE / FILE NUMBER

Constitutional Application 6 of 2013

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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

CORAM: KATUREEBE; KITUMBA; TUMWESIGYE;

KISAAKYE; JJSC; ODOKI; TSEKOOKO;

OKELLO; AG. JJSC.

CONSTITUTIONAL APPLICATION NO. 06 OF 2013

BETWEEN

1. HON. THEODORE SSEKIKUBO
2. HON. WILFRED NIWAGABA ::::::::::: APPLICANTS
3. HON. MOHAMMED NSEREKO
4. HON. BARNABAS TINKASIMIRE

AND

1. THE ATTORNEY GENERAL
2. HON. LT. (RTD) SALEH M. W. KAMBA
3. MS/ AGASHA MARYM :::::::::: RESPONDENTS
4. JOSEPH KWESIGA

5. NATIONAL RESISTANCE MOVEMENT (NRM)

Application for stay of execution and proceedings; arising from consolidated Constitutional Petitions Nos. 16, 19, 21 and 25 of 2013 and Constitutional Applications No. 14 and 23 of 2013.

Ruling of the Court

Introduction

The applicants brought this application by notice of motion to seek from this Court orders for:

1. Stay of execution and or effecting of the ruling and orders of the Constitutional Court in Miscellaneous Applications Nos. 14 and 23 of 2013 delivered on the 6th September, 2013 until the determination of the applicants' intended appeal in this Court.
2. Stay of proceedings and or any other action by the Constitutional Court in the consolidated Constitutional Petitions Nos. 16, 19, 21 and 25 of 2013 until the determination of the applicants' intended appeal in this Court, and
3. Cost of this application

The application was brought under Rules 2(2), 6(2) (b), 42 and 43(1) of the Rules of this Court. Supporting affidavits and other necessary attachments were duly filed by all the parties in accordance with rule 43(1) of the Rules of this Court.

Background

The background facts leading to this application are briefly that the 1st – 4th applicants are members of the 9th Parliament of Uganda having been elected to Parliament during the 2011 General Elections on NRM Party ticket.

In the course of their duties as such, disputes arose between them on the one hand and their political party, the NRM, on the other, over their behaviour which allegedly contravened various provisions of their Party Constitution. Consequently, they were arraigned before the Party disciplinary Committee for disciplinary proceedings. They instituted an application (Misc. Cause No. 251 of 2013) in the High Court seeking to quash the proceedings instituted against them before the disciplinary Committee challenging its composition.

While that application was pending the Committee proceeded to hear the complaint, found the applicants guilty and expelled them from the Party. The Central Executive Committee of the Party confirmed that decision. Following that confirmation, the Secretary General of the Party wrote to the Speaker of Parliament asking her to direct the Clerk to Parliament to declare the seats of the applicants in Parliament vacant by reason of their expulsion from their Party to pave way for by-elections to fill the applicants' positions in Parliament.

The Speaker declined that request arguing that there is no specific Constitutional provision providing for that course of action. The Attorney General then wrote a legal opinion advising the Speaker to reverse her decision on the matter and declare the seats of the applicants in Parliament vacant. The Speaker did not comply.

In the result, some members of the Party and the Party itself (now respondents here) separately filed Constitutional Petitions Nos. 16, 19 and 21 of 2013, challenging the 'act' of the Speaker declining to declare the applicants' seats in Parliament vacant and allowing them to continue as Members of Parliament .

Believing that the disposal of the petitions might take long, the 2nd and 3rd respondents filed Constitutional Application No. 14 of 2013 while the party, (Respondent No. 5) filed application No. 23 of 2013. Both applications sought to restrain the applicants from accessing Parliament and or from participating in any Parliamentary activities until petitions No. 16, 19, and 21 of 2013 were disposed of.

At the hearing before the Constitutional Court, several preliminary objections were raised on behalf of the applicants challenging various aspects of the procedural conduct by the Court. Rulings were made over-ruling all the preliminary objections so raised and disallowed applications made on behalf of the applicants. The applicants lodged notices of appeal against those decisions and sought a stay of proceedings in the petitions before the Constitutional Court until the disposal of their intended appeal. The Constitutional Court refused to grant the requests and proceeded to hear the petitions together with applications Nos. 14 and 23 of 2013.

On 6/9/2013 the Court delivered its ruling on the applications in which by majority decision of 4 to 1 it granted a mandatory injunction order to restrain the applicants from entering Parliament, to deny them seats therein and participation in any Parliamentary activities until the final judgment in the consolidated constitutional petitions was announced.

In the result, the applicants filed an amended application the purpose of which was stated earlier in this ruling.

(3) Grounds

The grounds on which the application is anchored are set out in the application. We observe that they are framed in a long and prolix manner. They may be summarised as follows:-

- (a) Applicant diligently lodged their Notice of Appeal.
- (b) The intended appeal raises triable issues with a strong likelihood of success.
- (c) Applicants will suffer irreparable damage if their application is not granted; and
- (d) The balance of convenience favours the applicants.

(4) Representation

When the application was called for hearing before us, the parties were represented as follows:-

Applicants by:

Prof George W. Kanyeihamba, lead Counsel

, assisted by Messrs. Wandera Ogalo, Peter Walubiri, Caleb Alaka, Julius Galishonga, Nicholas Opio, Emmanuel Arono and Jude Mbabali.

Ist Respondent by:

Mr, Cheborion Barishaki, Director Civil Litigation, assisted by Mr. Richard Adrole and Ms. Maureen Ijang both State Attorneys.

2nd, 3rd and 5th Respondents by:

Mr. John Mary Mugisha, lead Counsel, assisted by Messrs. Joseph Matsiko, Chris John Bakiiza, and Severino Twinobusingye.

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4th Respondent by:

Mr. Alison Karuhanga.

(5) Applicants' Case

Opening the applicants' case, Mr. Alaka submitted that the applicants seek from this Court the orders applied for because their intended appeal raises triable issues and has strong likelihood of success. He named some of the issues that will be raised in the intended appeal as:-

1. Expulsion of the Applicants
2. Mandatory Injunction
3. Affidavits evidence of H. E. Y. K. Museveni
4. Fair hearing
5. Bias

Expulsion

On this issue, learned Counsel submitted that the factual basis of the consolidated Petitions from which applications Nos. 14 and 23rd of 2013 arose is the expulsion of the applicants from their party, the NRM. He contended that the consolidated Petitions and Applications Nos. 14 and 23rd of 2013 were prematurely instituted as the question of their expulsion is not yet resolved since the applicants are challenging it in the High Court vide Misc. Cause No. 251 of 2013. He submitted that in the circumstances the consolidated Petitions disclose no cause of action as yet and therefore bad in law. He further submitted that when it proceeded to entertain the consolidated Petitions, the Constitutional Court had knowledge of the pendency of the applicants' application

before the High Court challenging their expulsion. He cited “Joint Scheduling Memorandum”, annexure AB to Hon. Ssekikubo’s supplementary affidavit to show that the Constitutional Court had knowledge of the pendency of the application before the High Court. In his view, the Constitutional Court was wrong in proceeding to entertain the consolidated Petitions when it had full knowledge of the pendency of the applicants’ application challenging their expulsion, before the High Court. He contended that the applicants will suffer irreparable damage if a stay of proceedings is not granted because their application before the High Court will be rendered nugatory.

(2) Mandatory Injunction

According to Mr. Alaka, the second issue that the applicants’ intended appeal will raise is “the grant of mandatory injunction” by the Constitutional Court. It was his contention that apart from the relief being unknown and not used in this country; it was neither pleaded nor prayed for. It first surfaced in the affidavits of H. E. Y. K. Museveni. He argued that prayers are made in the application not in the supporting affidavit. He stated that what was prayed for was a temporary injunction.

He submitted further that the Constitutional Court erred to grant the mandatory injunction, a relief that was neither pleaded nor prayed for. Besides it was granted in circumstances of bias. In his view, the applicants will suffer irreparable damage if a stay of execution of the order of mandatory injunction issued by the Constitutional Court on 6/9/2013 is not granted. The applicants will unfairly lose their mandate as Members of Parliament to represent their respective constituents in Parliament. He reasoned that the applicants as Members of Parliament are constitutional officers with – well defined procedure for their removal from office.

(3) Affidavit of H. E Y. K. Museveni

Mr. Walubiri while summarizing the applicants’ case submitted that the 3rd issue that the applicants’ intended appeal will raise is the admissibility of the affidavit evidence of HE Y. K. Museveni in Constitutional Petition No. 21 of 2013 and in Constitutional Application No.23 of 2013. He contended that the admission of this evidence contravenes Articles 98 (4) of the Constitution which prohibits subjecting a sitting President to proceedings of any court. He pointed out that when an application was made to expunge the evidence from the record, the Constitutional Court declined. Counsel submitted that the Constitutional Court erred in that regard.

(4) Fair Hearing

It was a further contention of Mr. Walubiri that the 4th issue that the intended appeal of the appellants will raise is about the principle of fair hearing. It was his submission that when the evidence of HE Y. K. Museveni was sustained, application was made on behalf of the applicants for leave to cross-examine him on his said affidavits but that the Constitutional Court dismissed the application.

Learned Counsel submitted that the Constitutional Court again erred in that regard as the refusal denied the applicants the right to cross-examine a witness testifying against them. The denial compromised the non-derogable right to a fair hearing guaranteed by Article 28 of the Constitution. He reasoned that on this issue alone, the applicants' intended appeal stands very strong likelihood of success.

Mr. Walubiri further submitted that the balance of convenience favours the applicants who are elected Members of Parliament whose duty is to represent their constituents in Parliaments. He finally, reiterated the prayers for the reliefs sought in the application.

The case for the 2nd, 3rd, and 5th, Respondents

Submitting for the 2nd, 3rd, and 5th respondents, Mr. Mugisha contended that the application is misconceived, abuse of court process and does not fit within the ambit of rule 6 (2) (b) of the Rules of this Court as it does not satisfy the requisite conditions precedent. Besides, no materials have been placed before court to exercise its inherent power under rule 2(2) of the Rules of this Court.

On stay of proceedings, counsel contended that there are no pending proceedings in the consolidated petitions before the Constitutional Court to be stayed. What is remaining is only delivery of judgment. The proceedings were concluded. He cited **Legal Brains Trust Ltd* Vs. **The Attorney General of Uganda, EA Court of Justice, Appeal Division** Appeal No.4 of 2012; **Joseph Orosiski Vs The Attorney General of Canada, SC of Canada No. 20411 of 1989; Environmental Action Network Ltd* s **Joseph Elyau, CA LNO 89 of 2005** for the proposition that a court of law will not adjudicate hypothetical questions, a case in abstract, or purely academic, or speculative or spent case, or where there is no underlying facts in dispute.**

He further submitted that there are conditions precedent before a stay of proceedings or stay of execution is granted. He cited **Akankwasa Damian vs. Uganda, Const. Appl. Nos. 7 and 9 of 2011 (Supreme Court*)* for the proposition that these principles are rooted in Rule 5 (2) (b) (sic) of the Rules of this Court.

It was his contention that in the instant case, the applicants have not satisfied the requisite conditions precedent; they have not shown, for instance, that they have a prima facie case which is likely to succeed, and made no attempt to point out where the Justices of the Constitutional Court went wrong.

Cause of Action (Expulsion)

Mr. Mugisha denied that the applicants challenged their expulsion in the High Court as claimed. He explained that the application (Misc. Cause No. 251 of 2013) pending in the High Court was filed one month before their expulsion was announced. The application was for Certiorari to which no copy of the expulsion order was attached. Therefore, he argued, the application could not be challenging the applicants' expulsion. The joint scheduling memorandum, on which the applicants relied, contains admitted fact that the applicants were expelled. He thus denied that

the petitions were prematurely filed and that they disclose no cause of action.

He pointed out that for a Petition under Article 137(3) of the Constitution to disclose a cause of action, it must plead the impugned 'act', the provision of the Constitution it is alleged to contravene and prayer for declaration. He submitted that the consolidated Petitions complied with those requirements.

Doctrine of lis pendens

Learned Counsel contended that this doctrine is not applicable in this country as there is no law which governs its operation. He cited ***J. W. R Kazoora Vs Rukuba, Supreme Court Civil Appeal No. 13 of 1992 to support that view***.

Mandatory Injunction

Submitting on mandatory injunction, Mr. Mugisha denied that this relief was neither pleaded nor prayed for as claimed by the applicants. He contended that while the words "mandatory" was not used in the pleading, that is specie of temporary injunction which court can issue where there is evidence to justify it. He submitted that the Constitutional Court properly granted it to prevent the continued violation of the Constitution by the applicants.

He pointed out that it was intimated for the applicants that the issue of bias by two Justices of the Constitutional Court on the Coram that handled the consolidated Petitions will be raised in the applicants' intended appeal. Learned Counsel contended that the applicants have no right of appeal from the decision of the two Justices declining to recuse themselves from that case. He cited ***Uganda Polybags Ltd vs. Development Finance Company Ltd & 3 Others*** – Supreme Court Misc. Appl. No. 2 of 2000 to support that view.

Points of Law

Mr. Matsiko, another counsel for the 2nd, 3rd and 5th respondents, submitting on points of law, posed the question whether the applicants have a right of appeal against the various decisions made by the Constitutional Court in the course of the proceedings in consolidated Petitions? He argued that a proper interpretation of articles 132 (2) (3) and 137 (1) of the Constitution shows that the applicants have no right of appeal against interlocutory decisions made by the constitutional Court in the course of the proceedings. They may appeal as of right only against a decision of the Constitutional Court interpreting a provision of the Constitution. He conceded in this regard that the decision of the Constitutional Court on admissibility of the affidavit evidence of HE Y. K Museveni is appealable as of right by the applicants as it involved interpretation of article 98 of the Constitution.

He contended further that in the instant case, the applicants have not indicated the legal basis for their claimed right to appeal against the various interlocutory decisions made by the Constitutional Court in the course of the proceedings.

Mr. Barishaki for the 1st respondent agreed with Mr. Mugisha on the principles governing grant of a stay of proceedings and execution. He cited **Dr. Ahamed Kalule vs. Green Land Bank in Liquidation, C/Appl. No. 17 of 2010** (supra). He added that by those principles the applicants have not placed sufficient materials before Court to determine whether they have established a prima facie case with likelihood of success. His submissions on cause of action and expulsion are similar to those of Mr. Mugisha.

On bias, he stated that the applicants did not follow the procedure laid down in the ***Republic of Kenya V Prof Anyang Nyong'o and 10 others*** EACJ Appl Nos. 7 and 9 of 2007 and therefore, that no appeal lies from the decision of the Justices declining recusal. He concluded that the balance of convenience favours the respondents as the applicants no longer represent the electorate. Therefore, he submitted, the applicants' continued stay in Parliament inconveniences the electorate.

Mr. Karuhanga who appeared for the 4th respondent associated himself with the submissions of his colleagues for the other respondents on all other issues. He, however, contended that this court was not properly constituted to deal with this application. He stated that the Constitution requires a full bench of all members of this Court when hearing Constitutional matters like this one and left the issue for the Court' decision.

Jurat

Learned Counsel further contended that the affidavits of Hon. Ssekikubo are defective in their jurat as they do not indicate therein the place where they were commissioned as required by law. He cited ***Kakooza John Baptist Vs EC*** Civil Appeal No. 11 of 2007 for the proposition that an affidavit must indicate in the jurat the place at which it was commissioned.

Applicants' Reply

Exercising the applicants' right of reply, Mr. Walubiri responded on the issue of the applicants' pending proceedings in the High Court that the case of ***JNR Kazoora Vs Rukuba*** (supra) is distinguishable from the instant case on their facts. On expulsion, he stated that the applicants' application to challenge their expulsion was amended after their expulsion was announced.

On whether the applicants have a right of appeal, learned Counsel disagreed with the interpretation put on articles 132 (2)(3) and 137(1) of the Constitution by Mr. Matsiko. He contended that article 132 (3) is broad enough to enable this Court to entertain appeal against any interlocutory decision of the Constitutional Court as of right. He added that the words "final decision" cannot be introduced into clause 3 of Article 132.

Closing the applicants' case, Mr. Alaka submitted that the omission in the jurat of Hon. Ssekikubo's affidavits is an irregularity which can be remedied under article 126 (2)(e) of the Constitution. He urged Court to find that the materials put before it by the applicants are sufficient to satisfy the requisite conditions precedent to grant a stay of proceedings and execution. He prayed that the applicants' application be allowed.

Consideration of the Arguments

Laws Applicable

The law governing grant of a stay of proceedings, an injunction or stay of execution is basically rule 6 (2) (b) of the Rules of this Court. This rule empowers this court, in civil proceedings, where notice of appeal has been lodged in accordance with rule 72 of the Rules of this Court, to order a stay of proceedings, stay of execution or grant an injunction. Clearly this is a discretionary power. Like in all judicial discretion it must be exercised on well-established principles.

This Court has in a number of cases laid down principles governing the exercise of the discretion conferred by this rule.

In **Akankwasa Damian vs. Uganda, Const. Appl. Nos. 7 and 9 of 201**¹, for instance, the principles were re-stated as follows:

1. Applicant must establish that his appeal has likelihood of success; or a prima facie case of his right of appeal.
1. That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.
1. If 1-2 above have not been established, Court must consider where the balance of convenience lies.

We should add that another principle is that the applicant must also establish that the application was instituted without delay.

Consideration of Points of law

Before we consider the merits of this application, we think we should deal with two questions of law raised by two counsel in the course of their submissions, namely:

1. **Defective affidavit**

Mr. Karuhanga for the 4th respondent contended that the affidavits of Hon. Ssekikubo are defective in that they do not indicate in the jurat the place where the affidavits were commissioned. He submitted that section 6 Oath Act (cap 19) requires that the affidavit must indicate in the jurat the place and date on which it is commissioned.

Mr. Alaka responded that the omission to indicate in the jurat the place where the affidavit was commissioned is an irregularity which can be remedied under article 126 (2)(e) of the Constitution.

Our brief answer to this point is that this Court had considered a similar issue in the case of Banco Arabe Espanol V Bank of Uganda Civil Application No. 8 of 1998 where it stated as follows:

“..... a *general trend is toward taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in article 126 (2) (e) of the Constitution that courts should administer substantive justice without undue regards to technicalities. Rules of procedure should be used as handmaidens of justice but not to defeat it.”*

We still stand by the position contained in that statement. Kakooza’ case above is distinguishable from the instant case on their facts. In Kakooza’ case, the deponent did not take an oath before the Commissioner for Oath as required by section 5 of the Oath Act. He merely signed his affidavit and sent it to the Commissioner for Oath miles away to endorse. In the instant case, only the place where the affidavits were commissioned was not indicated in the jurat. This is an irregularity which can be ignored in terms of article 126 (2) (e).

(2) Right of Appeal

Mr. Matsiko contended that the applicants have no right of appeal against the various decisions made by the Constitutional Court in the course of the proceedings in the consolidated Petitions. He reasoned that interpretation of articles 132 (2)(3) and 137 (1) of the Constitution shows that appeal lies as of right against “a final decision” of the Constitutional Court on interpretation of the Constitution. In his view, the word “a decision” in clause 3 of article 132 should be construed to mean “a final decision”.

Mr. Walubiri disagreed with that position. He contended that clause 3 of article 132 is broad enough to enable this court to entertain appeal against any interlocutory decisions of the Constitutional court. He stated that one cannot introduce the word “final decision” in clause 3 of article 132.

We have considered the above arguments of both counsel and we should point out that appellate jurisdiction and right of appeal are creatures of statute. The intention of the framers of the Constitution in Article 132 (2) was to create appellate jurisdiction of the Supreme Court over decisions of the Court of Appeal as prescribed by law. In clause 3 thereof, the intention was to create a right of appeal to a person aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court, and to confer appellate jurisdiction over such a decision on the Supreme Court. The key word here is “a decision” in clause 3. Looking at article 137 (1) which is about interpretation, it is clear that the word “a decision” in clause 3 relates to a decision on interpretation. It clearly does not relate to any other decisions made by the Constitutional Court in the course of the proceedings. We, therefore, rule that “a decision” in clause 3 relates to a final decision of the Court of Appeal sitting as a Constitutional Court on interpretation of a provision

of the Constitution and does not include interlocutory decisions.

Merits of the Application

Upon considering the submissions of Counsel for all the parties and the affidavit evidence filed by all parties, we are satisfied that the applicants' intended appeal is against various decisions made by the Constitutional Court in the course of the proceedings in the consolidated petitions. Some of the decisions appealed included admissibility of the affidavits evidence of H. E Y. K. Museveni and the question of a Coram of three Justices of the Court of Appeal sitting as a Constitutional Court to deal with Constitutional applications. Learned Counsel for the 2nd, 3rd and 5th respondents conceded, rightly in our view, that decisions on interpretation of provisions of the Constitution by the Constitutional Court are appealable as of right. The two decisions mentioned above involved interpretation of provisions of the constitution. The applicants therefore may appeal against those decisions as of right. We are satisfied that the intended appeal meets the conditions precedent.

It is trite that where a party is exercising its unrestricted right of appeal, and the appeal has likelihood of success, it is the duty of the court to make such orders as will prevent the appeal, if successful, from being nugatory.

In the instant case, the applicants are clearly exercising their unrestricted right of appeal, and the appeal meets the conditions precedent; it is thus the duty of this court to ensure that their appeal, if successful, is not rendered nugatory.

In the result, we allow the application and order as follows:

- (1) By a majority of 6 to 1, execution and or effecting of the order issued by Constitutional Court on 6/9/2013 are stayed until the disposal of the applicants' intended appeal.
- (2) By a unanimous decision, we grant no order for stay of proceedings in the consolidated Petitions before the Constitution Court as we are not satisfied that it is desirable.
- (3) As this matter is of great public importance, by a unanimous decision, each party shall bear its costs of the application.

Conclusion

Before we take leave of this matter, we wish to respond

to the issue of Coram of this court that was raised by Mr. Karuhanga. He contended, rightly in our view, that the law requires a full bench of all the members of this court when hearing Constitutional appeals. The law he referred to is Article (131) (2) of the Constitution.

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