

5 **THE REPUBLIC OF UGANDA**

IN THE SUPREME COURT OF UGANDA AT KAMPALA

**(Coram: Owiny-Dollo, CJ; Arach-Amoko, Opiio-Aweri, Mwondha,
Tibatemwa-Ekirikubinza, Mugamba and Tuhaise; JJSC)**

CONSTITUTIONAL APPLICATION NO.27 OF 2020

10 **BETWEEN**

THE ATTORNEY GENERAL:::APPLICANT

AND

KAZINDA GEOFFREY :::RESPONDENT

15 *(Application for stay of execution of the majority Judgment and Orders
of the Constitutional Court (Kiryabwire, Cheborion and Musota,
JA/JCC) dated 7th August 2020, in Constitutional Petition No. 30 of
2014.)*

RULING OF THE COURT

Introduction

20 The applicant lodged this application on the 24th August 2020 to seek
from this Court orders that:

1. The execution of the majority judgment and Orders of the
Constitutional Court (Hon. Kiryabwire, Cheborion and Musota,
JJA/JCC) dated 7th August 2020, in Constitutional Petition No
25 30 of 2014, be stayed, pending the final disposal of his appeal.
2. The costs of the application be provided

5 The application is premised on Rules 2(2), 6(2) (b), 42 and 43 of the
Rules of this Court. It is supported by an affidavit in support and a
supplementary affidavit sworn by Mr. Vincent Wagona, Deputy
Director of Public Prosecutions (Management Support Services) in
the Office of the Director of Public Prosecutions. The respondent
10 opposed the application and has duly filed an affidavit in reply and a
supplementary affidavit to that effect.

Background

From the record, the background facts leading to this application are
briefly that the respondent was an employee of the Government of
15 Uganda as a Principal Accountant under the Office of the Prime
Minister. He was arrested in 2012 and charged at the Anti-
Corruption Court with numerous corruption related offences
including embezzlement, causing financial loss, forgery and abuse of
office. Since then, he has faced numerous trials and has been
20 convicted in some of the cases. He has been serving jail terms in
Luzira Prison to date. He filed Constitutional Petition No. 30 of 2014
out of which this application arose alleging that sections 29, 30 and
59 of the Trial On Indictment Act and sections 89, 90 and 91 of the
Magistrates Courts Act contravened Article 28(9) of the Constitution.
25 Consequently, he prayed for a declaration to that effect.

In the majority judgment of the Constitutional Court dissented to by
Hon. Justices Kakuru and Muhanguzi, JA/CC, which was delivered
on 7th August, 2020, the Court granted some of the reliefs and
ordered *inter alia*, for:

- 5 (a) A permanent stay of proceedings against the respondent in criminal cases No.47 of 2013 and No.62 of 2014 now 101 of 2014 that are pending against him before the Anti-Corruption Court and his immediate discharge from the said cases and any future cases whose offences are founded on the same facts.
- 10 (b) A permanent prohibition against the State from using any process of any court to initiate and prosecute the respondent for any offences of similar 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.
- 15 (c) A declaration nullifying sections 29, 30 and 59 of the Trial On Indictment Act and sections 89, 90 and 91 of the Magistrate Courts Act for being in contravention of Article 28(9) of the Constitution.
- 20 The applicant is dissatisfied with the decision of the Constitutional Court and has filed a Notice of Appeal dated 11th August, 2020 and a letter requesting for certified copies of the judgment and record of proceedings.

Grounds

- 25 The grounds on which the application was brought are set out in the application as follows:
1. The applicant is dissatisfied with the majority judgment and orders above and has since filed a Notice of Appeal and has

5 lodged a letter requesting for certified copies of the record of proceedings as well as the judgment.

2. The intended appeal raises several constitutional and legal issues which warrant serious judicial consideration by the Supreme Court and has a high likelihood of success.

10 3. The appeal will be rendered nugatory unless a stay is granted.

4. The balance of convenience favours the applicant.

5. The application was brought without undue delay.

6. It is just and equitable that a stay of execution be issued against the majority Orders and Judgment of the Constitutional Court complained of.

15

Representation

Principal State Attorney Richard Adrole represented the applicant, while the respondent appeared in person.

Applicant's case

20 In his submissions, counsel for the applicant argues that his application has met the well settled principles for the grant of an order of stay of execution as set out in **Supreme Court Constitutional Application No.06 of 2013, Hon Ssekikuubo & 3 Others vs Attorney General & 4 Ors**, namely, that:

25 1. The appeal has a likelihood of success or a prima facie case of his right of appeal.

- 5 2. The applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.
3. If 1-2 above have not been established, the court must consider where the balance of convenience lies.
4. The application was instituted without delay.

10 Regarding the first principle, counsel submitted that the appellant had demonstrated that the intended appeal has a prima facie case and is likely to succeed. He relied on paragraph 5 of Mr. Wagona's affidavit where he deponed that the intended appeal raises several constitutional and legal questions of a serious nature regarding the
15 prosecutorial system of the criminal justice system in Uganda which calls for judicial consideration by the Supreme Court. He referred to the proposed grounds of appeal set out in the draft Memorandum of Appeal attached thereto which states that:

**1. The learned Justices of the Constitutional Court erred in
20 law and fact when they found that the continuous/
 successive prosecution of the Petitioner amounted to
 double jeopardy within the meaning of Article 28(9) of the
 Constitution.**

 Without delving into the merits of the intended appeal, counsel
25 submitted that the applicant shall demonstrate under this ground that the State did not offend the rule against double jeopardy because the successive prosecution of the respondent which the respondent alleged to be inconsistent with Article 28(9) of the Constitution was

5 based on different series of transactions, different sets of facts,
different sets of accused persons and were committed at different
times.

Counsel further submitted that the applicant is aggrieved by the
finding of the learned Justices of the Constitutional Court that the
10 offences for which the respondent was charged fell within the
definition of offences of the same character that could adequately
have been joined in one trial. He argued that the appellant will further
demonstrate on appeal under this ground that the offences with
which the respondent was charged could not be joined in one trial
15 /charge sheet because they were premised on different facts,
different transactions and were committed at different times.
Therefore, any attempt by the State to join them in one trial would
have amounted to a misjoinder, which would be prejudicial to the
respondent. He referred to the second ground which reads:

20 **2. The majority of the learned justices of the Constitutional
Court erred in law and fact when they found that the
numerous trials for offences similar in character amounts
to a deprivation of the right to a fair hearing and
contravenes Articles 28 (1) and (9) of the Constitution.**

25 Counsel submitted that the applicant shall demonstrate under this
ground that the rule on double jeopardy does not relate to offences
which are similar in character but rather offences forming a series of
the same transaction or same facts and shall further demonstrate
that it did not breach the rights to fair hearing enshrined in Article

5 28(1) of the Constitution. Counsel next referred to the third ground which reads:

10 **3. The learned Justices of the Constitutional Court erred in law and in fact when they found that the impugned sections 90 and 91 of the Magistrates Courts Act and Sections 29 and 30 of the Trial On Indictments Act are inconsistent with and contravene Article 28(9) of the Constitution.**

15 Counsel submitted that the applicant shall demonstrate on appeal that the said provisions do not contravene Article 28(9) of the Constitution since the Article provides for an exception. In addition, the applicant shall demonstrate on appeal that the learned Justices of the Constitutional Court contradicted themselves when they nullified as unconstitutional the provisions of Sections 28 and 89 of the Trial On Indictment Act and Magistrates Courts Act, respectively that provide for the rule against double jeopardy.

20 Regarding the second principle, counsel submitted that the applicant had demonstrated in paragraphs 7 and 8 of Mr. Wagona's supporting affidavit and paragraph 2 of his Supplementary affidavit that if the application is not granted, it will render the appeal nugatory and the applicant will suffer substantial loss in that the criminal justice system will suffer an irreparable set back. In summary, the evidence of Mr. Wagona is that the effect of the judgment and orders of the majority Justices of the Constitutional Court would cripple the criminal justice system in Uganda by nullifying the said provisions of the Trial On Indictment Act and the Magistrates Courts Act and has

5 thus curtailed the fight against corruption. He adds that the said judgment and orders have far reaching effects on a number of cases that are still under investigation and on trial in different courts. He added that the decision is impeding investigations and prosecution of cases in the courts. He cited **Criminal Cases No. 47 of 2013,**
10 **Uganda vs Kazinda Geoffrey and Ors;** and **No. HCT-CR-056.2018** as having been permanently stayed as a result of the impugned judgment and orders of the majority Justices of the Constitutional Court.

Regarding the third principle, counsel for the applicant submitted
15 that the balance of convenience heavily tilts in favour of the applicant in maintaining the status quo pertaining before the delivery of the impugned judgment and orders of the majority of the Justices of the Constitutional Court. However, he did not elaborate on his reasons for this submission.

20 Lastly, counsel submitted that the instant application was brought without delay, having been filed 17 days after the impugned judgment. He stated that it therefore satisfies the fourth principle as well.

Counsel prayed that the application be granted as prayed.

25 **The respondent's case**

The respondent strongly opposed the application on the ground that it did not meet the condition for the grant of the order sought and sought for it to be dismissed with costs.

5 He contended that no appeal has been instituted in this Court within
fifty days after lodging of the Notice of Appeal pursuant to Rule 79(4)
of the Supreme Court Rules. Under Rule 80(a) of the same Rules, if
a party fails to institute an appeal within the prescribed time, he or
she is taken to have withdrawn such appeal. Consequently he invited
10 Court to conclude that the applicant withdrew its appeal. He argued
that, there is no appeal whose integrity must be protected or which
might be rendered nugatory.

In summary, the respondent's argument is that the applicant is
merely trying to hoodwink this Court into granting the relief of stay
15 of execution so as to continue prosecuting him using a withdrawn
appeal that would never be heard by the Court. He submitted that
Court should not allow this.

Applicant's rejoinder

In his brief rejoinder, counsel for the applicant contended that, it is
20 sufficient, under the rules of this Court, for the applicant to proceed
to apply for a stay of execution where a Notice of Appeal has been
filed in court. He contended that the absence of a Memorandum and
Record of Appeal is not a ground to deny an applicant an order of
stay of execution. He referred to **Attorney General of Uganda vs**
25 **East African Law Society & Anor, Application No.1 of 2013, East**
African Court of Justice.

He reiterated his earlier submissions and prayer.

Consideration of the arguments by counsel

5 The law governing the grant of stay of proceedings is Rule 6(2) (b) of
the Supreme Court Rules. This Rule empowers this Court, in civil
proceedings, where a Notice of Appeal has been lodged in accordance
with Rule 72 of the Rules of this Court to order a stay of execution.
This Court has stated in a number of cases including **Hon. Theodore**
10 **Ssekikubo & Others vs. The Attorney General and Another,**
Constitutional Application No. 06 of 2013, that it is a
discretionary power and that it must, like all judicial discretion, be
exercised judiciously. The Court has gone ahead to lay down the well
established principles governing the exercise of this discretion that
15 have been set out earlier in this Ruling. We shall apply them to this
application.

Before considering the merit of the application, it is important to deal
with the point of law raised by the respondent that there is actually
no appeal on which to base an order of stay of execution since the
20 applicant has not complied with Rule 78(4) of the Supreme Court
Rules. Such an appeal would be affected by Rule 80(a) which
considers such an appeal to have been withdrawn. The application
would be disallowed for this reason.

Counsel for the applicant holds the contrary position which is to the
25 effect that for a stay of execution under Rule 6(2) (b), all that is
required is lodgment of a Notice of Appeal in accordance with Rule
72, which he contended the applicant has done. He argued that the
objection should accordingly be overruled.

5 According to the evidence on record, the judgment of the Constitutional Court, the subject of the intended appeal was delivered on the 7th August, 2020. The applicant lodged the Notice of Appeal in the Court of Appeal Registry on the 11th August, 2020. It was accompanied by a letter requesting for the judgment and record
10 of proceedings. This was in compliance with Rule 79(5) which provides that:

**“(5) ...in appeals to the constitutional court, for the purpose of guaranteeing the expedition in constitutional matters required under article 137(7) of the Constitution, the notice
15 of appeal shall contain a request for the copies of the proceedings and judgment, which shall be supplied by the Registrar of the Court of Appeal within 10 days after the date of the notice of appeal.”**

It is apparent that the Registrar of the Court of Appeal has
20 unfortunately been slow in supplying the required documents. That should explain why the applicant had not lodged the memorandum and record of appeal in this Court by the time of filing this application. This situation is however taken care of by Rule 79(6), which reads:

**“(6)... where the Registrar of the Court of Appeal has failed to provide copies of the proceedings and judgment within
25 10 days as provided in sub rule (5) of this rule, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as the registrar shall**

5 **explain in writing and certify as having been necessary for
the preparation of those copies.”**

This Court has stated in several cases including **Dr Ahmed Kisule vs Greenland Bank, Civil Application No. 07 of 2010**, that for an application for a stay of execution to succeed, the applicant must first
10 show, subject to other facts in a given case, that he /she has lodged a notice of appeal in accordance to Rule 72 of the Rules of this Court. All that is required is thus a Notice of Appeal. The point of law is therefore overruled.

We now turn to the merits of the application.

15 Learned counsel for the applicant has argued strongly that the applicant has met the conditions for the grant of the order sought. The respondent on his part has strongly opposed the application on the ground that it is intended to prevent him from enjoying the fruits of his judgment and to enable the applicant to continue violating his
20 constitutional rights by continuing to prosecute him for the numerous offences for which he has been charged before the Courts of law.

We have carefully considered the affidavits, the submissions and the authorities relied on by both sides. We find that the applicant has
25 met the last requirement by lodging the application without undue delay.

We also find that the applicant has established that the intended appeal involves matters of significant public importance and raises

5 several legal and constitutional issues that warrant consideration
and final determination by this Court as set out in the affidavits of
Mr. Wagona and apparent in the draft Memorandum of Appeal
attached thereto. As this Court guided in **Hon. Theodore**
Ssekikuubo & Ors vs The Attorney General, SCC Application No.
10 **6 of 2013** and recently in **The Electoral Commission vs Eddie**
Kwizera, Constitutional Application No. 1 of 2020 (SC), it is the
duty of the Court to ensure that the intended appeal, if successful, is
not rendered nugatory and to safeguard the right of appeal. We are,
of course, very much alive to the fact that the Court cannot at this
15 stage determine the likelihood of success of the intended appeal
before hearing out the arguments and considering the grounds of
appeal and the law. These arguments will be considered at the stage
of the appeal.

Having found as we have, we do not find it gainful to deal with the
20 third and fourth principles.

Conclusion and orders

In the result, we accordingly grant the application as prayed and
order that:

25 **(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.

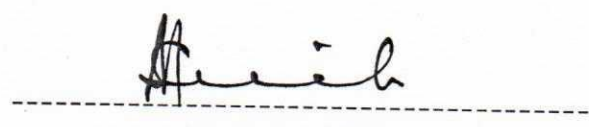
5 (b)The applicant shall institute the intended appeal without delay.

(c) As this matter is of great public importance, each party shall bear its/ his costs of the application

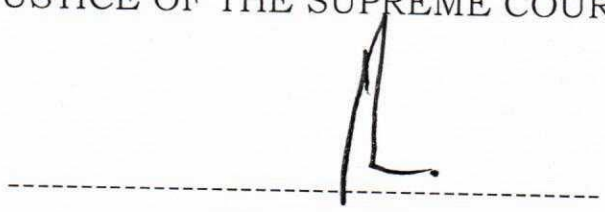
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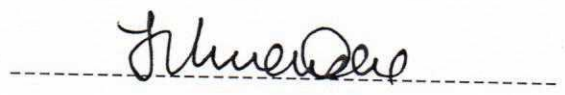
15 A.C. OWINY-DOLLO
CHIEF JUSTICE



20 ARACH-AMOKO
JUSTICE OF THE SUPREME COURT



25 OPIO-AWERI
JUSTICE OF THE SUPREME COURT



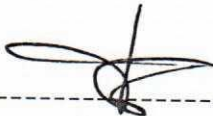
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MUGAMBA
JUSTICE OF THE SUPREME COURT

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TUHAISE
JUSTICE OF THE SUPREME COURT

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*Delivered 12th February 2021 before
Akelo Susan & Ojumbo Bichahe
on the applicant,
Edwin Arwayo on the respondent.*

