THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 31 OF 2025

IN THE MATTER OF ARTICLES 23(9), 44(D) AND 50 OF THE CONSTITUTION OF THE REPUBLIC OF UGANDA, I995

AND

IN THE MATTER OF SECTION 38 OF THE JUDICATURE ACT CAP I6

AND

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS

CORPUS AD SUBJICIENDUM BY DR KIZZA-BESIGYE

AND HAJI OBEID LUTALE

1. **RTD COL. DR KIZZA BESIGYE**
2. **HAJJI OBEID LUTALE::APPLICANTS**

VERSUS

1. **ATTORNEY GENERAL**
2. **COMMISSIONER GENERAL OF PRISONS::::::::::::::::::::::::RESPONDENTS**

Before: *Hon. Justice Dr Douglas Karekona Singiza*

RULING

1 Introduction

The writ of *habeas corpus* is integral to the enjoyment of personal freedoms and principally concerns persons in illegal detention. Historically founded in common law doctrines, the writ seeks to protect individuals from detentions that may be unlawful. The writ is therefore a powerful tool that guarantees individual freedoms and liberties without necessarily insulating from prosecution persons who may have committed offences. The motion before this court seeks for the orders that a writ of *habeas corpus ad subjiciendum* be issued requiring the Attorney General (AG) and the Commissioner General of Prisons (CGP), their servants, agents, and/or officers acting under their orders to produce Dr Kizza Besigye and Haji Abed Lutale before this court for appropriate orders.[1]

1.1 Background

The motion before this court is grounded on a number of assertions on behalf of the applicants which I summarise in the five bullet points below:

1) On l6 November 2024, the applicants were abducted from Riverside, Nairobi, Kenya, and unlawfully transferred against their will to Uganda by road, tortured, and illegally detained incommunicado at Makindye military barracks in Kampala, where they spent three nights.

2) On 20 November 2024, the applicants were illegally and irregularly arraigned before the General Court Martial (GCM) and charged with various offences relating to security, treachery, unlawful possession of firearms, and unlawful possession of ammunitions.

3) The applicants were remanded to Luzira Maximum Prison and last appeared before the court on 14 January 2025, where they were rescheduled for appearance on 3 February 2025.

4) On 3l January 2025, the Supreme Court, in *Attorney General v Hon. Michael Kabaziguruka*, Constitutional Appeal No. 2 of 2021, declared, inter alia, that the trial of civilians before the GCM is unconstitutional, and accordingly ordered, among other

[1] The motion was brought under the provisions of articles 23(7) and (9), 44(d) and 50 of the Constitution as amended; section 38 of the Judicature Act Cap. 16; and rules 3, and l3 of the Judicature (Habeas Corpus) Rules S. I l3-61.

things, that (as per the text of the motion) '[a]ll charges, or ongoing criminal trials, or pending trials, before the court martial involving civilians must immediately cease and be transferred to the ordinary courts of law with competent jurisdiction'.

5) In spite of the above finding of the Supreme Court, the respondents and their agents have continued to illegally detain the applicants at Luzira Maximum Prison without any lawful excuse or any valid remand warrant, a fact that further violates their right to personal liberty.

1.2 Representation

The applicants were represented by different law firms, including: M/s Mpanga Advocates; M/s Kizza Mugisha & Co. Advocates; M/s Nolukola Advocates & Solicitors; M/s Matsiko, Wando & Arinda Advocates; M/s Alaka & Co. Advocates; M/s Kintu, Twinomugisha & Co. Advocates; M/s Datum Advocates; M/s Alto Advocates; M/s Abdallah Kiwanuka Associated Advocates; M/s Baraka Legal Associated Advocates; M/s Tugume-Byensi & Co. Advocates; and M/s Arinaitwe Peter & Co. Advocates.

Specifically, Mr Elias Lukwago (the Lord Mayor), Mr Ernest Kalibbala, Hon. Medard Ssegona, and Mr Samuel Muyizi argued the motion on behalf of the applicants. The respondents were represented by Mr Johnson Natuhweera (a Senior State Attorney) and Ms. Jacky Amusugut (a State Attorney).

As is the practice of this court to state, I appreciate the contribution of counsel on both sides, and where I do not adopt all the arguments made and the authorities cited, it is not out of disrespect but due to limitations of time and space.

1.3 Issues for determination

From the motion papers, the reply thereto, and the other arguments that were presented, it is clear that the complaint before this court focuses on two main questions:

1) *Whether on the basis of the decree of the Supreme Court, the applicants remain in unlawful detention to warrant to grant of a writ of* habeas corpus.

2) *The remedies available to the parties.*

2 Depositions of the parties

The motion is supported by the depositions of the Hon. Winnie Byanyima, who is the 1st applicant's wife, and Ms. Proscovia Kunihira, one of the applicants' lawyers. The respondents rely on the deposition of Mr George Kallemera, a Commissioner in the Directorate of Civil Litigation in the AG's Chambers.

In the paragraphs below, I summarise the evidence that each the three deponents speaks to, beginning with the four major averments of Hon. Byanyima. In doing so, I have elected not to repeat paragraphs 2 to 6 of her deposition since those averments generally reiterate the grounds of the motions. Thus, the narration that covers the period from the point in time at which the applicants were allegedly abducted from Nairobi Kenya to the point in time at which the Supreme Court made a decision that affected the legal power of the General Court Marshal to try them is noted and will not be repeated.

Hon. Byanyima's evidence is that a wife of the Rtd Col. Kiiza, a person who is the Executive Director of UNAIDS (Joint United Nations Programme on HIV/AIDS) and also a former Member of Parliament representing the then Mbarara Municipality [Constituency], is in a suitable position to lead evidence in support of the motion. It is her contention that, on 3 February 2025, the applicants were never produced before the GCM, considering the decision of the Supreme Court. For that reason, the applicants remain on remand, where they continue to languish [in jail] up to the time of the hearing of the present motion before this court. According to Hon. Byanyima, the applicants continue to be detained illegally by the respondents' agents (namely, the prison authorities), an act that is not only illegal but also a clear infringement of the applicants' liberty.

For her part, Ms Kunihira's deposition indicates that she is one of the lawyers of the applicants who is familiar with the motion. Her deposition in paragraphs 2–10 repeats much of what has already been summarised in the grounds of the motion and the deposition of Hon. Byanyima. The only addition is that since the pronouncement of the Supreme Court decision, the applicants have neither been produced in any courts of law nor released by the respondents.

In opposing the motion, Mr Kallemera, for the respondents, begins by not contesting the facts from the time the applications were arrested in Nairobi Kenya to the time that the Supreme Court took out a decision that technically found the GCM's power to try the applicants on the previously preferred criminal charges as unconstitutional. According to Mr Kallemera, he is

aware that the Supreme Court orders, among other things, that '*[a]ll charges, or ongoing criminal trials, or pending trials, before the courts martial involving civilians must immediately cease and be transferred to the ordinary courts of law with competent jurisdiction'* (emphasis in the original text).

In reference to the above order, Mr Kallemera lists six steps that the respondents have taken to implement it:

1) On 3 February 2025, the Government commenced the implementation of the Supreme Court orders with a letter to the Ministry of Defence [and Veterans Affairs] (MoDVA) [Director of Public Prosecutions] DPP, along with another letter to the Chief Justice.

2) On 4 February 2025, the [Rt Hon.] Chief Justice appointed the [Hon.] Principal Judge as the liaison contact and further instructed that all the matters will be handled by the Principal Judge.

3) On 6 February 2025, the AG's Chambers forwarded the [Rt Hon.] Chief Justice's letter to the MoDVA and the DPP advising that the files be forwarded to the [Hon.] Principal Judge.

4) On 13 February 2025, the AG's Chambers received a draft decree from the lawyers of Mr Kabaziguruka.

5) The initial draft court decree had errors and was accordingly corrected and sent back to the lawyers of Mr Kabaziguruka on 14 February 2025.

6) On 18 February a decree from the court was duly signed and the process of transfer of the [GCM] files started.

In the light of the above listed set of events, Mr Kallemera insists that the applicants are presently in lawful custody, considering that the Supreme Court did not order their release. In any case, the argument goes, the orders of the Supreme Court did not operate retroactively. Given the planned transfer of files from the GCM to the civilian courts, the motion in its present form is stillborn and not well thought-out.

3 Parties' arguments

Mr Lukwago, for the applicants, commenced his arguments by making two main points. The first is that personal liberty can be limited only by a lawful order, which must be documented. The second is that, in terms of article 44 of the Constitution, the writ of *habeas corpus* is none-

derogable and historically traceable to the days when *Grace Ibingira and Ors v Uganda* (1966) 446 was determined. According to counsel, personal liberty as a constitutional value has two major entailments:

1) that persons must appear before the court from an illegal detention, and it matters not if the prisoners' whereabouts are in fact known; and

2) knowledge of the place of the prisoners' detention does not validate an illegal detention.

In applying these principles to the complaint before this court, it was argued that, given the decision of the Supreme Court, those persons who had been remanded on the orders of the GCM would never remain incarcerated for ever. Accordingly, the argument went, the burden to justify the continuous detention of the applicants is on the respondents and simply requires two things: (a) that the respondents demonstrate that the applicants are detained under a valid warrant; and (b) that the respondents show that charges are pending against the applicants under a formal charge sheet.

Hon. Ssegona (for the applicants) took the arguments further by explaining that what the prison authorities could do was to detain the applicants in terms of the conditions under section 57 of the Prisons Act, which requires that there must be a valid warrant before any persons may be admitted in prisons.[2] Since the decision of the Supreme Court had "killed" the GCM's power to make any orders, all previous orders of that court (the GCM) had equally "died".

Having laid out that factual background, Hon. Ssegona then posed the following questions: (a) under whose orders are the applicants in continuous detention; (b) what is the criminal case number [of the file under which the applicants are detained], given that the decree of the Supreme Court had ceased the authority of the GCM; and (c) for how long would the applicants be detained?

[2] Section 57 of the Prisons Act Cap. provides as follows: '(1) No person shall be received or admitted into prison custody without a valid commitment or a remand warrant, order of detention, warrant of conviction or committal signed with a court seal or authenticated by a person authorised to sign or authenticate such warrant or order under the provision of any law. (2) The officer-in-charge shall satisfy himself or herself before the admission of any person into prison custody that – (a) the particulars of each person are accurately described in the warrant or order of detention accompanying such person; and (b)such warrant or order of detention has been properly issued or authenticated.'

In essence, Hon. Ssegona finds fault on a number of fronts with the propositions put forward by Mr Kallemera:

1) The purported administrative measures undertaken by the respondents to transfer all the files to the Hon. Principal Judge in a coordinated manner require that government now must commence the investigations afresh.

2) The transfer of the GCM files to the DPP and the civil courts is [legally] impossible since that court had no power to try the applicants in the first place.

3) The Supreme Court did not order that the DPP could take over the GCM files because doing so would infringe the constitutional provisions [on the prosecutorial powers of the DPP].

4) All that the Supreme Court told the AG was to commence investigations afresh.

5) According to Mr Muyizi (for the applications), the DPP is, in terms of article 120(3)(b) of the Constitution, in fact precluded from taking on the CGM files at all.[3]

In reply to the above assertions, Mr Natuhweera, speaking for the respondents, reiterates the principles on which the writ of *habeas corpus* is anchored and in turn cautions this court not to second-guess the decree of the Supreme Court on account of three critical considerations. First, the decree of the Supreme Court is self-explanatory; secondly, if for some reason the decree were unclear to the applicants, they could have approached the Supreme Court for clarification; and, thirdly, it was the Supreme Court which had ordered that all the GCM files be transferred to the civil courts.

With this in mind, Mr Natuhweera lists the steps taken by both the executive and the judiciary in chronological order (which for reasons of time and space are not repeated here). It was Mr Natuhweera's argument that if the Supreme Court had wished to cancel the remand warrants on which the applicants had been detained in prison, it could have done so but chose not to; thus, it would be contempt of the Supreme Court were this court to interfere with the manner in which its decree was worded. In supplementing this line of argument, Ms. Amusugut warns that it is not possible to impute any more words and meaning to the Supreme Court decree than what is already stated therein. It was her further argument that once there is a valid and

[3] Article 120(3)(b) of the Constitution vests the power in the DPP 'to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial'.

substantive basis for continuous detention, then the detention remains justified notwithstanding the existence of procedural flaws relating to the prisoners' detention.[4]

Mr Lukwago countered the AG's arguments by cautioning this court not to read too much into the Supreme Court's decree that ordered the transfer of the GCM files to the DPP and the judiciary. The argument was that such a transfer could never validate remand warrants that had already ceased to exist. According to Mr Lukwago, the 48-hour constitutional parameter made in terms of article 23(a) of the Constitution together with section 37 of the Prisons Act demands that the following three questions first be answered by this court:

- Under which charges are the applicants presently remanded for?
- Does the DPP have anything to do with any of the charges, if any?
- Does the Hon. AG's letter to the DPP indicate the steps taken to comply with the decision of the Supreme Court?

His argument remains that individual liberties may not be limited by mere administrative processes. Even so, the reasons for keeping the applicants in detention have not been given and that, in any case, the respondents could still have done more in speeding up the administrative process. In the words of Hon. Ssegona, all that the respondents' counsel had done was simply to read the Supreme Court decree mechanically (and mischievously).

3.1 Examination

The courts in many common law counties recognise the changing nature and purpose of *habeas corpus* but emphasise that it is available to all persons without distinction. In Uganda, the writ is considered an essential remedy in case a person's oft-ignored pre-trial detention rights are violated and seeks to discourage arbitrary arrests; it is defined with reference to the judicial power to avail persons before a court in order to ensure that the lawfulness of prisoners' detention or imprisonment is examined.[5]

As mentioned, the writ is grounded on the constitutional axiom that personal liberty is a hands-off right which is strictly protected to the extent that it may never be deferred.[6] Personal liberty as a right may however be limited for a number of reasons including

[4] *R. V. Brixton Prison Governor, Ex Parte Ahson and Others* [1969] 2 QB 222.
[5] See *Black's Law Dictionary* 9th edition.
[6] See article 23(1) and (9) of the Constitution.

> for the purpose of preventing the unlawful entry of that person into Uganda, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Uganda or for the purpose of restricting that person while being conveyed through Uganda in the course of the extradition or removal of that person as a convicted prisoner from one country to another.[7]

This section deliberates on Issue 1: *Whether on the basis of the decree of the Supreme Court, the applicants remain in unlawful detention to warrant to grant of a writ of* habeas corpus. In answering this question, it also engages with Issue 2: *The remedies available to the parties?*

The writ of *habeas corpus* is regulated in the main by the Judicature (Habeas Corpus) Rules S.I. 13–6. In principle, applications for *habeas corpus* are *ex parte,* although the preference is always that, where necessary, all concerned parties should be notified, albeit with strict timelines set in regard to the serving of such notices.[8]

The writ of *habeas corpus* has been discussed extensively by many courts in Uganda and the parameters thereof clarified. The consensus seems to be that a writ of *habeas corpus ad subjiciendum* places emphasis on the oversight power of the High Court to assess the lawfulness of a person's arrest, imprisonment, and detention. The writ seeks to examine the legality of the arrest and detention of persons who in fact remain in custody, and it is therefore invoked in situations where no charges have been preferred against the detained individual or where all the available pre-trial rights have been denied to him or her. In essence, the writ is intended to discourage incommunicado detentions where there is no legal basis for them and to ensure that persons are produced before courts dead or alive. The precedents caution not to rely on the writ as a sufficient shield or buffer against post-detention rights violations; rather, it operates as a 'red flag' which is raised instantly whenever personal freedoms are threatened.[9]

The writ of *habeas corpus* will not be granted where the continuous detention of the applicant can be justified by valid intervening factors.[10] It matters not if the previous arrest and detention were invalid because the subsequent proceedings will retroactively validate those acts.[11] Thus,

[7] See article 23(1)(g) of the Constitution.
[8] See rules 3 and 4 of the Judicature (Habeas Corpus) Rules.
[9] See *Jovia Karuhanga v The Inspector General of Police* MC 86 of 2013.
[10] See *In the matter of Sheik Abdul Karim Sentamu & another* Constitutional Reference 7 of 1998.
[11] See *Queen v Well* (1982) 9 QBD 70.

the date of the return of the writ is the cut-off time beyond which an applicant can complain except in separate other judicial proceedings.[12]

4 Decision of the court

In determining whether there are sufficient grounds to issue a writ of *habeas* corpus or whether in the circumstances of the complaint at hand those writs are still necessary, it is important that the true nature of the complaints before this court are given the correct context. As understood by this court, the applicants' position is that, to the extent that the Supreme Court decision nullified the power of the GCM to try them, they remain in illegal detention because they are no longer lawfully detained by the prison authorities and cannot remain in illegal detention on account of the uncertain administrative processes that seek to implement the Supreme Court's decision. Besides, all previous cases before the GCM had equally collapsed and could never be resurrected by the DPP because doing so would be constitutionally improper.

Under section 56 of the Evidence Act Cap. 8, this court is enjoined to take judicial notice of the proceedings of 21 February 2025 in the Chief Magistrates Court of Nakawa at Nakawa in Criminal Case No. 285/2025, in which the applicants were formally charged in the courts of law and remanded. While the court would have wished to answer the issues raised, it would be moot for it to do so. Accordingly, the application is dismissed with no orders as to costs.

5 Obiter

I note that from the time the motion was filed and allocated to me until the point when it was heard, I was subjected to numerous attacks on social media in the form of insults and personal threats to my life and those of the people closest to me. While certain of the insults might reasonably fall under the category of fair comment and thus be tolerable, I take particular issue with some of the alleged satire in form of cartoon drawings that suggested that I was probably a Nazi judge. Untrue insinuations were also made that I was very much under the spell of powerful persons in government, an allegation that could easily bring the integrity and competency of this court into question. In many jurisdictions of the world, any depiction of an individual as a Nazi apologist is *prima facie* evidence of criminal prejudice.[13] That notwithstanding, I wish to remind all those persons who vigorously trolled me as a person on

[12] *In the matter of an application for a writ of habeas corpus* ad subjiciendum *by Kyagulanyi Sentamu Robert* Misc. Cause No. 16 Of 2021.
[13] The publication of the swastika is per se evidence of anti-Semitism and easily criminally sanctioned in many jurisdictions of the civilised world.

different platforms, as well as via my personal email address, that courts in this country execute their judicial functions without fear or favour on the basis of the law and the evidence. It is hoped that such persons or their surrogates will reflect on their conduct and stop it.

Dr Douglas Singiza Karekona

Judge

24 February 2025