

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 437 - 2013
(Arising from Civil Suit No. 231 of 2013)

ATUKWASE NICKSON :::::::::::::::::::::::::::::::
APPLICANT/PLAINTIF

(Suing through his lawful Attorney Arinaitwe Reuben)

VERSUS

ATTORNEY GENERAL :::::::::::::::::::::::
RESPONDENT/DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

By this application, Atukwase Nickson, the Applicant seeks a default judgment against the Attorney General, the Respondent hereof.

The dispute has its origin in Civil Suit Number 231 of 2013. In the suit the Applicant sued for compensation, general damages for trespass and breach of contract, special, aggravated and exemplary damages against the Defendant/Respondent for what he claimed was loss of business and opportunities, illegal, arbitrary, oppressive,

unconstitutional and high handed acts and breach of statutory duty, wanton destruction of property, loss and damages.

It is on record that the Applicant/Plaintiff filed the suit on the 7th May 2013 and the summons to file a defence were issued the same day. It is also not indispute that the Respondent/Defendant was served with the summons on the 8th day of May 2013 a day after they were issued.

It is also on record that the Respondent/Defendant filed a Written Statement of Defence on the 5th June, 2013 and served a copy upon the Applicant/Plaintiff on the 11th July, 2013. A reply to the Defendant/Respondents. Written Statement of Defence was filed on the 26th July, 2013.

On the 31st May 2013, the Applicant must have realized that the Respondent had filed his Written Statement of Defence 27 days after he was served with the plaint. The Applicant contending that the defence was filed late, filed this application seeking a default judgment and leave to proceed with formal proof.

In his submission Counsel for the Applicant contended that the summons to file a defence required that the Respondent files his defence within 15 days like any other litigant, Order VIII Rule 1(2). That since the Respondent was served on the 8th May 2013, he should have filed his defence not later than the 23rd May 2013. That the Respondent had not sought leave to file a belated defence which rendered the Written Statement of Defence in admissible.

On Rule 11 of the Government Proceedings (Civil Procedure) Rules SI 77-1 which gave the Attorney General 30 days in which to file a defence, Counsel for the Applicant submitted that the rule was unconstitutional in as much as it discriminated against other litigants who were given only 15 days in which to file the defence.

He relied on **Dr. James Rwanyarare and 9 Others Vs Attorney General** Constitutional Application No. 6 of 2002. For purposes of convenience, Rule 11 referred to provides;

“In the case of Civil Proceedings against the Government, Rule 1 of Order VIII of the principal Rule shall have effect as if the words “thirty days” were substituted for the words “fifteen days” which occur in that rule”

In the **Rwanyarare case**, the bone of contention arose from Section 15(2) of the Government Proceedings Act which was aimed at preventing courts from issuing injunctions against the government. The Section 15(2) provided;

“The Court shall not in any Civil Proceedings grant an injunction or make any order against an officer of Government if the effect of granting the injunction or making the order would be to give any relief against the Government which would not have been obtained in proceedings against Government.”

The effect of that provision was that while injunctions would issue to other litigants, they could not be issued against the Government. The Court subjecting it to Article 126(1) concluded that it was anti people and in breach of the constitution.

That since the Government Proceeding Act was in existence by the time the 1995 Constitution was promulgated, the Act had to be construed, as provided under Article 273(1), “with such modification, adaptations as may be necessary to bring it into conformity with the constitution”.

In reply Counsel for the Respondent submitted that Rule 11 of the Government Proceedings Rules were not unconstitutional and therefore the Written Statement of Defence filed before the expiry of 30 days was in time. He distinguished this case from the **Rwanyarare** and **Attorney General V Osotraco Ltd**, CA 32 of 2002 cases. He submitted that while in those cases, the parties sought reliefs, it was not so in this case.

The gist of Counsel for Applicants argument is that the 1995 frowned at anything that created inequality between litigating parties.

Counsel for the Applicant submitted that the Government Proceedings Rules, particularly Rule 11 brings forth discrimination against non government litigants in that it allows the Attorney General 30 days within which to file a Written Statement of Defence, while giving the other litigants only 15 days.

Order VIII r 1(2) under which most litigants file their Written Statement of Defence reads;

“Where a Defendant has been served with a summons in the form provided by rule 1(1)(a) of Order V of these Rules, he or she shall, unless some other or further

order is made by the Court, file his or her defence within 15 days after service of summons.”

While the Government Proceedings (Civil Procedure) Rules in Rule 11 provides

“In the case of Civil proceedings against the Government Rule 1 of Order VIII of the principal Rules shall have effect as if the words “thirty days” were substituted for the words “fifteen days” which occurs in that rule.”

On the face of it, Rule 11 of the Government Proceedings (Civil Procedure) Rules gives more time to the litigating Government than Rule 1(2) of Order VIII does to the other litigants. Taken at face value it would fall in those archaic laws that place the State above the citizens by giving it preferential treatment at their (citizens) expense yet under the present constitution judicial power is derived from the people, Article 126 of the Constitution.

The same Constitution provides for a fair hearing, in determining peoples’ civil rights, Article 28(2).

It further demands for equality. The question that arises, is what equality does it mean. Counsel for the Applicant in his contention that Order VIII Rule 1(2) conflicts with Rule 11 of the Government Proceedings Rules was saying exactly that the disparity in time span, gives to the Attorney General and the ordinary citizen different degrees of access to the court. In my view the equality referred to in

the constitution goes beyond mere access, it goes to the root of access and that is justice.

When one talks of equal opportunity, he or she simply aims to breakdown the artificial barriers. These artificial barriers are seen explicitly clear in reliefs sought by the parties such as the barrier in Section 14(1)(b) (formerly 15(1)(b)) of the Government Proceedings Act, **Attorney General V Osotraco Ltd** Civil Appeal No. 32 of 2002 or when seeking injunctions against the Attorney General as in **Dr. James Rwanyarare & 9 Others** Constitutional Application No. 6 of 2002,

The foregoing are reliefs that maintain the status quo or even bring litigation to an end.

In my opinion the inequality referred to in the constitution would not as much affect things like affirmative action or as in this case procedures that are aimed at giving equal opportunity to two litigating parties to be heard on the same plane.

The Attorney General represents all government bodies far and near its Headquarters. When the Attorney General is sued, he has the duty to trace the responsible person across the country, inquire into the circumstances in which it is alleged that the liability of Government has arisen and as to the departments and officers of the Government concerned.

The foregoing is not necessarily the bother individual litigants go through. This is so because the ordinary litigant is normally himself

the Defendant and has immediate knowledge of how the dispute arose.

The Attorney General is sued on matters that have or allegedly been committed by employees of various ministries whose cooperation is at times not easily obtained. Imagine an accident caused by an officer in the forces. These are mobile and deployed at very short notice. The Attorney General gets to know about the accident after some time when the alleged offender may be at a front line. He then has to contact the relevant ministry, trace the offender, obtain statements before he files a defence. Such is not necessarily the case of an ordinary Defendant. These are not things that can be done in 15 days, moreover with weekends in between when offices that form addresses of alleged offenders or which are sources of their whereabouts are closed.

In view of the above to limit the Attorney General to 15 days would be to deny it access to justice in as much as the Written Statement of Defence would not in most cases be on court record at the close of the time span.

The other reason is that of public interest because the property that the Attorney General protects belongs to the ordinary citizen who most times is innocent of what has happened. It is therefore for the public good that ample opportunity be given to Attorney General to file his defences.

The disparity in the time spans is to try as much as possible to have pleadings of both parties on the court file before hearing. It is when every one of the parties has an “equal opportunity” of being heard

that the equality that Counsel for the Applicant pressed for can be achieved.

I would add that justice does not only lie in the law and that the law is not necessarily justice. Justice also lies in the context in which the parties operate. Even the constitution that speaks of equality and is intended to promote justice, is based on context which I may call the story behind the story. So the equality before the law that the constitution talks of includes the opportunity for both parties to have access not only to the courts but having reached there to justice.

Fair opportunity in legal practice includes measures taken by the committees responsible for procedural rules like the rules committee does and or Parliament in its legislative function. Those measures are responsible for the disparity in things like time spans such as the one under consideration. The disparity in time spans is however for the promotion of fairness by enabling the Attorney General to file his defence like the ordinary litigant can in the time afforded.

Equality in this case can be measured by the criteria of equality of outcome.

Going by the above criteria, one should be able to answer in the positive the question - if the Attorney General was also restricted to 15 days, would he be able like other Defendants be able to put in his Written Statement of Defence? - If the answer is in the negative, and it is in my view in the negative, then, the need to enlarge the time span to enable such filing so as to level the procedural path of litigation cannot be referred to as preferential treatment.

It is in my view with that in mind that the Applicant in this case decided to file for leave to be granted a judgment in default under Section 26(2)(b) of the Government Proceedings Act yet he would not have gone through all that trouble if he was proceeding against an ordinary litigant under Order IX rule 8.

For the reasons I have given herein above, I find that the disparity in time span that the Applicant sought to be declared unconstitutional, necessary to enable both parties equal opportunity to be heard and administration of justice. They do not offend the constitution in its protection of equality. I find Rule 11 of the Government Proceedings (Civil Procedure) Rules, not discriminatory and so the defence that was filed within 30 days, was well in time.

The application of the Applicant is therefore without foundation and is dismissed. The costs shall abide the decision the suit.

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David K. Wangutusi
JUDGE

Date: 05 - 11 - 2013