

1. An order against the respondent for discovery of information including relevant documents in possession of the Judicial Service Commission regarding the purported nomination or otherwise of Justice Steven Kavuma as Deputy Chief Justice of Uganda to be produced expeditiously to enable the applicants to pursue a petition in the Supreme Court.
2. Costs of the application be provided for by the respondent.

The application is supported by the affidavit of Kiiza Eron the second applicant which briefly depones that:

1. The applicants filed Misc. Cause No. 2 of 2015 in the Supreme Court of Uganda challenging the appointment of Justice Steven Kavuma as Deputy Chief Justice of Uganda.
2. The Judicial Service Commission has failed or refused to provide the applicants information in their possession regarding the nomination by the Judicial Service Commission of Justice Steven Kavuma as Deputy Chief Justice.
3. Several members of the Judicial Service Commission have informed the applicants that such information and documents are in possession of the Judicial Service Commission.
4. The applicants have written several letters to the Judicial Service Commission requesting for information regarding the candidature of Justice Steven Kavuma without success.
5. The documents in possession of the respondents are vital in facilitating the applicants challenging the appointment of Justice Steven Kavuma as Deputy Chief Justice of Uganda.
6. It is fair, just and equitable that this court grants the application and issues orders for the production of the information regarding the candidature of the third respondent.

In its affidavit in reply, deponed by Richard Adrole, a State Attorney in the Attorney General's Chambers. The 1st respondent averred that there is no pending suit before this court from which this application arises. That paragraph 4 and 5 of the application are premised on speculation and hearsay evidence. That this application is incompetent, frivolous, vexatious, barred in law and a

glaring abuse of court process since there are conventional means through which the applicants can apply for the required information. Finally that the second respondent is not a proper party to this application.

In his affidavit in opposition to the application, the Hon. Justice Steven Kavuma the Deputy Chief Justice of Uganda averred that the supporting affidavit to this application has made false allegations in paragraph 3 of Mr. Kiiza Eron's affidavit. That he was appointed a Justice of Appeal of the Court of Appeal on 29th October 2004 and served as such until March 2015 when he was appointed the Deputy Chief Justice of Uganda after serving as acting Deputy Chief Justice from 13th March 2013 to March 2015. That he applied to the Judicial Service Commission for the position of Deputy Chief Justice of Uganda. He was duly interviewed and the president was advised to appoint him which the president accepted and appointed him Deputy Chief Justice. The third respondent further deponed that the first and second applicants have no suit pending before this court against the respondents to require the use of the documents applied for before this court. That Misc. Cause 2 of 2015 referred to in paragraph 3 of the application was filed by the first and second applicants in the Supreme Court to which this court cannot adjudicate. That the application is intended to scandalize the third respondent since there is no necessity for the document asked for as there is no suit before this court for decisions that require the documents.

The third respondent further deponed that this application is merely a fishing expedition by the applicants because if their case in the Supreme Court Misc. Cause 2 of 2015 seeks to challenge the procedure that led to his appointment they should have not filed it before getting the necessary evidence. Finally that it is just and fair and in the interest of justice that this application ought not to be granted as it was not brought in good faith, is untenable in law and an abuse of court process and should be struck out.

In his affidavit in reply to opposition of the petitioner's application, the first applicant Hon. Gerald Karuhanga made a general denial of the third respondent's averments save for the admission of paragraphs 1 and 2. A similar thing was done by Kiiza Eron the second applicant.

In his rejoinder to the affidavit of Richard Adrole, the first applicant made a general denial thereto except admitting paragraphs 1 and 2 therein.

At the commencement of the hearing of this application, Mr. Kabega learned counsel for the third respondent raised preliminary points of law which he hoped could dispose of this application to the effect that this application is incompetent, frivolous vexatious and an abuse of court process which should be struck out with costs. That since this is an interlocutory application, before a party seeks for production of documents from the other party, it must have a suit pending before the court to which the application is made. That there must be pending issues for determination by the court and the documents sought must be relevant to the determination of the pending suit before court. That since Misc. Cause 2 of 2015 is in the Supreme Court, that suit is not before this court and this court has no concurrent jurisdiction with the Supreme Court.

Mr. Kabega further submitted that the applicants are on a fishing expedition which conduct cannot be allowed by court. Secondly Mr. Kabega submitted that under Section 16 of the Judicial Service Act, it is doubtful if this court would have the authority to issue the orders sought. That the only exception is found in Section 24 of the same Act which permits proceedings such as these to be brought under criminal proceedings or Judicial Review. Learned counsel prayed that this application be struck out with cost.

Mrs Rwakoojo, the Commissioner Civil Litigation representing the first and second respondents associated herself with the submissions by Mr. Kabega. In support of the assertion that this application is an abuse of court process, she relied on the case of ***R. Benkay Nigeria Ltd Vs Caddbury Nigerian PLC of the Supreme Court Case No. 29 of 2006 at page 6.*** Mrs Rwokoojo further added that it was erroneous to add the second respondent as a party to this application

since the Judicial Service Commission is not a body corporate on which one can just confer legal personality. She referred to the case of **Sentiba & 2 Others Vs The Inspectorate of Government, SCCA No. 6 Of 2008** followed in **The Inspector General of Government Vs UVETSO Association Ltd & 3 Others High Court Misc. Application No.536 of 2014.**

In reply to the objections Prof. Kanyeihamba learned counsel for the applicants agreed with the submissions by both learned counsel for the respondents but branded their submissions as totally outdated and ancient history because the laws they have relied on cannot overtake the Constitution of Uganda. He relied on the provisions of Article 2 and 274 of the Constitution and said that any provision of the law which is inconsistent with the Constitution is void to that extent and that all existing laws have to be construed with such modifications to bring them in conformity with the Constitution.

Learned counsel also relied on Article 41 of the Constitution to argue that the Judicial Service Commission is an organ of state so it is bound to provide the information sought since it is not against state security or interfering with the privacy of any person.

Learned counsel for the applicant also referred to Article 50 of the Constitution on enforcement of rights and freedoms as another article which supports his application for information which is in possession of the state. That the Constitution does not say that to get information one must first have a suit in the court and in any case this application is already before this court.

Professor Kanyeihamba finally submitted that in view of Articles 41 and 50 of the Constitution, no other law or authority however eminent the judge who pronounced it can override the provision of the Constitution.

In rejoinder, Mrs Rwakoojo denied that the laws relied on by the respondents are outdated and emphasized that the Articles of the Constitution referred to by learned counsel for the applicant supported the respondents' case. That whereas Article 41 provides for access to information, the laws provide for the manner in which it should be released. That there is nothing wrong with that. That under Article 147 (1)(F) of the Constitution the function of the Judicial Service Commission is given and include other functions prescribed by parliament. Mrs Rwakoojo further submitted that Article 126 (1) and (2) of the Constitution provide that judicial power has to be exercised in conformity with the law. That such laws cannot be said to be outdated and therefore the Constitution directs court to do everything they do in conformity with the law.

In his rejoinder, Mr. Karuhanga for the third respondent wondered why learned counsel for the applicant brought this application under outdated laws instead of Article 50 or 41 or 247 or 2 of the Constitution. Further that anything to do with the interpretation of the Constitution has to be referred to the Constitutional Court. He prayed that the application be struck out with costs.

I have considered this application and the law applicable. I have taken into account the respective submissions by the panel of some of the eminent legal minds in this land. I will now go ahead and resolve the objections raised by the respondents starting with locus *standi* of the second respondent and that is the Judicial Service Commission. It is common knowledge that the Judicial Service Commission is not a legal personality capable of suing or being sued in that capacity. As rightly pointed out by Mrs. Rwakoojo no one other than legislation can confer legal personality on the Judicial Service Commission. This position was enunciated in the often quoted Supreme Court case of **Gordon Sentiba & 2 Others Vs The Inspectorate of Government, SCCA No. 6 Of 2008** followed in **The Inspector General of Government Vs UVETSO Association Ltd & 3 Others High Court Misc. Application No.536 of 2014.** where the Supreme Court held *inter alia* that it is not the function of courts or anybody to confer corporate status or legal capacity or similar powers on public institutions or bodies which are not specified in the parent or enabling laws. Therefore adding the Judicial Service Commission as a party to these proceedings was done illegally. Article 41 of the Constitution relied upon by the applicants does

not confer corporate status on the Judicial Service Commission even if it is an organ or an agency of state. The second respondent will accordingly be struck out with costs.

This is an application for discovery of information including documents regarding the nomination or otherwise of Justice Steven Kavuma as Deputy Chief Justice of Uganda to be produced expeditiously to enable the applicants to pursue a petition filed in the Supreme Court. Discovery is a category of procedural devices employed by a party to a civil or a criminal action, prior to trial to require the adverse party to disclose the information that is essential for the preparation of the requesting party's case and that the other party alone knows or possesses. It is a device used to narrow the issues in a law suit or obtain evidence not readily accessible to the applicant for use at trial and/or ascertain the existence of information that may be introduced as evidence at trial provided it is not protected by privilege. Public policy considers it desirable to give litigant access to all material facts not protected by privilege to facilitate the speedy and fair administration of justice. Discovery is contingent upon a party's reasonable belief that he or she has a good cause of action or defence.

In view of the above clear objects of discovery, I am persuaded to agree with the submissions of Mr. Kabega for the third respondent and Mrs Rwakoojo for the first respondent that this being an interlocutory application, a party seeking for a production of documents from the other party must have a suit pending before the court. That suit must be before the court to which the application is made and the suit must have pending issues for determination by that court. The documents sought must be documents relevant to the determination of the pending suit before court. This correct position is born out in the law under the provisions of Order 10 rule 12 (1) and Order 10 rule 14 of the Civil Procedure Rules.

Order 10 rule 12 (1) of the Civil Procedure Rules provides that:

“ (1) Any party may, without filing any affidavit apply to the court for an order directing any other party to the SUIT to make a discovery on oath of the documents,

which are or have been in his or her possession or power relating to any matter in question in the SUIT

And order 10 rule 14 of the CPR provides that;

“The court may, at anytime during the pendency of a suit, order the production by any party to the suit, upon oath, of such documents in his or her possession or power relating to any matter in question in the suit, as the court shall think right.....”

It is an obvious fact that there is no suit pending between the parties to this application before this court. The Notice of Motion reads that the applicant filed Misc. Cause No. 2 of 2015 in the Supreme Court challenging the appointment of Justice Steven Kavuma as Deputy Chief Justice. That cause is not in this court since this court is not a Supreme Court. The suit is pending determination by the Supreme Court and obviously this court has no concurrent jurisdiction with the Supreme Court. The suit envisaged under the law is not the present Misc. Cause as learned counsel for the applicant wants this court to believe. It must be a different suit with a clear cause of action with issues to be resolved by this court between the parties and not an interlocutory application like the instant one.

This is the correct position of the law and I do not agree with the submission by Prof. Kanyehamba that the law in this regard is outdated in view of the provisions referred to in the Constitution. Whereas the Constitution is the supreme law of the land several of its provisions are operationalized by other legislation enacted by parliament. For example, whereas Article 41 of the Constitution prescribes the right of access to information it is the enabling law which provides for the manner in which information should be released. Organized societies must have such process, otherwise anarchy would prevail.

As rightly submitted by Mrs Rwakoojo, the exercise of judicial power under Article 126 (1) of the Constitution is supposed to be done in conformity with the law. Whereas the Constitution is the mother of all laws, it usually refers and directs the citizens to the substantive laws. For example Article 126 (1) provides;

“Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the law.....”

And article 126 (2) says;

“In adjudicating cases both civil and criminal nature, the court shall subject to the law apply the following principles.....”

Therefore the Constitution demands that whatever courts do must be in conformity with the law which law supports the Constitution since we cannot have everything embedded in the Constitution.

This court is mindful of the provisions of Article 274 referred to by learned counsel for the applicant which provides that the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. The fact that this application has been brought under provisions of Order 10 rules 12, 14 and 24, Sections 98 and 64 (e) of the Civil Procedure Act and Section 33 of the Judicature Act which have been severally interpreted many years after the promulgation of the 1995 Constitution suggests that the said interpretations have had Article 274 in mind. For example requirement that for one to seek discovery must have a suit before the court in which the application is made cannot be said to be against the Constitution as I have explained above. This application is not brought under Articles 2,50, 41 or 247 of the Constitution but it is brought under the substantive laws I have mentioned.

Finally Mr. Kabega supported by his co-counsel submitted that this application is incompetent, frivolous, vexatious and an abuse of court process which should be struck out with costs.

According to the third respondent’s affidavit in opposition, he averred in paragraphs 10 and 11, that this application is merely a fishing expedition intended to merely scandalize him.

It is trite law that court will deny discovery if the party is using it as a fishing expedition to ascertain information for the purpose of starting an action or developing a defence. A court is responsible for protecting against the unreasonable investigation into a party's affairs and must deny discovery if it is intended to annoy, embarrass, oppress or injure the parties or the witnesses who will be subjected to it. A court will stop this discovery when used in bad faith. I think this is such a case.

The concept of abuse of court process is not very precise but the Nigerian case of ***R-Benkay Nigeria Ltd Vs Cadbury Nigerian PLC SC 29 of 2006*** outlines circumstances which give rise to abuse of court process and these include:

- a) Instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of actions on the same matter between the same parties where there exists a right to begin the action.
- b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and the respondents' notice.
- d) Where an application for adjournment is sought by a party to an action to bring an application to court for leave to raise issues of fact already decided by a lower court.
- e) Where there is no law supporting a court process or where it is premised on frivolity and recklessness.
- f) Where a party has adopted the system of forum shopping in the enforcement of a conceived right.
- g) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. In that case the second action is *prima facie*, vexatious and an abuse of court process.

In a nutshell, the common feature of an abuse is in the improper use of the judicial process by a party in litigation.

From the facts of this case, this is a fishing expedition because without a suit before this court for determination, there is no way this kind of application can be competent before the court.

On what amounts to a fishing expedition I will refer to the case of **Gale Vs Denman Picture Houses Ltd [1930] KB 588, 590** per lord, Scrutton L. J relied upon by the respondent wherein it was held inter alia thus

“A plaintiff who issues a writ must be taken to know what his case is. If he merely issues a writ on the chance of making a case he is issuing what used to be called a “fishing bill” to try to find out whether he has a case or not. That kind of proceeding is not to be encouraged. For a plaintiff after issuing his writ but before delivering his statement of claim to say, “show me the documents which may be relevant so that I may see whether I have a case or not” is most undesirable proceeding.”

I agree therefore that this application is a fishing expedition which cannot be allowed by this court.

For the reasons I have endeavored to give in this ruling I will uphold the objections by all learned counsel for the respective respondents and find that this application is incompetent and is accordingly struck out with costs to the respondent. I so order.

A certificate of three counsel is given.

Stephen Musota

J U D G E

28.05.2015