THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 142 OF 2020

(Arising from Misc. Cause No. 86 of 2019)

1. **FRANCIS NAMARA**
2. **JUSTINE AHIMBISIBWE**
3. **MUGISHA JULIUS**
4. **MUHWEZI JOHNSON :: APPLICANTS**

VERSUS

1. **THE ATTORNEY GENERAL**
2. **EDISON MUHANGI**
3. **GERTRUDE NAKIMBUGWE**
4. **NABIRYE EDITH**
5. **OMBA DAVID**
6. **LUGOLOBI TIMOTHEOS :: RESPONDENTS**

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING ON A PRELIMINARY OBJECTION

Introduction

This application was brought by Notice of Motion under Article 50 of the Constitution, Section 98 of the Civil Procedure Act, the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules 2008 and Order 52 Rules 1 & 3 of the Civil Procedure Rules seeking a number of declarations and orders to the effect that the acts of the Respondents amount to contempt of court orders issued by this court and that the said acts were wanton and illegal.

The application was supported by an affidavit sworn by the 1st above named Applicant for and on behalf of himself and the other Applicants. The application was opposed by the Respondents vide affidavits in reply deponed to by the 1st, 2nd, 4th, 5th and 6th Respondents. The 3rd Respondent made no reply to the application.

The brief facts leading to this application according to the Applicants are that the Applicants own land in Gayaza Buwagga having purchased the same on various dates from a one Ruta Ngambwa (hereinafter called the **Vendor**). On 27th March 2019, the Applicants received a letter from the Commission of Inquiry into Land Matters constituted by the 1st Respondent and chaired by Justice Catherine Bamugemereire directing authorities to halt all the activities and transactions on the said land so as to allow the Commission do its work. Believing that the said Commission had no powers to stop them from using their land and upon the advice of their lawyers, the Applicants filed an application for judicial review vide Misc. Cause No. 86 of 2019 seeking to have the said directive quashed; which order was secured from the High Court together with a prohibition order against a number of authorities inclusive of the second Respondent from enforcing the said directive.

It was stated by the Applicants that pursuant to the said orders of the High Court, the Applicants on 19th January 2020 proceeded to the land to mark their boundaries to avoid any further conflicts thereon. During the course of the said activity, the 2nd Respondent being the DPC Kasangati, acting on information supplied to him by the 3rd to 6th Respondents among others, moved to the said land, with a number of police officers and ordered for the arrest of the Applicants together with all the other persons involved in the boundary opening exercise. The Applicants claim that they were arrested brutally and were assaulted in course of being arrested. This was despite the 2nd Respondent being served with the order of the High Court allowing the Applicants to use their land. The Applicants were detained overnight and were only released on police bond in the night of 20th January 2020. The

Applicants were never charged with any offence but the 2nd Respondent continued harassing the Applicants through summoning them to police and treating them with utter arrogance and impunity; thus this application.

On their part, the Respondents denied the allegations. For the 1st Respondent, it was stated by Kukunda Clare, a State Attorney in the Attorney General's Chambers, that the 1st Respondent did not disobey any Court orders and could not therefore be in contempt of any Court orders. The deponent stated that the police arrested and detained the Applicants on reasonable and probable cause that they had committed a crime. As such, their detention was lawful and they were later released on police bond.

The 2nd Respondent, the Division Police Commander for Kasangati, in his affidavit in reply averred that the application and the supporting affidavit contains material irregularities and falsehoods and he would raise preliminary objections seeking the same to be struck out. The 2nd Respondent stated that it was upon registration of a complaint of threatened use of violence and criminal trespass by one Nabirye Edith against the Applicants that arrests were made. He stated that the said arrest had no connection whatsoever with the enforcement of the Commission of Inquiry directives or any orders as alleged by the 1st Applicant. He further stated that the arrest was a lawful act following a complaint by a citizen against the Applicants.

The 4th, 5th, and 6th Respondents denied the allegations and stated that they were not party to the proceedings in the cases mentioned in the application and were not aware of the allegations levelled against them. They prayed for dismissal of the application.

Representation and Hearing

The Applicants were represented by Mr. Bariyo Allan, while Ms. Charity Nabasa appeared for the 1st Respondent, Mr. Kabazzi Richard appeared for

the 2nd Respondent and Mr. Kalali Stephen appeared for the 4th, 5th and 6th Respondents.

When the case came up for hearing, Counsel for the 2nd, 4th, 5th, and 6th Respondents indicated that they wished to raise some preliminary points of law which had the effect of disposing of the suit and wished to have them determined before consideration of the merits of the case. It was agreed that the same be raised by way of written submissions which were duly filed, and thus this ruling. In their submissions in reply to the preliminary objections, Counsel for the Applicants also raised some points of objection towards the Respondents' submissions. I have added this point of objection to the list for consideration.

The preliminary points of objection

Four preliminary points of objection were raised, namely:

1. **The application is incompetent owing to the supporting affidavit being fatally defective as it offends Order 1 Rule 12 of the CPR.**
2. **The application is incompetent for being brought under a repealed law.**
3. **The application discloses no cause of action against the Respondents.**
4. **Whether the joint submissions of the Respondents' Counsel were offensive to the law and ought to be struck out.**

Determination by the Court

Point 1: The application is incompetent owing to the supporting affidavit being fatally defective as it offends Order 1 Rule 12 of the CPR.

It was submitted by Counsel for the Respondents in their consolidated submissions that the application is incompetent as it is supported by a fatally defective affidavit. Counsel submitted that the affidavit sworn by Francis Namara offends Order 1 Rule 12 (1) and (2) of the CPR as there is no written authority by the other Applicants authorising the 1st Applicant to

depone on their behalf. Counsel relied on the case of ***Lena Nakalema Binaisa & 3 Ors vs. Mucunguzi Myers MA 460 of 2013*** in which Justice Bashaija Andrew held that the affidavit was incurably defective for non-compliance with the said requirement of the law.

For the Applicants, it was submitted that the Applicants gave written authority to swear the affidavit on their behalf and the same was on record and also attached to the submissions. Counsel for the Applicant argued that the law only requires that the said authority be filed in the case; not that the same has to be attached to the affidavit. The rule is complied with as soon the written authority is received by the court. Counsel further submitted that in any case, the other Applicants have always accompanied the 1st Applicant to Court and have never disowned him. Counsel further submitted that even if the said written authority was lacking, the effect would not be striking out the entire affidavit as the court is in position to sever the defective part of the affidavit from the other and rely on the relevant part. Counsel relied on the decision in ***Tomasi Kallinabiri Vs George William Kalule, HC Civil Appeal No. 19 of 2010***.

Order 1 rule 12 of the CPR provides:

> *"12. Appearance of one of several plaintiffs or defendants for others.*
> *(1) Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding.*
> *(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."*

It is clear from the above provision that while sub-rule (1) permits one party to appear, plead or act on behalf of another, sub-rule (2) makes it

mandatory that where one party so acts on behalf of the other, there must be written authority signed by the party giving the authority and filed in the case. As such, and upon decided authority, a pleading that is not in compliance with the said provision would be defective and incompetent before the court. It follows therefore that the said authority cannot be implied or inferred from conduct of the parties to the suit as the Applicant's Counsel wants the Court to believe. Merely accompanying the deponent to court would not confer the authority envisaged under the law. That part of Counsel's submission is therefore misconceived and superfluous.

It was shown in the instant case that the requisite written authority was indeed filed albeit not attached to the application and the supporting affidavit. Counsel for the Applicants attached a copy of the same to their submissions. For the record, there is no such copy on record or any indication that the same was filed separately. Upon scrutiny of the copy attached to the submissions, it is a copy of a written authority said to have been signed by the 2nd, 3rd and 4th Applicants. It is said to have been received into the Court Registry on 16th March 2020, the same day the application was filed. There is no explanation why the court copy is not on record. There is also no rebuttal by the Respondents questioning the fact as to whether the same was filed or not. In absence of any allegation questioning the manner in which the said document came to bear the official "Court Received Stamp", I am prepared to accept the said document as having been duly filed.

As submitted by Counsel for the Applicants, from the clear reading of sub-rule (2) of Rule 12 above, the law does not strictly require that the written authority has to be attached to the pleading; all it says is that the authority has to be filed in the case. Believing that the same was duly filed as it appears on the copy availed, and in absence of any other evidence to the contrary, I find that the 1st Applicant was seized with the requisite written authority to depose to the facts of the case for himself and on behalf of the

other Applicants. This point of objection therefore has no merit and is dismissed.

Point 2: The application is incompetent for being brought under a repealed law.

Counsel for the Respondents submitted that the application was brought under the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, 2008 which was revoked by the Judicature (Fundamental and other Human rights and Freedoms) (Enforcements Procedure) Rules 2019, S.1 31 of 2019. The new law came into force on 9th July 2019, yet the current application was filed on 16th March 2020. Counsel prayed to Court to find that the instant application is a nullity having been brought under a revoked law.

For the Applicants, it was submitted by Counsel that citing a wrong law is not fatal and the same is curable under article 126(2)(e) of the Constitution. Counsel relied on the case of ***Francis Wazarwahi Bwengye vs. Haki W. Bonera HC CA No. 33 of 2009*** where it was held that failure to cite the correct law was an error or lapse which would not debar the application from proceeding.

This application was brought under Article 50 of the Constitution, Section 98 of the CPA, Order 52 Rules 1 and 3 of the CPR and the Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules, S.I No. 55 of 2008. The latter instrument was made by the Rules Committee on 26th February, 2008, in exercise of the powers conferred upon the Committee by Section 41 of the Judicature Act and Article 150 (1) of the Constitution.

On 25th January 2019, however, the Rules Committee passed *The Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules, No. 31 of 2019* which came into force on 31st May 2019 and expressly revoked S.I No. 55 of 2008. In the same year 2019, Parliament

enacted the Human Rights Enforcement Act, 2019 which was assented to by the President on 31st March 2019 and came into force on 15th November 2019, the date it was published in the Gazette.

Under Section 18 of the Act, the Rules Committee is given power to make rules of procedure to give effect to the provisions of the Act. The correct law to be cited therefore was the Human Rights Enforcement Act, 2019 and the Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules, S.I 31 of 2019.

I am, however, in agreement with the decision in ***Francis Wazarwahi Bwengye Vs Haki W. Bonera, HC C.A No. 33 of 2009*** that failure to cite the correct law is an error or lapse which is curable and would not necessarily debar an application from proceeding. The Court can exercise its inherent power under Section 98 of the CPA to cure such an error or lapse; especially taking into account the dictate under Article 126 (2) (e) of the Constitution.

In this case, the Applicants cited Article 50 of the Constitution and Section 98 of the CPA which, in my view, affords them sufficient legal authority to move the court for the reliefs sought. It is my finding therefore that the citing of the revoked law had no effect on the validity of present matter before the Court. This preliminary point of law, therefore, has no merit and is overruled.

Point 3: The application discloses no cause of action against the Respondents.

It was submitted by Counsel for the Respondents that the application discloses no cause of action against the 3rd to 6th Respondents. Counsel submitted that it is trite that a cause of action is disclosed by the plaint or pleading and the annextures thereto. Counsel relied on the case of ***Ssande Godfrey vs. Kanyije James & 2 Others, HC C.S No. 375 of 2016***. Counsel submitted that the 1st Applicant averred that the 3rd to 6th

Respondents gave false and misleading information to police which led to the arrests as contained in plain statements at police yet the one pertaining to the 3rd Respondent is not attached. As such, the allegations against the 3rd Respondent are unfounded. Counsel further submitted that the attached statements as they relate to the 4th, 5th and 6th Respondents do not reveal the Applicants as suspects and, as such, the Applicants' allegations against the Respondents should be dismissed as based on falsehoods and unsupported.

In reply, Counsel for the Applicants contended that this point of objection has no merit and is premature. Counsel submitted that the affidavit evidence discloses the respective claims against the Respondents; which the Respondents shall have the opportunity to rebut at the hearing of the application. In specific reply to the 3rd Respondent, Counsel for the Applicants submitted that the affidavit clearly discloses the 3rd Respondent's tortious conduct. Additionally, there is neither an affidavit in reply by the 3rd Respondent nor did she appear or have a representative in the Court. Counsel submitted that, as such, the claim by the Respondent's Counsel is a submission from the bar and the law is that facts that are not opposed are deemed to be admitted. Counsel concluded that in respect to the 3rd Respondent, Counsel for the 4th to 6th Respondents were acting without instructions.

Under the law, for a suit to disclose a cause of action, it must be shown that the plaintiff enjoyed a right; the right was violated and it is the defendant who violated the right. **See:** ***Auto Garage Vs Motokov (No.3) 1971 EA at page 514*** and ***Ainomigisho Winfred & 8 Ors Vs Fatuma Dusto Nalumansi & 3 Ors, H.C (Kampala-Land Division) M. A No. 2084 of 2016***.

It is also the established position of the law that in order to determine whether a plaint or any pleading discloses a cause of action, court has to look at the plaint or the particular pleading only together with its

annextures and nowhere else. **See: *Kapeeka Coffee Works Ltd Vs. NPART, Civil Appeal No. 03 of 2000 (unreported); Ainomugisho Winfred & Others Vs. Fatuma Nalumansi & Others (supra).***

On the case before me, the allegation by the Applicants is that they were beneficiary of a court order that had okayed their occupation and use of the land in issue. While the said court order was still in force, the Applicants were brutally arrested and harassed by the 2nd Respondent upon the complaint of the 3rd to the 6th Respondents. The 1st Respondent is alleged to be vicariously liable for the acts of the 2nd Respondent. That is the allegation of the Applicants; to which the Respondents have made replies. If the allegations were proved, there definitely will be a case to answer by the Respondents. The above set of facts, in my view, are sufficient to establish that the Applicants enjoyed a right, which right was violated and, upon evidence, the Respondents would be liable for the violation. I am also in agreement with Counsel for the Applicants that Counsel for the 4th to 6th Respondents have no locus to argue the case for the 3rd Respondent who neither filed any response nor appeared in the court.

In the circumstances therefore, I am satisfied that the application before the court discloses a cause of action against the Respondents. This point of objection is also overruled.

Point 4: Whether the joint submissions of the Respondents' Counsel were offensive to the law and ought to be struck out.

It was argued by Counsel for the Applicants that the submissions by Counsel for the Respondents offended the provisions of Section 67 of the Advocates Act which requires any person who writes a legal document to disclose their name and full address. Counsel further submitted that the said submissions also offended the provisions of Order 1 Rule 12 of the CPR in so far as there is no written authority from the rest of the firms to the firm that signed the submissions. Counsel prayed that the submissions be found defective and struck out.

Counsel for the Respondents made no submissions in rejoinder and, as such, made no response to this submission.

Section 67 of the Advocates Act Cap 267 refers to instruments to which Section 66 of the Act applies. Section 66 sets a penalty for persons who, being unqualified to draw particular documents for gain, proceed to make such documents. Section 66 exempts an advocate with a valid practicing certificate. Under Section 67 of the Act, every person who draws or prepares any instrument to which section 66 applies shall endorse or cause to be endorsed on it his or her name and address. Submissions by an advocate are not one of the instruments to which Section 66 of the Act apply. This provision was therefore cited by the Applicants' Counsel out of context.

Regarding the provisions of Order 1 Rule 12 of the CPR, the same has been set out herein above. From the clear reading of the said provision, it refers to appearance, pleading or acting by one party on behalf of the others in a case where there are more parties than one. Counsel for the Respondents are not parties in the matter. The pleadings for the different Respondents were not filed jointly. Counsel had separate and distinct instructions. The arrangement between them to make the submissions in support of the preliminary objections jointly was for purpose of convenience and expediency. I do not see how the cited provision is applicable to these set of facts and circumstances. The objection by Counsel for the Applicants is therefore totally misconceived and is devoid of any merit. It is accordingly rejected.

In all therefore, all the preliminary points of law have been found devoid of merit. They are all overruled and the hearing of the application shall proceed on the merits. The costs shall be in the cause.

Owing to the Covid-19 pandemic lockdown, I will direct herein that the parties file their written submissions in the application. The Applicants are

given 21 days from the date of delivery of this Ruling to file and serve their submissions. The Respondents shall file their replies within 21 days from the date of service of the Applicants' submissions. Submissions in rejoinder shall be filed by the Applicants within 15 days from the date of service of the Respondents' submissions. The Ruling in the application will be by email on notice.

It is so ordered.

Dated, signed and delivered by email this 8th day of June 2021.

Boniface Wamala
JUDGE