THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 194 OF 2021

MALE H. MABIRIZI K. KIWANUKA :::::::::::::::::::::::::::::: APPLICANT

VERSUS

ATTORNEY GENERAL OF UGANDA :::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

This is a judicial review application brought by the Applicant by Notice of Motion under *Paragraphs I, XXVI, XXIX(a) & (f), of the National Objectives and Directive Principles of State Policy; Article 8A, 17(1)(i), 28(1), 29(2), 44(c), 99(1) – (3), 128(1) & (2), 139(1) of the Constitution; Sections 33, 36(1), 38(1) & (2) and 39 of the Judicature Act; Sections 27, 29 & 36 of the Public Health Act Cap 281; Sections 17 – 19 of the Interpretation Act; and Rules 3 & 6 of the Judicial Review Rules, 2009 as amended in 2019*. The application seeks for the following declarations and orders:

1. A declaration that;
   a) The several oral statements/ speech orders/ directives/ decrees by the President of the Republic of Uganda communicated on Friday 18th June 2021 relating to the Corona Virus (Covid-19) have no force of law, are illegal, procedurally improper and ultra vires the powers of the President of the Republic of Uganda. [**For ease of reference, I will hereinafter refer to the oral statements/ orders/ directives/ decrees as the "The President's Directives"].**
   b) The Chief Justice's Circular CJ/C.7 dated 21st June 2021 titled **"Revised Contingency Measures by the Judiciary to Prevent and Mitigate the Spread of Covid-19"** has no force of law, is illegal,

procedurally improper and ultra vires the powers of the Chief Justice of the Republic of Uganda. **[For ease of reference, I will hereinafter refer to the said Circular as the "Chief Justice's Circular"].**

2. An order of Certiorari quashing;
   a) The President's Directives communicated on Friday 18th June 2021 relating to the Corona Virus (Covid-19).
   b) The Chief Justice's Circular CJ/C.7 dated 21st June 2021.
3. An order of Certiorari quashing any action, decision or step taken in pursuance of;
   a) The President's Directives.
   b) The Chief Justice's Circular.
4. An order of Prohibition prohibiting;
   a) Any Ugandan Government Official or Agency from implementing the said President's Directives.
   b) Any Judicial Officer, Court Staff or Judiciary Administrator from implementing and complying with the Chief Justice's Circular.
5. A permanent injunction restraining;
   a) Any Uganda Government Official or Agency from implementing the President's Directives.
   b) Any Judicial Officer, Court Staff or Judiciary Administrator from implementing and complying with the Chief Justice's Circular.
6. General damages, exemplary and aggravated damages to be paid to the Applicant by the Respondent for inconveniences caused.
7. Costs of the application be paid by the Respondent.

The grounds of the application as set out in the Notice of Motion are that the President of Uganda has no powers to regulate people in prevention of a contentious/infectious disease by mere oral statements/ speech/ orders/ directives/ decrees; the measures declared are not supported by any Act of Parliament or Statutory Instrument; and the President's said Directives are illegal, were issued in a procedure which was improper, are unreasonable,

irrational and defeat common sense, subject Ugandans to unclear and uncertain martial law, and are uncertain and incapable of being complied with or enforced.

In respect to the Chief Justice's Circular, the grounds are that the Chief Justice has no power to regulate people in prevention of a contentious/infectious disease; the Chief Justice has no powers to make decisions with a force of law without any Statutory Instrument; the measures declared are not supported by any Act of Parliament or Statutory Instrument; the Presidential directives relied on by the Chief Justice are not supported by any law; the Circular is illegal; the Circular was issued in a procedure which was improper; and the contents of the Circular are unreasonable, irrational and defeat common sense. The Applicant stated that it is fair and equitable that the application is allowed.

The application is supported by an affidavit affirmed by the Applicant which substantiates the grounds of the application. In the affidavit, the Applicant states that he is a lawyer by profession and a civically active Ugandan who has been closely following the constitutional, human rights and rule of law trends in Uganda; in which capacity he brings the application.

The Applicant states that on Friday 18th June 2021, the President of the Republic of Uganda, in his televised address, stated that starting 2200 hours and for a period of 42 days, he was revising and updating all the directives that he had issued on the 6th June 2021. The Applicant lists the measures contained in the President's Directives and averred that the only lawful way the President could make the said directions was through a Statutory Instrument, putting into account public participation and involvement. The Applicant further stated that he knows that laws in Uganda take effect upon publication in the gazette and not upon oral communication. It was also unreasonable and illegal to ban people from travelling throughout Uganda instead of merely

advising them not to and making restrictions in particular areas. The directions/orders do not pass the test of being acceptable and demonstrably justifiable in a free and democratic society. The Applicant therefore averred that the directives are illegal, unreasonable, irrational and issued in a procedure that was improper.

Regarding the Chief Justice's Circular, the Applicant averred that the Chief Justice suspended all court hearings and all execution proceedings and processes, stating that courts will continue to hear only urgent matters without specifying the method of determining the urgency. The Applicant states that he knows that the Chief Justice lacks the powers to order the closure of courts acting on a President's Speech since such is outside his administrative functions. The Applicant also knows that it is contrary to the principles of rule of law, democracy, good governance and human rights to have the police and defence forces enforcing the speech where people are arrested but courts are closed. The Applicant finally averred that it is fair, equitable and in the interest of protecting the rule of law in Uganda that the application be allowed.

The Respondent opposed the application through two affidavits in reply; one deponed to by Dr. Henry G. Mwebesa, the Director General for Health Services in the Ministry of Health, and the other deponed to by His Worship Ayebare Tumwebaze, a Deputy Registrar in the Judiciary of Uganda currently charged with administrative duties under the office of the Chief Justice.

In his affidavit, Dr. Henry G. Mwebesa set out the background to the interventions undertaken by the Government of Uganda since 30th January 2020 when the World Health Organization (WHO) declared the outbreak of Covid-19 to be a Public Health Emergency of International Concern and 11th March 2020, when it was recognised as a pandemic. The deponent listed the measures the President of the Republic of Uganda took to curtail the spread of the Covid-19 disease from 18th March 2020 to 21st July 2020.

The deponent further stated that he knows that Covid-19 has since mutated into more deadly and more severe variants which have been registered in Uganda and are fuelling transmission. He averred that if the current state of affairs is left unabated, it portends disaster to the population and could wreck the country's health system.

The deponent also stated that the Government of Uganda put in place a National Covid Task Force constituting a number of experts in the medical field to study and advise on the way forward to address the state of affairs in the Country. The deponent knows that the President issued a Statutory Instrument on 18th June 2021 pursuant to the provisions of the Constitution of the Republic of Uganda and the Public Health Act and it came into force at 2200 hours on 18th June 2021. The Statutory Instrument issued by the President was authenticated by the Minister of Health on 1st July 2021 pursuant to the powers conferred upon the Minister by Sections 11, 27 and 29 of the Public Health Act, Cap 281 and the Interpretation Act. The said Statutory Instrument was published in the Uganda Gazette on 1st July 2021 pursuant to the provisions of the Interpretation Act and is cited as *Statutory Instrument No. 38 of 2021, The Public Health (Control of COVID-19) Rules*.

It was further averred by the deponent that due to the skyrocketing new infections and deaths, the measures issued by the Government were intended to prevent, control and suppress the spread of Covid-19. The measures issued by the President were premised on expert advice and consultation from various stakeholders. The measures were also informed by the serious threat posed to national security and public health by the spread of the pandemic. The measures were further to serve as precautionary/preventive measures to minimize/mitigate the spread of Covid-19 and to prevent potential resultant deaths. This was done to protect human rights which is a constitutional responsibility of the Government of Uganda. The measures are proportionate

and reasonable in an open and democratic society and are within the constitutional mandate of the Government.

The deponent concluded that the Applicant has no valid grievance before this Court and the application was brought in bad faith and was merely intended to interfere with the legislative and executive functions of the Government of Uganda.

In the second affidavit in reply, His Worship Ayebare Tumwebaze stated that the Hon. The Chief Justice is the head of the Judiciary in Uganda and is, *virtute officii*, clothed with the Constitutional power to issue guidelines and directions to the Courts of Judicature in the Republic of Uganda for the proper and efficient administration of justice. He stated that the Chief Justice issued the subject Circular in the exercise of this constitutional mandate. The measures in the said Circular were made by the Judiciary arising from the many resolutions of the Judiciary Administration and pursuant to the provisions of Article 133 of the Constitution of Uganda and Statutory Instrument No. 38 of 2021, The Public Health (Control of COVID-19) Rules enacted to avert or mitigate the spread of the Covid-19 disease in Uganda.

The deponent further stated that he knows that the guidelines in the circular did not close the courts but were aimed at scaling down the operations to 10% physical presence in the courts and ensure that only critical staff remained to attend to the court business on a daily basis for the 42 days. The guidelines were intended to ensure public health and safety following the escalating levels of Covid-19 infections where a number of pivotal staff have lost their lives and several others hospitalized in critical condition. The guidelines were also aimed at promoting the rule of law and better administration of justice during the 42 days' lockdown. He concluded that the application is frivolous, an abuse of court process, lacks merit and ought to be dismissed with costs.

The Applicant filed an affidavit in rejoinder to each of the affidavits in reply whose contents I have also taken into consideration.

Representation and Hearing

At the hearing, the Applicant appeared in person while the Respondent was represented by Mr. Mwambutsya Martin (the Director Civil Litigation) and Mr. Ebira Hillary Nathan (State Attorney).

It was agreed that the hearing proceeds by way of written submissions which were duly filed. I have reviewed the respective submissions and have considered them in the course of resolution of the issues that are before the Court for determination.

Issues for Determination by the Court

In their submissions, the Applicant and the Respondent's Counsel disagreed on the framing of the issues for determination by the Court. The Applicant framed three issues as follows;

1. Whether the President's Directives communicated on Friday 18th June 2021 relating to Covid-19 are *ultra vires* the powers of the President of the Republic of Uganda and issued in a procedurally improper manner?
2. Whether the Chief Justice's Circular dated 21st June 2021 is *ultra vires* the administrative powers of the Chief Justice and issued in a procedurally improper manner?
3. What remedies are available to the parties?

On their part, Counsel for the Respondent indicated they intended to raise a preliminary point of objection which would be taken as issue one; raise one issue in place of the 1st and 2nd issues of the Applicant and agreed with the third issue. The issues raised by Counsel for the Respondent, therefore, are;

1. Whether the Applicant has locus standi to institute this suit?
2. Whether this application discloses any grounds for judicial review?

3. What remedies are available to the parties?

I note that the 1st and 2nd issues proposed by the Applicant are well catered for under the 2nd issue as proposed by Counsel for the Respondent. This is because the questions as to whether "the President's Directives and the Chief Justice's Circular were ultra vires or issued in a procedurally improper manner", if answered in the affirmative, would constitute grounds for judicial review. I therefore find it more precise that Court investigates as to whether the application discloses grounds for judicial review.

But more importantly, I note that the issues as proposed by the Applicant are not exhaustive enough going by the pleadings. The law is that issues for determination by the Court shall be based on the parties' pleadings and evidence. It was stated in the Applicant's own pleadings and evidence that the impugned directives and circular were also being challenged on the grounds of irrationality or unreasonableness. Yet in the issues as proposed by the Applicant and in his submissions, he abandoned this line without informing the Court that the was doing so intentionally. Since the Respondent had responded to this claim, the Court is duty bound to investigate the same. By adopting the 2nd issue as proposed by the Respondent's Counsel, the Court is able to do so without having to raise any other issue. For that reason, I will adopt the issues as proposed by Counsel for the Respondent. The issues for determination by the Court, therefore, are:

1. **Whether the Applicant has *locus standi* to institute this suit?**
2. **Whether this application discloses any grounds for judicial review?**
3. **What remedies are available to the parties?**

Resolution by the Court

<u>Issue 1:</u> Whether the Applicant has *locus standi* to institute this suit?

It was contended by the Respondent that the Applicant has no *locus standi* to bring the present application. Counsel for the Respondent submitted that

under Rule 3A of the Judicature (Judicial Review) (Amendment) Rules, 2019, a person applying for judicial review has to have "direct and sufficient interest in a matter". Counsel submitted that going by the Applicant's averments in the affidavit in support, the Applicant has not shown whether and how the process of making the said measures and guidelines have directly affected him. Counsel submitted that the Applicant is not clothed with direct and sufficient interest to bring this application for judicial review. Counsel relied on the decision in ***Ben Muhumuza vs Attorney General & Others, HC MC No. 212 of 2020*** for the above submission and prayed to Court to find that the Applicant does not have *locus standi* to bring this application and the same should be dismissed.

In reply, the Applicant submitted that he has *locus* before the Court and the application is properly before Court pursuant to the provisions of the law cited in the Notice of Motion. The Applicant relied on the decisions in ***National Drug Authority & Another vs Nakacwa Florence, Court of Appeal Civil Appeal No. 281 & 286 of 2017*** and ***Kyagaba & 2 Others vs Namuganga Trading Co. Ltd, Court of Appeal Civil Appeal No. 88 of 2012***. The Applicant prayed that the objection be disregarded and the Court proceeds to determine the application on its merits.

Locus standi is defined as the right to bring an action or be heard in a specific forum. See: **The Black's Law Dictionary, 8th Edition, page 2754**. In an application for judicial review, *locus standi* is provided for under the Judicial Review Rules. *Rule 3A of the Judicature (Judicial Review) (Amendment) Rules, No. 32 of 2019* provides as follows –

> *"Any person who has a direct or sufficient interest in a matter may apply for judicial review".*

The question therefore is what amounts to a direct or sufficient interest. This term has been a subject of construction by the Court. In ***Ben Muhumuza vs Attorney General & Others, HC MC No. 212 of 2020***, **Ssekaana J**. had this to say on what amounts to sufficient interest as to make an applicant seized with *locus standi* in an application for judicial review:

> ***"The interest required by law is not a subjective one; the court is not concerned with the intensity of the applicant's feelings of indignation at the alleged illegal action, but with objectively defined interest. Strong feelings will not suffice on their own although any interest may be accompanied by sentimental considerations. Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective."***

The Learned Judge further held that to sustain an action on account of public interest in a judicial review application, an applicant must fulfil either of two elements, namely; that the matter before the court has such a real public significance that it involves a public right and an injury to the public interest; or that he/she has sufficient interest of his/her own over and above the general interest of other members of the public bringing the action.

It was alleged by the Applicant that the above cited decision was made *per incuriam*. The Applicant however did not demonstrate to the Court the *per incuriam* nature of the decision. The Applicant only stated that the decision was "*per incuriam* the Constitution which imposes a duty on every citizen to promote rule of law, the Judicial Review Rules and the Court of Appeal decisions".

A decision made *"per incuriam"* refers to a decision reached by a court through lack of due regard to the law or the facts; or through mistake or inadvertence. A party cannot declare a decision of a court *per incuriam* simply because he/she disagrees with it. In the instant case, the claim by the Applicant that the Constitution imposes a duty on every citizen to promote the rule of law does not mean that any "meddlers" or meddlesome interlopers" are given a license to bring any kind of action into the court. The duty referred to by the Applicant is directed to be exercised in accordance with the law. The law here is the Judicature Act and the Judicial Review Rules, 2019. According to the Rules, as set out herein above, an applicant for judicial review must have either a direct or sufficient interest in a given matter. This is the provision the cited decision was construing.

The decisions in ***National Drug Authority & Another vs Nakacwa Florence, Court of Appeal Civil Appeal No. 281 & 286 of 2017*** and ***Kyagaba & 2 Others vs Namuganga Trading Co. Ltd, Court of Appeal Civil Appeal No. 88 of 2012*** were, in my view cited by the Applicant out of context. The excerpts quoted by the Applicant from the said decisions were based on particular findings based on the particular facts of those cases. They were not construing the term "direct or sufficient interest" and neither were they setting general principles of the law on *locus standi*. As such, those findings cannot in any way be construed as granting a license to any bystander to bring an action, let alone one for judicial review.

In my considered view, therefore, the construction by the Court of the term "direct or sufficient interest" in the case of ***Ben Muhumuza vs Attorney General & Others (supra)*** is based on sound legal principles and I agree with the said decision on the construction of the concept.

Turning to the facts before this Court, the Applicant brought this application as a lawyer by profession and a civically active Ugandan who has closely been

following the constitutional, human rights and rule of law trends in Uganda for quite some time. The matters subject of this application are of great public importance to any Ugandan and, perhaps, to the international community as well. The questions raised point to matters of good governance, the rule of law, human rights and constitutionalism. It is a different question as to whether the application has merits or not. But in my view, as far as *locus standi* is concerned, the application sufficiently discloses that the matter before the court has such a real public significance that it involves a public right and a possible injury to the public interest. This is one of the tests required to be satisfied in order for the Court to find direct or sufficient interest.

I am therefore satisfied that the Applicant is seized with sufficient interest in the matters raised in the application and, as such, the Applicant has *locus standi* to bring this application for judicial review.

Issue 2: Whether this application discloses any grounds for judicial review?

The law is that judicial review is concerned not with the decision but with the decision making process. Essentially, judicial review involves an assessment of the manner in which a decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. The duty of the court, therefore, is to examine the circumstances under which the impugned decision or act was done so as to determine whether it was fair, rational and/or arrived at in accordance with the rules of natural justice. See: ***Attorney General vs Yustus Tinasimiire & Others, Court of Appeal Civil Appeal No. 208 of 2013*** and ***Kuluo Joseph Andrew & Others vs The Attorney General & Others, HC MC No. 106 of 2010***.

The *Judicature (Judicial Review) (Amendment) Rules 2019,* set out the factors to be considered by the Court when handling applications for judicial review. *Rule 7A thereof* provides as follows:

> *(1) The court shall, in considering an application for judicial review, satisfy itself of the following –*
>
> *(a) That the application is amenable for judicial review;*
>
> *(b) That the aggrieved person has exhausted the existing remedies available within the public body or under the law; and*
>
> *(c) That the matter involves an administrative public body or official.*
>
> (2) *The court shall grant an order for judicial review where it is satisfied that the decision making body or officer did not follow due process in reaching a decision and that, as a result, there was unfair and unjust treatment.*

For a matter to be amenable for judicial review, it must involve a public body in a public law matter. Two requirements, therefore, need to be satisfied; first, the body under challenge must be a public body whose activities can be controlled by judicial review; and secondly, the subject matter of the challenge must involve claims based on public law principles and not the enforcement of private law rights. See: **Ssekaana Musa, *Public Law in East Africa*, p. 37 (2009) LawAfrica Publishing, Nairobi**.

In ***Arua Kubala Park Operators and Market Vendors' Cooperative Society Ltd vs Arua Municipal Council, HC MC No. 003 of 2016***, **Mubiru J.** expressed the opinion that in order to bring an action for judicial review, it is a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed by the public at large. The "public" nature of the decision challenged is a condition precedent to the exercise of the courts' supervisory function.

In the instant case, there is no dispute that the decisions or acts sought to be challenged were performed by public bodies or officials and they involved public law matters. There is no doubt, as well, that the subject matter of the challenge involves claims based on public law principles and the rights sought to be protected are not of a personal or individual nature but public ones enjoyed by the public at large. This application is therefore amenable for judicial review.

There is no allegation before me that the Applicant had any other existing remedies under the law that he did not exhaust. This condition is also satisfied. I will therefore proceed to examine on merit the application for judicial review before the Court. The duty of the Applicant is to satisfy the Court on a balance of probabilities that the decision making bodies or officers subject of his challenge did not follow due process in making the respective decisions or acts and that, as a result, there was unfair and unjust treatment of the Applicant and other members of the public.

Under the law, the court may provide specific remedies under judicial review where it finds that the named authority has acted unlawfully. A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of unreasonableness or irrationality); or without observing the rules of natural justice (unlawful on grounds of procedural impropriety or unfairness). See: ***ACP Bakaleke Siraji vs Attorney General, HC MC No. 212 of 2018***.

In the instant case, the allegation by the Applicant is that the impugned President's Directives and the Chief Justice's Circular were passed ultra vires the powers of the President and the Chief Justice respectively under the Constitution of the Republic of Uganda. Ultra vires is a plea that the impugned

decisions were made without the requisite legal powers. As such, the allegation is that the decisions were made illegally for being ultra vires the decision-makers' powers. The second and third grounds raised by the Applicant are that the said decisions or acts were made in a procedurally improper manner and/or were unreasonable. I intend to handle the arguments concurrently.

The Applicant's submissions

It was submitted by the Applicant that in making the impugned oral directives, the President committed errors of law and acted without jurisdiction or ultra vires or contrary to the provisions of the law or its principles, failed to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision. The Applicant relied on the case of ***Justus Barugahare vs Board of Directors of Uganda Printing and Publishing Corporation & Another, HC MC No. 065 of 2016***.

The Applicant submitted that under Article 79 (2) of the Constitution, the power to make provisions having the force of law is only exercisable under authority conferred by an Act of Parliament. The Applicant also submitted that the Executive authority of the President is provided for under Article 99 (1), (2) and (3) of the Constitution. Under Section 27 of the Public Health Act Cap 281, the Minister is given powers to make rules applicable to all infectious diseases or only to such infectious diseases as may be specified in the rules. The Applicant submitted that the import of Sections 29 and 36 (1) of Cap 281 is that Parliament authorized the Minister (including the President) to make pandemic rules by way of Regulations or Statutory Order, and not merely using speech orders. The Applicant argued that exercising such powers in a manner contrary to that provided is an illegality and acting ultra vires.

The Applicant referred to the provisions under Sections 14, 17 and 18 of the Interpretation Act Cap 3 for the procedure of making Regulations or Statutory

Orders. The Applicant submitted that as stated in paragraph 18 of his affidavit in support, the only lawful way the President could make the said directives was through a Statutory Instrument putting into account public participation and involvement. He further submitted that in absence of such an instrument, the President acted illegally and ultra vires his powers. The Applicant relied on the case of ***Nakasero Market Sitting Tenants (NAMASITE) Ltd vs Nakasero Market Sitting Vendors & Traders Ltd, Court of Appeal Civil Appeal No. 90 of 2016***.

Regarding the Circular issued by the Chief Justice, the Applicant submitted that Article 133 of the Constitution cited in the Circular as the one conferring power upon him does not in fact grant such powers to the Chief Justice and, as such, he acted ultra vires his powers. The Applicant submitted that under the said article of the Constitution, the powers of the Chief Justice are restricted to management and performance and not making laws closing down courts.

The Applicant further submitted that the power to make legally binding decisions in the administration of justice is vested in the Rules Committee pursuant to the Judicature Act, Section 41(1) thereof. He submitted that the Chief Justice, who is the Chairperson of the Rules Committee ought to have presented his proposals to the Committee and if agreed upon, the same would be published in the Gazettee, which was not done. The Applicant further stated that under Article 44(c) and (d) of the Constitution, the rights to a fair hearing and to a writ of habeas corpus are non-derogable under any circumstances. He argued that this made it impossible for any authority in Uganda to close down courts which is the only place where these rights can be enjoyed. He argued that this was another aspect of illegality of the impugned Circular.

Respondent's Submissions

In response, it was submitted by Counsel for the Respondent that on 18th June 2021, the President of Uganda issued a Statutory Instrument pursuant to the

provisions of Article 99 (5) of the Constitution of the Republic of Uganda and Sections 11, 27 and 29 of the Public Health Act; which Statutory Instrument came into force at 2200 hours on 18th June 2021. Counsel submitted that the issuance of the said Statutory Instrument by the President is consistent with the provisions of the laws of Uganda and the actions were therefore legal. Counsel referred to the evidence in paragraph 16 of the affidavit in reply deposed to by Dr. Henry G. Mwebesa.

Referring to Article 99 (1) and (2) of the Constitution, Counsel for the Respondent submitted that the Executive Authority of Uganda is vested in the President who is the Head of Government; and is clothed with power to execute and maintain the Constitution and all laws made under or continued in force by the Constitution. Counsel submitted that Article 99 (5) of the Constitution confers on the President of Uganda power to make a Statutory Instrument or any other instrument issued by the President or any person authorized by the President. Counsel also referred to Section 31 (a) & (b) of the Interpretation Act Cap 3 for the submission that where a power is conferred on a Minister by any Act, the exercise of the power may be signified under the hand of the President or any Minister. Counsel therefore submitted that the President acted within the provisions of the Constitution and the laws of Uganda.

Counsel for the Respondent further submitted that the Statutory Instrument issued by the President was authenticated by the Minister of Health on 1st July 2021 pursuant to the provisions of Article 99 (5) of the Constitution and the powers conferred on the Minister by Sections 11, 27 and 20 of the Public Health Act. Counsel further submitted that contrary to the contention by the Applicant, a Statutory Instrument may be made to operate retrospectively to any date which is not earlier than the commencement of the Act under which the instrument is made. Counsel submitted that the Statutory Instrument herein in issue, The Public Health (Control of COVID-19) Rules No. 38 of 2021 commenced and became law on 18th June 2021. Counsel invited the Court to

find that the measures taken by the President were within his powers and therefore lawful; that there was no procedural impropriety and the same were reasonable in the circumstances.

Regarding the Circular issued by the Chief Justice of Uganda, Counsel for the Respondent submitted that the Chief Justice is the administrative head of the Judiciary and is responsible for the administration and supervision of all courts in Uganda. As such, the Chief Justice is clothed with constitutional power to make orders and directions to the courts necessary for the proper and efficient administration of justice. Counsel referred to Article 133 (1) (a) and (b) of the Constitution.

Counsel further submitted that the Guidelines issued by the Chief justice were grounded on the provisions of the Constitution and the laws of Uganda. The Chief Justice acted on the premise of the Statutory Instrument issued by the President which is lawful and, as such, the actions of the Chief Justice were legal.

Counsel invited the Court to find that the Chief Justice's Circular was not ultra vires as alleged by the Applicant but was lawful. Counsel further submitted that there was also no procedural impropriety in the manner in which the Guidelines in the Chief Justice's Circular were issued. Counsel also invited the Court to find that the said Guidelines were rational or reasonable in the circumstances.

Applicant's Submissions in Rejoinder

In his submissions in rejoinder, the Applicant protested reliance on Statutory Instrument No. 38 of 2021 saying that it was issued on 1st July 2021, way after the filing of the instant case. The Applicant argued that what is in contention is the legality of the several oral statements/speech orders/directives/decrees by The President of the Republic of Uganda communicated on Friday 18th June

2021. The Applicant therefore stated that he would not delve into matters before and after 18th June 2021.Counsel relied on the holding in the case of ***Fangmin v. Belex Tours & Travel, SC Civil Appeals No. 06 of 2013 and 01 of 2014, page 30***, where it was held that ***"It is a cardinal principle of our judicial process that in adjudicating a suit, the trial court must base its decision and orders on the pleadings ..."***. The Applicant also relied on the case of ***Bitamisi v. Rwabuganda, SCCA No. 16 of 2014*** for the submission that S.I No. 38 of 2021 was a new matter which cannot be considered in the instant case.

The Applicant further submitted that the submission by the Respondent's Counsel that the President issued a Statutory Instrument on 18th June 2021 is weak and false since words of mouth cannot amount to an instrument. The Applicant stated that S.I No. 38 of 2021 was signed and published in the Gazette on 1st July 2021 and that is its date; its date cannot be 18th June 2021 because of the clear provisions of Section 16 of the Interpretation Act, which state that ''Every statutory instrument shall be published in the Gazette and shall be judicially noticed." There was no instrument on 18th June 2021 and the Court should find so.

The Applicant also relied on Article 28 (7) of the Constitution and Section 17 (3) of the Interpretation Act to argue that because lockdown measures are punished by criminal sanctions, the Statutory Instrument would be prohibited for making provisions making persons liable to a penalty in respect of any act committed before the date on which the Instrument was published in the Gazette. The Applicant thus reiterated his submissions that the President's Directives and the Circular of the Chief Justice were ultra vires their powers, were illegal and passed in a procedurally improper manner.

Court Determination

Let me begin with the contest by the Applicant against reliance on *The Public Health (Control of COVID-19) Rules, Statutory Instrument No. 38 of 2021* (hereinafter to be referred to as **"S.I No. 38 of 2021"**). It was argued by the Applicant that the above instrument cannot be part of these proceedings since the same was not part of the pleadings and constitutes a new matter that cannot be considered in the instant case.

In my view, while the authorities cited by the Applicant, namely ***Fangmin v. Belex Tours & Travel, SC Civil Appeals No. 06 of 2013 and 01 of 2014*** and ***Bitamisi Namuddu v. Rwabuganda Godfrey, SCCA No. 16 of 2014***, set out the correct position of the law, they are not applicable to the instant case. Let me put this in context.

In ***Fangmin v. Belex Tours & Travel (supra),*** **Odoki Ag. JSC** (as he then was) at page 30 quoting **Katureebe JSC** in ***Julius Rwabinumi vs Hope Bahimbisibwe SCCA No. 10 of 2009*** stated:

> ***"It is a cardinal principle of our judicial process that in adjudicating a suit, the trial court must base its decision and orders on the pleadings and the issues contested before it. Founding a court decision or relief on unpleaded matter or issue not properly placed before it for determination is an error of law."***

In the case of ***Bitamisi Namuddu v. Rwabuganda Godfrey (supra)***, Counsel for the Appellant therein was raising a new matter on appeal to the Supreme Court. **Tumwesigye JSC** (as he then was) held that such were new matters that were not part of the parties' pleadings and which could not, therefore be considered at that level.

As I have stated above, both decisions set out the correct position of the law but the same are not applicable to the instant case. In the present case, the Respondent in their two affidavits in reply introduced and relied on the Statutory Instrument that was said to have been issued by the President and authenticated by the Minister of Health in accordance with the provisions of the Constitution of the Republic of Uganda, the Public Health Act and the Interpretation Act. These matters are clearly averred in paragraphs 16, 17 and 18 of the affidavit in reply deposed by Dr. Henry G. Mwebesa. In paragraph 6 of the second affidavit in reply deposed by His Worship Ayebare Tumwebaze, he states that he knows that the measures in the Circular issued by the Chief Justice were made pursuant to Article 133 of the Constitution and Statutory Instrument No. 38 of 2021, The Public Health (Control of Covid-19) Rules enacted to avert or mitigate the spread of the Covid-19 disease.

The Applicant was served with the said affidavits in reply and he responded to them vide two separate affidavits in rejoinder. He clearly made a response to the averments regarding issuance of the impugned Statutory Instrument.

I need to point out that when the law refers to matters raised in the pleadings, it is not only in reference to the plaintiff or applicant's pleadings. It clearly refers to the parties' pleadings, which includes the defendant, respondent or even a third party as the case may be. In a proceeding commenced by way of an application, say by Notice of Motion, the affidavit in reply by the Respondent constitutes the pleading filed by the Respondent. An affidavit in rejoinder is also part of the pleadings in the matter. As such, I do not appreciate the argument by the Applicant to the effect that a matter raised in an affidavit in reply and responded to in an affidavit in rejoinder is not part of the pleadings. Clearly such a matter is part of the pleadings and the issues before the court for determination. This contestation by the Applicant is therefore devoid of any merit.

I now turn to the merits of the arguments of both parties on this issue. The provisions of Article 99 of the Constitution were articulated and relied on by both parties. For avoidance of doubt, I will set out the said provision here below:

> ***"99. Executive authority of Uganda.***
>
> *(1) The executive authority of Uganda is vested in the President and shall be exercised in accordance with this Constitution and the laws of Uganda.*
>
> *(2) The President shall execute and maintain this Constitution and all laws made under or continued in force by this Constitution.*
>
> *(3) It shall be the duty of the President to abide by, uphold and safeguard this Constitution and the laws of Uganda and to promote the welfare of the citizens and protect the territorial integrity of Uganda.*
>
> *(4) Subject to the provisions of this Constitution, the functions conferred on the President by clause (1) of this article may be exercised by the President either directly or through officers subordinate to the President.*
>
> *(5) A statutory instrument or other instrument issued by the President or any person authorised by the President may be authenticated by the signature of a Minister; and the validity of any instrument so authenticated shall not be called in question on the ground that it is not made, issued or executed by the President.*

That the President has the power to make a Statutory Instrument is without doubt, going by the above provision of the Constitution. Article 99 (5) thereof

goes ahead to provide that a Statutory Instrument issued by the President *"may be authenticated by the signature of a Minister and the validity of any instrument so authenticated shall not be called in question on the ground that it is not made, issued or executed by the President"*.

The Constitution, as expected, does not set out the procedure for making a Statutory Instrument. Other laws do. One such law is the Interpretation Act Cap 3. Section 14 of the Act defines a statutory instrument as follows:

> ***"14. Definition of statutory instrument.***
> *Where any Act confers on the President, a Minister or any other authority, a power to make or a power exercisable by making proclamations, rules, regulations, byelaws, statutory orders or statutory instruments, <u>any document</u> by which that power is exercised shall be known as a statutory instrument, and the provisions of this Act shall apply to it accordingly."* [Emphasis added]

Under Section 16 of the Act, *"Every statutory instrument shall be published in the Gazette and shall be judicially noticed"*.

The provisions under Section 17 (1), (2) and (3) of the Interpretation Act are relevant to matter before the Court. I will also set them out here below;

> ***"17. Commencement of statutory instruments.***
> *(1) Subject to this section—*
> *(a) the commencement of a statutory instrument shall be such date as is provided in or under the instrument or, where no date is so provided, the date of its publication as notified in the Gazette;*
> *(b) every statutory instrument shall be deemed to come into force immediately on the expiration of the day next preceding its commencement.*

(2) A statutory instrument may be made to operate retrospectively to any date which is not earlier than the commencement of the Act under which the instrument is made.

(3) Nothing in this section shall be deemed to empower the making of a statutory instrument so as to make a person liable to any penalty in respect of any act committed before the date on which the instrument was published in the Gazette …"

It the position of the law that where power is given by an Act of Parliament to make a statutory instrument, that power may be exercised by the President or by the Minister (**Section 31 of the Interpretation Act**). Under Sections 27 of the Public Health Act, Cap 281, the Minister has power to make rules applicable to all infectious diseases or only to such infectious diseases as may be specified in the rules.

In the instant case, it is averred on behalf of the Respondent that the President made a Statutory Instrument for control of the Covid-19 disease on 18th June 2021 to take effect at 2200 hours of the said day. It is submitted for the Respondent that the said Statutory Instrument was authenticated by the Minister in accordance with Article 99 (5) of the Constitution and published in the Gazette on 1st July 2021. Upon publication, the Statutory Instrument provided for its date of commencement as 18th June 2021. Section 17 (2) of the Interpretation Act permits this occurrence. Counsel for the Respondent therefore argued that the Statutory Instrument was issued within the powers of the President and the correct procedure was followed.

I entirely agree with Counsel for the Respondent over the said submission. The President has the power to issue a Statutory Instrument. The same is permitted to be authenticated by the Minister. The law does not demand that for the Statutory Instrument to be one, it has to be signed and published on the day it is made. Clearly the law allows for the Instrument to be made to

operate retrospectively. It is clear to me that it is not envisaged under the law that the day the President makes the Statutory Instrument should be the same day the Minister authenticates it and the same day it should be gazetted. Clearly, the mind of the framers of the Constitution were alive to a scenario such as the present one where measures may need to be implemented immediately and the legal process be made to follow in accordance with the law. In my view, that is why the Interpretation Act made provision for the same as well.

The argument by the Applicant that the President made the directives orally is not backed by any evidence and is speculative. The fact that the President communicated the directives through a televised address does not and cannot be taken to mean that he had no script upon which the address was premised. I do not believe that the Applicant intends to tell this Court that the President should have laid the Statutory Instrument before the general public on Television. What was important was the knowledge that the President had the power to make Orders or Directives that have the force of law and that the law permitted the legal process to be concluded as by law provided. I am convinced that this is what happened in the instant case.

I have therefore not found any evidence to lead to a conclusion that the President's Directives were ultra vires his powers and or were made in breach of established procedure. I have found no evidence of either illegality or procedural impropriety in the way the said Directives were made. As a matter of fact, the Respondent has established that the said Directives were based on a Statutory Instrument that was made by the President, authenticated by the Minister of Health, and published in the Uganda Gazette on 1st July 2021 with a clear provision for its commencement date being the 18th June 2021. This is the date the President issued the impugned directives. As shown herein above, this process is well provided for under the law.

It was further argued by the Applicant relying on Article 28 (7) of the Constitution and Section 17 (3) of the Interpretation Act that because lockdown measures are punished by criminal sanctions, the Statutory Instrument would be prohibited under the law for making provisions making persons liable to a penalty in respect of any act committed before the date on which the Instrument was published in the Gazette.

The above argument by the Applicant is based on the constitutional prohibition against retrospective application of penal provisions against persons. It should however be noted that although S.I 38 of 2021 creates some offences for particular breaches, it is essentially not a penal instrument. As such, although the offences created therein cannot be enforced before the date of publication of the Statutory Instrument, owing to the constitutional command, this fact cannot be a basis for questioning the validity of the Statutory Instrument. Further, that position does not affect the substance of the Statutory Instrument. The effect would be that if a person is charged under the Instrument over an act done before 1st July 2021, that plea would constitute a defence to the charge and the criminal charges would be nullified by the court.

In light of the foregoing therefore, the claim by the Applicant that the President's Directives were made ultra vires his powers and or in a procedurally improper manner is not made out. The same accordingly fails. Since the Applicant did not pursue the claim for unreasonableness of the said Directives and I have found no evidence or basis for the said claim, the same also fails.

Turning to the Chief Justice's Circular, given the above findings, the fact that the said Circular was premised on a Statutory Instrument issued by the President is no longer in dispute. The remaining question is whether the Chief Justice has the power to make guidelines or directives affecting the operation of the courts in the manner effected by the impugned Circular.

To begin with, the claim by the Applicant that the Chief Justice's Circular closed the courts is outrageous. I am in agreement with the submission by Counsel for the Respondent to the effect that the mere fact that the Applicant was able to file and pursue this application and a number of other matters in the courts should have been enough evidence, even to the Applicant himself, that the courts were not closed. It is not that the Applicant forced himself into a closed court. The same Circular made provision for an orderly handling of urgent matters and physical presence of crucial staff at an average of 10% of a given court's human resource. I do not find any basis for the claim by the Applicant that the Chief Justice's Circular had the effect of closing the courts.

I also do not agree that the impugned Circular was in contravention of Article 44 (c) and (d) of the Constitution which prohibits any derogation of the right to a fair hearing and the right to a writ of habeas corpus. In my view, regulation is not derogation. If that was the case, there would be no rules of procedure and practice. I have also found no merit in this argument by the Applicant.

Now, squarely to the question as to whether the Chief Justice has the power to make guidelines or directives affecting the operation of the courts in the manner effected by the impugned Circular, reference was made to the provisions under Article 133 (1) of the Constitution. It provides as follows –

> ***"133. Administrative functions of the Chief Justice.***
> *(1) The Chief Justice —*
> *(a) shall be the head of the judiciary and shall be responsible for the administration and supervision of all courts in Uganda; and*
> *(b) may issue orders and directions to the courts necessary for the proper and efficient administration of justice."*

It was argued by the Applicant that Chief Justice can only exercise the power to "issue orders and directions to the courts necessary for the proper and efficient administration of justice" with the involvement of the Rules Committee under Section 41 (1) of the Judicature Act. I do not agree with this argument. In my view, the argument is based on a misconception of the clear provision under Article 133 of the Constitution. The Article clearly places the position of the Chief Justice. He is the head of the Judiciary; he is responsible for the administration and supervision of all courts in Uganda; he may issue orders and directions to the courts necessary for the proper and efficient administration of justice. This power is not subjected to any other law. It is principally only guided by this Constitution. In relation to the Judiciary, the Chief Justice is the executive head. If the Constitution intended to subject this power to the Rules Committee, it should have clearly stated so.

The other aspect of misconception by the Applicant is that under Section 41 (1) of the Judicature Act, the mandate of the Rules Committee is *"by statutory instrument, [to] make rules for regulating the practice and procedure of the Supreme Court, the Court of Appeal and the High Court of Uganda and for all other courts in Uganda subordinate to the High Court*".

The Circular issued by the Chief Justice does not and was not intended to fit the above classification. It is clearly titled "Circular". It does not purport to be a statutory instrument. It is not an instrument making provision for rules of procedure and practice. It contains guidelines that are within the ambit of the Chief Justice to make as the head of the Judiciary, responsible for the administration and supervision of all courts in Uganda, and with power to issue orders and directions to the courts necessary for the proper and efficient administration of justice. This is exactly what the Chief Justice did through the said Circular and based upon a Statutory Instrument issued by the President.

In light of the foregoing therefore, the claim by the Applicant that the Chief Justice acted ultra vires his powers or that he acted in a procedurally improper manner bears no merit. There is also no evidence or basis for the claim that the guidelines contained in the said circular are unreasonable. The claim by the Applicant as against the Chief Justice's Circular fails as well.

In answer to the second issue therefore, my finding is that the application by the Applicant does not disclose any grounds for judicial review.

Issue 3: What remedies are available to the parties?

Flowing from the above findings, the application by the Applicant wholly fails. None of the reliefs sought by the Applicant is available. The application is accordingly dismissed. Since costs follow the event and there is no cause to the contrary, the Applicant shall pay the costs of the application to the Respondent.

It is so ordered.

Dated, signed and delivered by email this 23rd day of July 2021.

Boniface Wamala
JUDGE