

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

MISCELLANEOUS CAUSE NO. 193 OF 2021

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

VERSUS

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

**[AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL & OTHER
HUMAN RIGHTS UNDER ARTICLE 50 OF THE CONSTITUTION]**

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This is an application for Human Rights Enforcement 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), 20, 21, 22, 23, 26, 28(1), 29, 37, 38, 40, 42, 43(2)(c), 44, 45, 50, 99(1) – (3), 128(1) & (2), 139(1) of the Constitution; Sections 3(1) & (2), 4, 9 & 14 of the Human Rights (Enforcement) Act 2019; and Rules 6, 7(1), 8 & 11 of the Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement) Rules, 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) and 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”** are infringements on the Applicant’s and other Ugandans’ fundamental, inherent and other rights as enshrined in Chapter Four of the Constitution of Uganda. **[For ease of**

reference, I will hereinafter refer to the oral statements/ orders/ directives/ decrees as the “The President’s Directives” and the Circular as the “Chief Justice’s Circular”].

2. A permanent injunction restraining;
 - a) Any Uganda Government Official or Agency from implementing the President’s Directives; and
 - b) Any Judicial Officer, Court Staff or Judiciary Administrator from implementing and complying with the Chief Justice’s Circular.
3. An order nullifying all the actions, decisions and processes undertaken pursuant to the President’s Directives and the Chief Justice’s Circular.
4. General damages, exemplary and aggravated damages to be paid to the Applicant by the Respondent for inconveniences caused.
5. Costs of the application be paid by the Respondent.

[2] 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 infringe on, violate and threaten the Applicant’s and other Ugandans’ right to equality and freedom from discrimination, right to life, right to personal liberty, right to property, right to fair hearing, right to associate with others, right to move freely throughout Uganda, right to culture and similar rights, right to participate in the affairs of Government, economic rights, and other human and other rights. The Applicant further stated that the said Directives of the President subject Ugandans to unclear and uncertain martial law and are incapable of being complied with or enforced.

[3] 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; and the administrative powers of the Chief Justice do not extend to closing down courts. The Applicant stated that it is fair and equitable that the application be allowed.

[4] 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 and depones to the affidavit in support.

[5] In the affidavit, 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.

[6] Regarding the Chief Justice's Circular, the Applicant averred that the Chief Justice, citing the above President's Directives, 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.

[7] The Applicant further averred that the President's Directives and the Chief Justice's Circular infringe, violate and threaten the rights of the Applicant and of other Ugandans as enumerated in the application. It is fair, equitable and in the interest of protecting the rule of law in Uganda that the application be allowed.

[8] 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.

[9] 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.

[10] 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.

[11] The deponent also stated that the Government of Uganda put in place a National Covid Task Force consisting of 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*.

[12] 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.

[13] 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.

[14] 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.

[15] 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. The guidelines contained in the Circular are consistent with the provisions of the Constitution of Uganda and do not infringe on, violate or threaten the fundamental and other human rights of the Applicant and other Ugandans as alleged. He concluded that the application is frivolous, an abuse of court process, lacks merit and ought to be dismissed with costs.

[16] 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

[17] 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

[18] In their respective submissions, the Applicant and the Respondent's Counsel disagreed on 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 infringements on the Applicant's and other Ugandans' fundamental, inherent and other rights as enshrined in Chapter Four of the Constitution?
2. Whether the Chief Justice's Circular dated 21st June 2021 infringes on the Applicant's and other Ugandans' fundamental, inherent and other rights enshrined in Chapter Four of the Constitution?
3. What remedies are available to the parties?

[19] On their part, Counsel for the Respondent indicated that 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 application is properly before this Court?

2. Whether the measures put in place by the Government of Uganda to combat the spread of Covid-19 are an infringement on the Applicant's and other Ugandans' fundamental, inherent and other rights?
3. What remedies are available to the parties?

[20] The major disagreement is basically on the phrasing of the Applicant's 1st and 2nd issues on the one part and the 2nd issue as proposed by the Respondent's Counsel. The 1st and 2nd issues as proposed by the Applicant would better bring out the substance of the dispute but I do not see why he had to break them into two issues. The matters raised therein can sufficiently be investigated as one issue. I will therefore combine the said two issues into one. The issues for determination by the Court, therefore, are:

- 1. Whether the application is properly before this Court?**
- 2. Whether the President's Directives and the Chief Justice's Circular are an infringement on the fundamental, inherent and other rights of the Applicant and other Ugandans?**
- 3. What remedies are available to the parties?**

Resolution by the Court

Issue 1: Whether the application is properly before this Court?

[21] It was contended by Counsel for the Respondent that this application does not fall within the ambit of Section 4 of the Human Rights Enforcement Act, 2019 since the Applicant has not shown rights that were violated that fall in that category. Counsel contended that the competent court before which the Applicant ought to have filed the application would have been the Magistrates Court pursuant to Section 5 of the said Act. The other matters raised by Counsel for the Respondent while arguing this objection appear to touch on the merits of the application. I will therefore only restrict myself on the aspect of the objection as it relates to jurisdiction.

[22] In reply, the Applicant stated that the application is properly before the Court owing to the provision under Article 139(1) of the Constitution which grants this Court unlimited jurisdiction. The Applicant submitted that even going by Section 4(1) of the Human Rights Enforcement Act, he had indicated in his application that among the rights said to have been infringed on were the right to a fair hearing and other human and other rights; which puts this application within the ambit of Section 4(1) of the Act.

[23] I will set out the provisions of Sections 4(1) and 5(1) of the Human Rights Enforcement Act 2019.

“4. Enforcement of rights and freedoms by the High Court

(1) The High Court shall hear and determine any application relating to the enforcement or violation of-

a) non-derogable rights and freedoms guaranteed in article 44 of the Constitution;

(b) other rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms envisaged in article 45 of the Constitution;

c) rights and freedoms restricted under a law made for purposes of a state of emergency; and

d) rights and freedoms which are preserved by this Act to be determined by a magistrate court, where the remedy sought by the applicant is beyond the pecuniary jurisdiction of that court.”

[24] Section 5(1) of the same Act provides –

“5. Enforcement of rights and freedoms by magistrate courts

(1) A magistrate court shall hear and determine applications relating to the enforcement or violation of human rights and freedoms guaranteed in

Chapter Four of the Constitution in any of the circumstances not referred to in subsection (1) of section 4.”

[25] To my understanding, once any circumstance referred to in Section 4(1) of the Act exists in a particular matter, the application has to be lodged in the High Court; which has unlimited original jurisdiction to handle all matters. As such, where an application contains matters that are both within the ambit of the High Court and the Magistrates Court, the proper option is to file in the High Court. Clearly, in such a case, even if some matters are triable by the Magistrates Court, it cannot try the matters that are outside its competence. Conversely, the High Court is competent to try any matter within the jurisdiction of a lower court which is brought together with a matter that is within the exclusive jurisdiction of the High Court.

[26] In the instant case, the Applicant listed the right to a fair hearing among those allegedly infringed by the impugned directives and guidelines. He also mentioned other rights in line with Article 45 of the Constitution. That alone puts the application within the jurisdiction of the High Court. In such circumstances, there is no way the application would have been filed in a magistrate’s court. In view of the above finding therefore, the preliminary objection raised by Counsel for the Respondent is devoid of any merit. It is accordingly overruled. The first issue is answered in the affirmative.

Issue 2: Whether the President’s Directives and the Chief Justice’s Circular are an infringement on the fundamental, inherent and other rights of the Applicant and other Ugandans?

The Applicant’s submissions

[27] The Applicant submitted that the general principles relating to Court’s implementation and enforcement of fundamental and other human rights have

been well laid down by the Supreme Court in ***Charles Onyango Obbo & Anor V. Attorney General, Supreme Court Constitutional Appeal No. 2 of 2002.***

[28] The Applicant submitted that the central right in this lockdown upon which all others are hinged is the right to personal liberty guaranteed under article 23 and 29(2) of the Constitution. The Applicant submitted that a look at paragraphs 6-17 of his affidavit in support shows a common thread of limitations on personal liberty by way of banning use of vehicles, use of motorcycles, imposition of curfew, among others. He submitted that these limitations do not pass the test under Article 43(2) of the Constitution. He also submitted that the limitations are not authorized by law.

[29] The Applicant further 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.

[30] The Applicant referred the Court 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 submitted that in absence of an Instrument as required not only by the Constitution but also by the Public Health Act and

the Interpretation Act, there is no way the liberty of the Applicant and other Ugandans could be restricted and or limited.

[31] The Applicant further submitted that in absence of an Instrument issued by the Respondent, they have failed to prove that the said limitations on personal liberty, and consequently on the other rights, pass the test of being demonstrably justifiable in a free and democratic society. 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.***

[32] Regarding the Circular issued by the Chief Justice, the Applicant submitted that the Chief Justice has no Constitutional or Statutory mandate to limit the Applicant's and other Ugandans' right to access Courts through Circulars citing a Pandemic and relying on Presidential Directives which are not contained in any Statutory Instrument. He submitted that Article 44 of the Constitution contains two non-derogable rights which are only realizable in Courts; that is, the right to a fair hearing and the right to a writ of habeas corpus. He further submitted that by the said Circular, the Chief Justice put the enjoyment of the right to fair hearing and writ of habeas corpus upon the discretion of judicial officers sitting at home yet these rights are non-derogable. The Applicant also submitted that Article 133 of the Constitution does not grant such powers to the Chief Justice as his powers are restricted to management and performance and not making laws.

[33] The Applicant further submitted that Section 41(1) of the Judicature Act places the function of making rules in the Rules Committee and not the Chief Justice. Even then, the mode is by statutory instrument not Circular like in the instant case. Worse still, the Chief Justice relied on Presidential directives which had no force of law. The Applicant therefore concluded that it is clear that the fundamental rights to fair hearing and right to a writ of habeas corpus

were infringed and/or threatened without any legal basis. The Applicant prayed that the application be allowed.

Respondent's Submissions

[34] In response, it was submitted by Counsel for the Respondent that the measures put in place by the Government of Uganda to combat the spread of Covid-19 are well within the law and there was no infringement on any rights as alleged by the Applicant. Counsel submitted that according to Article 20(2) of the Constitution, it is the duty of the State to respect, uphold and promote the rights and freedoms of the individual and groups enshrined in Chapter Four of the Constitution. Under *Objective 23 of the National Objectives and Directive Principles of State Policy*, the State is enjoined to institute an effective machinery for dealing with any hazard or disaster arising out of natural calamities or any situation resulting in general displacement of people or serious disruption of their normal life. Counsel submitted that with this duty in mind, the Government of Uganda established the National Covid Task Force to study and analyse the potential risks of the Covid-19 pandemic in the entire country.

[35] Counsel for the Respondent submitted that when announcing measures to combat the resurgence and spread of the new Covid-19 variants, the President acted in exercise of his Executive and Constitutional mandate under Article 99 of the Constitution. Counsel submitted that the President of Uganda issued a Statutory Instrument on 18th June 2021 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.

[36] Counsel further submitted that under Article 99 (5) of the Constitution, a Statutory Instrument or any other instrument issued by the President or any person authorized by the President may be authenticated by the signature of a Minister. 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.

[37] Counsel also 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.

[38] 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.

[39] 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. The guidelines also arose from so many resolutions of the Judiciary Administration. Counsel invited the Court to find that the Chief Justice's Circular was lawful.

[40] The Respondent's Counsel also submitted that prior to the issuance of the Statutory Instrument by the President, the National Covid-19 Task Force did a number of consultations and meetings with various experts and weighed the potential risks of the pandemic in the entire country before advising the President to issue the measures. Counsel relied on the case of ***Simon Dolan & Others v. Secretary of State for Health & Another [2020] EWCA Civ 1605*** where the court stated that "*on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers*".

[41] Counsel submitted that in absence of evidence to the contrary, the Court cannot question a decision taken by the Government upon guidance of medical experts. Counsel further relied on the Kenyan case of ***Law Society of Kenya v. Hillary Mutyambai Inspector General National Police Service & Others [2020] eKLR*** to argue that the Government cannot be faulted for enforcing precautionary and restrictive measures in order to slow the spread of the Covid-19 disease.

[42] Counsel also relied on the South African case of ***Muhammed Bin Hassim Mohamed & 2 Others Versus The President of the Republic of South Africa & 2 Others, Case No. 21402/20*** for the submission that public interest in this matter lies in saving the life of Ugandans and protecting their well-being against Covid-19. Counsel submitted that there was no evidence provided by the Applicant that his and other Ugandans' rights have been violated and his allegations are therefore without proof. He submitted that any

limitation to the rights of the Applicant and other Ugandans was justifiable and within permissible limits as provided for under Article 43 of the Constitution. Counsel relied on the decision in ***Lukwago Erias vs Electoral Commission, HC MC No. 393 of 2018*** to submit that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing of competing values, and ultimately an assessment based on proportionality.

[43] Counsel for the Respondent invited the Court to find that the evidence presented before this Court confirms the justification of the restrictions imposed in order to avert a potential danger and that the said restrictions were made in public interest or to protect the public from infecting themselves or becoming a danger to others.

Applicant's Submissions in Rejoinder

[44] 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.

[45] 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 contended that under Sections 27, 29 and 36 of the Public Health Act, Parliament authorized the Minister or the President to make rules by way of Regulations or Statutory Order and not by proclamation as stated by the Respondent's Counsel.

[46] 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 failure by the Respondent to prove existence of a Statutory Instrument at 2200 hours of 18th June 2021 amounts to illegal limitation of the personal liberty of the Applicant and other Ugandans in a manner that is not demonstrably justifiable in a free and democratic society.

Court Determination

[47] This Cause is similar in many respects with **HC M.C No. 194 of 2021: Male H. Mabirizi Kiwanuka vs Attorney General**. The only major difference is that while M.C 194 of 2021 was an application for judicial review, the current application is for Human Rights Enforcement. The subject matter is however the same and most contentions have featured in both Causes.

[48] Like I did in M.C 194 of 2021, I will 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.

[49] 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; as I will show in the following paragraphs.

[50] 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.”

[51] 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.

[52] 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.

[53] I should point out that when the law refers to matters raised in the pleadings, this 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.

[54] I now turn to the merits of the arguments of both parties on this issue. I will begin with the matter as to whether any Statutory Instrument was made by the President in accordance with the provisions of the Constitution, the Public Health Act and the Interpretation Act. The provisions under Article 99 of the

Constitution were articulated and relied on by both parties. The said provisions state as follows:

“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.

[55] It is clear from the above provisions that the President has the power to make a Statutory Instrument. 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”.

[56] 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, any document 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]

[57] 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 also 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 ...”

[58] It is 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 Section 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.

[59] 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, the correct procedure was followed and the Statutory Instrument is therefore lawful.

[60] 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 the Statutory Instrument so issued 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.

[61] As I stated in ***M.C 194 of 2021 (supra)***, 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.

[62] I have therefore not found any evidence to lead to a conclusion that the President's Directives were made without legal authorization or in breach of established procedure. To the contrary, 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.

[63] It was further argued by the Applicant that because lockdown measures are punished by criminal sanctions, the Statutory Instrument would be prohibited under the law for having 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 relied on Article 28 (7) of the Constitution and Section 17 (3) of the Interpretation Act for this argument.

[64] 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 above highlighted 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.

[65] In light of the foregoing therefore, the claim by the Applicant that the President's Directives were made without legal authorization and or without following established procedure is not made out. The same accordingly fails. I will later on return to the question as to whether the provisions of the Statutory Instrument constitute an infringement on the human rights of the Applicant and other Ugandans. Let me first deal with the contestation on the legality of the Chief Justice's Circular.

[66] 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. The other

question is whether the guidelines contained in the impugned Circular constitute an infringement on the human rights of the Applicant and other Ugandans.

[67] To begin with, the claim by the Applicant that the Chief Justice's Circular closed the courts is outrageous. As submitted by Counsel for the Respondent, 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. As I stated earlier, it is not like 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.

[68] On 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.”

[69] It was argued by the Applicant that the 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 provisions 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.

[70] 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.

[71] In light of the foregoing therefore, the claim by the Applicant that the Chief Justice had no legal authorization to issue the impugned Circular or that the same was issued in breach of established procedure bears no merit.

[72] I now turn to the question as to whether the provisions of the Statutory Instrument passed by the President and the guidelines contained in the Chief

Justice's Circular constitute an infringement on the human rights of the Applicant and other Ugandans.

[73] The Applicant restricted his submissions to the legality of the impugned Directives and Guidelines and abstained from delving into the merits of the impugned Statutory Instrument since he contended that it was non-existent. Suffice it to note however that the Applicant had in his pleadings averred that the impugned directives and guidelines constituted an infringement on his and other Ugandans' rights and that they introduced limitations that were beyond those that are permissible under Article 43 of the Constitution. Further, in his submissions, the Applicant referred the Court to a number of legal provisions and Authorities from decided cases which set out principles that guide the courts when determining permissible limitations to the enjoyment of fundamental and other human rights. Particularly, the Applicant referred the Court to the decision in ***Charles Onyango Obbo & Anor V. Attorney General, Supreme Court Constitutional Appeal No. 2 of 2002*** which sets out the general principles relating to Court's implementation and enforcement of fundamental and other human rights.

[74] On the other hand it was shown by Counsel for the Respondent that the directives and guidelines having been issued pursuant to a Statutory Instrument lawfully passed by the President do not infringe on the fundamental and other rights of the Applicant and other Ugandans and that any restrictions contained in the said Instrument and the Circular are permissible and demonstrably justifiable in a free and democratic society.

[75] I am in agreement with the submission of Counsel for the Respondent that the Government of Uganda has a duty under the Constitution to respect, uphold and promote individual and group rights and freedoms as provided for under Article 20 (2) of the Constitution. It is a well-known principle of human rights law that human rights are indivisible and inter-dependent. It is therefore

possible that as the Government is making attempts to protect the right to life, safety and security of the people, the same people's other rights, say to free movement, may be curtailed. This therefore calls for a balancing act and the application of the principle of proportionality. In a situation that calls for such a balancing act, the Court cannot look at a restriction of one particular right and close a blind eye on the purpose of the restriction. Essentially therefore, the nature, extent, purpose and justifiability of any such restriction is a critical element in a case such as this.

[76] Under *Objective 23 of the National Objectives and Directive Principles of State Policy*, the State has a duty to institute an effective machinery for dealing with any hazard or disaster arising out of natural calamities or any situation resulting in serious disruption of the people's normal life. It was shown by the Respondent that following international recognition of the Covid-19 disease as a pandemic, the Government of Uganda established a National Covid-19 Task Force which consisted of experts on the subject and which Task Force advised the Government on the steps to take to combat the spread of the disease.

[77] Article 43 of the Constitution permits a limitation on the enjoyment of rights and freedoms enshrined in Chapter Four of the Constitution provided any such limitation is not beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided by the Constitution. In ***Charles Onyango Obbo & Anor V. Attorney General (supra)***, the Supreme Court expressed the view that the onus of proving that a limit on a right or freedom guaranteed by the Constitution is reasonable and demonstrably justifiable in a free and democratic society rests upon the party seeking to uphold the limitation. The question is whether the Respondent has executed that duty.

[78] From the evidence on record provided in the two affidavits in reply and the arguments raised by Counsel for the Respondent, I am convinced that the

Country was faced with a looming crisis that had to be countered. Incidentally, as shown in a number of authorities relied on by the Respondent's Counsel, and as can be judicially noticed by the Court, Uganda was not in this alone. This was a crisis of international proportion that required the same range of measures all over the World as recommended by the World Health Organization (WHO). For the first time in a number of years, the wealthiest and the poorest countries in the World were caught up in the same web and needed the same range of strategies to survive a crisis.

[79] Courts from various jurisdictions of the World had occasion to grapple with similar human rights issues and the resultant decisions are quite telling. In ***Simon Dolan & Others v. Secretary of State for Health & Another [2020] EWCA Civ 1605***, particular rules regulating the Covid-19 lockdown in England and Wales were challenged. The Court of Appeal had this to say:

“We also bear in mind that this is an area in which the Secretary of State had to make difficult judgments about medical and scientific issues and did so after taking advice from relevant experts.”

[80] The Court of Appeal in the above cited decision quoted the opinion of **Lord Bingham of Cornhill CJ** in ***R v Secretary of State for Health, ex parte Eastside Cheese Co [1999] 3 CMLR 123, para.47*** thus;

“On public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers”.

[81] In ***Law Society of Kenya v. Hillary Mutyambai Inspector General National Police Service & Others [2020] eKLR***, curfew orders were challenged in the High Court of Kenya at Nairobi. **W. Korir J.** held that the circumstances in which the curfew orders were issued were in line with the 'precautionary principle'. He cited with approval the following passage in the

case of ***Republic v Ministry of Health & 3 Others, Ex-parte Kennedy Amdany Langat & 27 Others [2018] eKLR***;

“... applying the precautionary principle, which principle is designed to prevent potential risks, I find and hold that it is the duty of the state to take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated or manifested. This approach takes into account the actual risk to public health, especially where there is uncertainty as to the existence or extent of risks to the health of consumers. The state may take protective measures without having to wait until the reality and seriousness of those risks are apparent.”

[82] I should perhaps cap this up with the words of **R.E Aburili J.** in ***Republic v Ministry of Health & 3 Others, Ex-parte Kennedy Amdany Langat & 27 Others (supra)*** when he stated that ***“No Country should be forgiven for presiding over a dying population”***.

[83] The Applicant neither materially controverted the facts relevant to these contentions nor countered the arguments of Counsel for the Respondent. The Respondent has, therefore, satisfied the Court that the restrictions contained in the Statutory Instrument No. 38 of 2021 and in the Chief Justice’s Circular were necessary, reasonable, and proportionate to the crisis that was sought to be averted. They were also reasonable and necessary on basis of the precautionary principle. They therefore, in my view, constitute a limitation that is acceptable and demonstrably justifiable in a free and democratic society. The restrictions therefore do not amount to an infringement on the fundamental, inherent and other rights of the Applicant and other Ugandans. The second issue is accordingly answered in the negative.

Issue 3: What remedies are available to the parties?

[84] In light of 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 is ordered to pay the costs of the application to the Respondent.

It is so ordered.

Dated, signed and delivered by email this 29th day of July 2021.

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

Boniface Wamala
JUDGE