THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 297 OF 2019

1. KIRYA MARTINS

2. ABONEKA MICHAEL :: PLAINTIFFS

VERSUS

ATTORNEY GENERAL :: DEFENDANT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING ON PRELIMINARY OBJECTIONS

Introduction

[1] The Plaintiffs brought a suit by plaint against the Defendant under Articles 4 & 50 of the Constitution of Uganda, Order 2 Rule 9 and Order 4 of the Civil Procedure Rules. The Plaintiffs' claim against the Defendant is based on alleged failure to translate the Constitution of the Republic of Uganda in all indigenous local languages of Uganda, to promote awareness of the Constitution, to ensure that all education training and military institutions review their curricula to incorporate and teach the Constitution to persons as mandated under Article 4 of the Constitution. The gist of the Plaintiffs' contention is that the Defendant has deliberately failed to execute its mandate under Article 4 of the Constitution. The Defendant filed a written statement of defence denying the allegations contained in the plaint.

[2] When the matter came up before the Court for preliminary steps, Counsel for the Defendant indicated that they intended to raise some preliminary objections to the suit. Counsel for the Plaintiff also indicated that they intended to raise counter objections to the Written Statement of Defence filed by the Defendant. It was agreed that the objections be argued by way of written

submissions. The Plaintiff was represented by Mr. Gawaya Tegulle while the Defendant was represented by Mr. Moses Mugisha (State Attorney).

The Preliminary Objections

[3] Counsel for the Defendant raised two preliminary points of objections, namely that;

a) The Plaint does not disclose a cause of action against the Defendant.
b) The Plaintiffs' suit is commenced under a wrong procedure.

The Defendant raised one counter preliminary objection to the effect that the Written Statement of Defence (WSD) filed by the Defendant is frivolous, vexatious and full of mere denials; and as such, it should be stuck out by the Court.

Consideration by the Court

[4] I will begin by considering the second point of objection as raised by the Defence Counsel since the propriety (or lack of it) of the procedure adopted in bringing this suit will determine the substance of the other issues.

Preliminary Point 2: The Plaintiffs' suit is commenced under a wrong procedure.

Submissions by Counsel for the Defendant

[5] Counsel for the Defendant relied on *Rule 7(1) of the Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019* which provided that "Every application for an action under these rules, shall unless specifically provided for to the contrary, be made by motion on notice supported by an affidavit in the form prescribed in the schedule to the Rules". Counsel submitted that at the time this suit was commenced, the applicable law was the *Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, 2008*. Counsel relied on the case of ***Mwesigwa Hannigton & 3 Others V Attorney General, Court of Appeal Civil Appeal No. 02 Of 2008***

wherein the Court of Appeal, in deciding on whether the trial Judge erred to have held that the fundamental human rights and freedoms guaranteed under the Constitution can only be enforced by an action on a plaint and not by notice of motion, having relied on the case of ***Charles Twagira V Attorney General CACA 61 Of 2002***, Justice A.S Nshimye, JA (as he then was) held that *"It is my humble view that the new rules have overtaken the Twagira case and made it clear that the procedure is by notice of motion".* Counsel therefore concluded that the present suit was commenced under a wrong procedure and prayed that the plaint be rejected or dismissed with costs.

Submissions by Counsel for the Plaintiffs

[6] In reply, it was submitted by the Counsel for the Plaintiffs that their case was not about enforcement or violation of human rights but it was about failure or refusal of the Defendant to perform an obligation under a social contract which amounts to a breach. Counsel relied on the case of ***Hajji Medi V Wandera Stephen Civil Appeal No. 102 Of 2011*** wherein the court held that "It is accordingly clear that the only mode of instituting suits is by plaint. Other modes in specific circumstances provided by law are by originating summons or by petition. The instant case is not one of those exceptions". Counsel further relied on *Order 4 Rule 1 CPR* and the case of ***Muwanga Daniel V Sun Huawen Misc. App. No. 114 Of 2018*** where the court held that Order 4 of the CPR is meant to make provision for institution of ordinary suits by plaint. Counsel prayed that the court finds that the correct procedure was followed and that the objection be dismissed.

Submissions in Rejoinder by Defence Counsel

[7] In rejoinder, Counsel for the Defendant submitted that the Constitution is silent as to the procedure to be followed or how to access courts to seek redress outside the constitutional interpretation and enforcement of human rights. Counsel questioned whether, in the laws of Uganda, there is such an action

hinged on the breach of social contract and the procedure of enforcing the same.

Determination by the Court

[8] In terms of Section 19 of the Civil Procedure Rules, every suit shall be instituted in such manner as may be prescribed by the Rules. "Rules" under the Act means "rules and forms made by the rules committee to regulate the procedure of courts". This includes the Civil Procedure Rules (CPR) S.I No. 71 – 1 and other Rules passed by the Rules Committee to regulate the procedure of the courts. On the matter before me, the question regarding the proper procedure that ought to have been adopted by the Plaintiffs is to depend on the nature of the suit that was commenced by the Plaintiffs. If it is an ordinary suit, the procedure would be by plaint in accordance with Order 4 of the CPR. If it is an action for human rights enforcement, the procedure would be by Notice of Motion in accordance with the *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019*.

[9] On the facts before the Court, it was claimed by Counsel for the Defendant that the suit brought by the Plaintiffs was brought in public interest and as an action for enforcement of human rights to which the provisions of the *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019* were applicable. Counsel submitted that the action ought to have been commenced as an application by Notice of Motion in accordance with the said Rules. In response, Counsel for the Plaintiff submitted that the action was not brought in public interest and was not a human rights enforcement action but rather one brought by the Plaintiffs in their individual capacity as persons affected by the Defendant's breach of its duty under the Constitution. Counsel for the Plaintiff submitted that the *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019* were not applicable to the present suit and the same was rightly brought by plaint under Order 4 of the CPR.

[10] I have considered the relevant provisions of the *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019*. First, it is not true as submitted by Counsel for the Defendant that at the time this action was commenced, the applicable law was the old Rules – The *Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, 2008*. This is because the 2019 Rules were made on 25th January 2019 and published in the Gazette on 31st May 2019. Under the law, their date of commencement is 31st May 2019. This suit was filed on 9th July 2019 by which time the 2019 Rules were in force. As such, the applicable Rules would be the 2019 Rules.

[11] Under *Rule 3 of the Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019*, the objectives of the Rules are set out and the first objective is to *"promote the right of any person to institute court action where he or she believes that a fundamental right or other human right or freedom under Chapter Four of the Constitution has been violated, or that there is a threat that it is likely to be violated"*. The second objective, which is also relevant to this discourse, is to *"encourage the development of constitutional and public interest litigation"*.

[12] Under Rule 4 of the Rules (supra), *"fundamental and other rights and freedoms"* referred to by the Rules mean *"any of the rights provided for in Chapter Four and Article 45 of the Constitution." Public Interest* includes *"the interest of society or any segment of society in promoting human rights, democracy, rule of law and good governance"*. *Public interest litigation* means *"actions provided for in rule 5(2)"* thereof. Rule 5 of the Rules (supra) makes provision of actions that may be instituted under the Rules which are;

> *"a) where there has been an infringement or threatened infringement of a fundamental right or other human right or freedom;*
>
> *b) an action under article 137 of the Constitution;*

c) an application for a writ of habeas corpus; or

d) an action in public interest."

[13] The instant suit is not an action alleging infringement of a fundamental right or other human right or freedom under Chapter Four of the Constitution which would put it within the purview of the Rules. According to the plaint, the action is based on breach of the state obligation set out under Article 4 of the Constitution. Article 4 is under Chapter 1 of the Constitution. It is not therefore subject to the provisions of the *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019.* Obviously the action is not brought under article 137 of the Constitution and neither is it for a writ of habeas corpus. What remains is whether it is an action brought in public interest.

[14] Under Rule 5(2) of the Rules (supra), a public interest action may be instituted in the following circumstances;

a) where there has been an infringement or threatened infringement of a fundamental or other human right or freedom guaranteed under Chapter Four of the Constitution;

b) in a matter of public importance that promotes human rights, democracy, rule of law and good governance; or

c) where the public interest action constitutes any question as to the interpretation of the Constitution as provided for under article 137 of the Constitution.

[15] I have already indicated herein above that paragraph (a) above does not apply to the present suit. Paragraph (b) could be applicable but the Plaintiffs have clearly indicated that such is not the import of their suit. Their suit is brought in their capacity as individuals affected by breach by the state of its constitutional duty. Paragraph (c) is clearly not applicable. As such this matter was not brought in public interest or as a public interest litigation.

[16] In the circumstances, therefore, this matter was brought neither for alleged infringement of any fundamental or other human right or freedom under Chapter Four of the Constitution nor in public interest. Clearly therefore, the *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019* do not apply to the suit before the Court. Indeed, even the Human Rights (Enforcement) Act 2019 is not applicable to the suit since according to its long title and Section 1 thereof, the Act applies to the enforcement of human rights and freedoms guaranteed by Chapter Four of the Constitution.

[17] In their argument, Counsel for the Defendant appears to give the impression that the only way of accessing the courts in enforcement of rights and duties provided for under the Constitution is through the *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019* and through constitutional interpretation. From my finding above, this is far from the truth. The Rules are only applicable if the right being enforced is a fundamental or other human right or freedom provided for under Chapter Four of the Constitution. This does not mean that other rights and duties provided for in the Constitution (outside Chapter Four) are not enforceable in courts. It only means that where a right or duty provided for in the Constitution, outside Chapter Four, is a basis of a person's action, and the Constitution is silent as to its enforcement, the ordinary rules of pleading applies. For instance, the Constitution makes specific provision for enforcement of rights under Chapter Five – Representation of the People. Among others, certain actions shall be brought by petition. In other instances, the Constitution is silent on how rights and duties provided for are enforceable. Such is the situation presented by the present facts. Under article 4 of the Constitution, the State has a duty to promote public awareness of the Constitution. The fact that the Constitution is silent on enforcement of this duty does not mean that its breach is not actionable. Where a person has a proper cause of action, he/she is competent to commence an action by

bringing an ordinary suit within the provisions of Order 4 of the CPR. In essence therefore, the determining factor is existence of a cause of action and not the procedure adopted.

[18] In light of the foregoing therefore, the present suit was properly brought as an ordinary suit under Order 4 of the CPR. The only question is whether the Plaintiffs have a proper cause of action and this is the subject of the first preliminary objection which I opted to discuss as the second. As such, the preliminary point of objection regarding the procedure adopted by the Plaintiffs has been found devoid of merit and is accordingly dismissed.

Preliminary Point 1: The Plaint does not disclose a cause of action against the Defendant.

Submissions by Counsel for the Defendant

[19] Counsel for the Defendant relied on *Order 7 Rule 11(a) of the Civil Procedure Rules (CPR)* which provides that *"a plaint shall be rejected in cases where it does not disclose a cause of action".* Counsel further relied on the case of ***Ssemakula V Serunjogi, HC Civil Suit No. 187 of 2012*** which cited the case of ***Tororo Cement Co. Ltd V Frokina International Ltd, Civil Appeal No. 21 of 2001***; which laid down the three essential elements to support a cause of action, namely that; the Plaintiff enjoyed a right; the right has been violated and that the Defendant is liable. Counsel submitted that despite the fact that the Plaintiffs do not disclose the capacity within which they are suing, the plaint does not disclose that the Plaintiffs had a right, that the right was violated which resulted into damages and that the Defendant is liable. Counsel concluded that the court should reject the plaint for failure to disclose a cause of action against the Defendant.

Submissions by Counsel for the Plaintiff

[20] In reply, counsel for the Plaintiffs submitted that this matter was of great national importance as it touches the foundations of constitutionalism and rights of the citizens. Counsel submitted that the government had not discharged its duty as envisaged under Article 4 of the Constitution. Counsel contended that the preliminary objections raised by the Defendant does not go to the root of the matter and only raise mere technicalities.

[21] Counsel relied on the case of ***Major General David Tinyenfuza V Attorney General of Uganda, Constitutional Appeal No.1 of 1997*** which was cited with approval in the case of ***General Parts (U) Ltd V Middle North Agencies Ltd & District Land Board of Kampala and Others, H.C.C.S No. 610 of 2013*** for the definition of what amounts to a cause of action. Counsel submitted that the Defendant was obliged to have the Constitution translated and taught to all citizens in all educational, training and military institutions. Counsel further submitted that the Plaintiffs are citizens of Uganda who have never been taught the Constitution or handed translated versions in their local languages; which gives them a right to pursue this suit under the Constitution if each feels aggrieved. Counsel contended that it is these failures that have aggrieved the Plaintiffs in their personal capacity.

Determination by the Court

[22] A cause of action is disclosed when it is shown that the Plaintiff had a right, that the right was violated resulting into injury or damage, and the Defendant is liable. See: ***Auto Garage V Motokov (1971) EA 314; Tororo Cement Co. Ltd vs Frokina International Ltd; Civil Appeal No. 21 of 2001***. It is also the established position of the law that in order to determine whether a plaint or any pleading discloses a cause of action, court has to look at the plaint or the particular pleading only together with its annextures and nowhere else. **See: *Kapeeka Coffee Works Ltd Vs. NPART, Civil Appeal No. 03 of***

2000 (unreported); Ainomugisho Winfred & Others Vs. Fatuma Nalumansi & Others, H.C (Kampala-Land Division) M. A No. 2084 of 2016.

[23] In the instant case, the Plaintiffs in the plaint stated that as indigenous citizens of Uganda, they were never taught the Constitution nor handed translated versions in their local languages. The pleading by the Plaintiffs however has a mixture of alleged infringement of their personal rights and of the rights of other Ugandans. Since this is not an action brought in public interest, according to the Plaintiffs' own confession, and is not a representative suit within the terms of Order 1 Rule 8 of the CPR, the Plaintiffs have no capacity to bring a suit in the interest of other persons not named and without their authority. As such, in as far as the Plaintiffs seek to rely on breach of a constitutional duty by the State towards other unnamed persons, the Plaintiffs cannot establish a cause of action on that account. However, in as far as the Plaintiffs seek to rely on breach of their personal rights, by the State, leading to personal injury or damage, and making the Defendant liable, the Plaintiffs are capable of establishing a cause of action.

[24] Under the law, where a plaint contains facts capable of establishing a cause of action and others irrelevant to the cause of action, the existence of the latter facts should not defeat the action. Rather the mischief can be cured by severing from the plaint the irrelevant facts and giving the plaintiff an opportunity to have the relevant facts investigated and adjudicated upon. Such a mischief can therefore be cured by amendment and ought not to be allowed to defeat an otherwise competent action.

[25] In the instant case, despite the mixture of pleadings based on personal claims with those improperly based on public interest, I find that the Plaintiffs have established that they enjoyed a right to be taught the Constitution at all levels of education; and to access translated versions of the Constitution in

their local languages. The plaint establishes an allegation that this right has been violated considering the fact that the Constitution was not included in the school curriculum (before studying law at the University) and neither were any translated versions of the Constitution made and disseminated. Indeed, in the WSD filed by the Defendant, it is averred that translation in a number of local languages have been done and copies disseminated. This, prima facie, establishes that there is a genuine claim by the Plaintiffs that ought to be investigated by the Court and adjudicated upon evidence. I also believe that the Plaintiffs are capable of establishing injury or damage suffered by them as a result of the said violation of their rights. Given that the alleged violation or breach was committed by the State; the Defendant would evidently be liable for the violation or breach.

[26] In the circumstances, therefore, I am able to reach a finding that the plaint in the present suit discloses a cause of action. The first point of objection, which I opted to consider as the second one, bears no merit and is dismissed.

The Counter Preliminary Objection by the Plaintiff

Submissions

[27] Counsel for the Plaintiffs also raised a preliminary objection to the effect that the Written Statement of Defence (WSD) filed by the Defendant was not sustainable under the law because it was frivolous, vexatious and full of mere denials. Counsel submitted that the consequence was that such a WSD should be struck off in accordance with *Order 6 Rules 8, 10 and 30 of the Civil Procedure Rules (CPR).* Counsel also relied on the decision in the case of ***Eco Bank Uganda Limited V Kalsons Agrovet Concern Ltd, Patrick Kaliisa and Henry Kaliisa H.C.C.S No. 573 Of 2016***. Counsel prayed that since some material facts had not been expressly denied by the Defendant, judgement ought to be entered on admission and or the defence be struck off and judgement entered for the Plaintiffs.

[28] In reply, Counsel for the Defendant submitted that the plaint was brought under **Article 50 of the Constitution** and that the written statement of defence under paragraph 3 denied the allegations in paragraph 4 of the plaint and went ahead to state that it is not in breach of its duty to promote, translate and educate the public about the Constitution having translated and disseminated the same over the years. Counsel contended that from the contents in the WSD, the Defendant did not admit to any of the averments of the Plaintiffs.

Determination by the Court

[29] As a principle of the law on pleadings, the system of pleadings is one of fact finding. *Order 6 Rule 1(1) of the Civil Procedure Rules* provides that *"every pleading shall contain a brief statement of the material facts on which the party pleading relies for claim or defence as the case may be".* A WSD is one such pleading. Regarding the nature of denial envisaged in a WSD, Order 8 Rule 3 of the CPR provides –

> ***"3. Specific denial.***
>
> *Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against a person under disability; but the court may in its discretion require any facts so admitted to be proved otherwise than by that admission."*

[30] As such, although it is correct from the above provision that an allegation in a plaint that is not specifically denied by the defendant shall be taken to be admitted, it is also correct under the same provision that the court may in its discretion require any facts so admitted by such necessary implication to be proved otherwise than by that admission. Perhaps I should also add that the court would be in order to recognise that a pleading style that is adopted by a particular party when drawing a written statement of defence should be that of

the defendant provided that the defendant complies with the rules some of which have been set out herein above. If upon complying with the rules, the plaintiff thinks that the denial is insufficient but the court is not satisfied to enter judgment on admission, then the plaintiff ought to proceed to prove its case and the lack of specific denial would go towards determination of the strength or lack of it of the defendant's defence in the matter.

[31] In my view, such a circumstance would not invalidate or render the WSD defective. It neither amounts to evasive denial nor does it make the WSD frivolous or vexatious. It is not one that would make the WSD capable of being defeated pursuant to the provisions of Order 6 Rules 8, 10 and 30 of the CPR. In the circumstances, therefore, the preliminary point of objection raised by the Plaintiffs' Counsel towards the WSD is devoid of any merit and is accordingly dismissed.

Decision of the Court

[32] In all therefore, the preliminary points of objection raised by Counsel for the Defendant and the counter objection raised by Counsel for the Plaintiffs have all been found to be devoid of merit and have been dismissed. The suit shall be fixed for hearing on the merits. The costs of this proceeding shall be in the cause.

It is so ordered.

Dated, signed and delivered by email this 10th day of January 2022.

Boniface Wamala

JUDGE