THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
MISC. CAUSE NO. 011 OF 2020

1. JOSEPH MANGAFU
2. MUGENYI STEVEN
3. KABERA JAMES
4. SOITA STEVEN
5. WALEKULA JOSEPH
6. WANDIBA MOSES
7. KANAMUGYIRE YOWERI :::::::::::::::::::::::::::::::::::: **APPLICANTS**
8. OKIDI WALTER
9. MBABAZI HARRIET
10. KATUSIIME WILLIAM
11. KAREGEYA WILSON
12. AKITENG STELLA

VERSUS

1. AGILIS RANCH 20 & 21 LTD
2. SAM OCHEN
3. BYARUHANGA PATRICK :: **RESPONDENTS**
(Former District Police Commander Kiryandongo)
4. THE ATTORNEY GENERAL

Before: Hon. Justice Byaruhanga Jesse Rugyema

RULING

[1] The Applicants filed this application by an Amended Notice of Motion dated 28/5/2020 under **Article 50 of the Constitution of the Republic of Uganda 1995, Ss. 3, 4, 9, 10 of the Human Rights (Enforcement) Act 2019, S.33 of the Judicature Act and Rules 3, 5(1)(a)&(d), (2)(a)&(b), 6(1)(d), (2), 7(1), 8, 9, 10 & 11(1)(a)&(2) of the Judicature Fundamental Rights and Other freedoms (Enforcement procedure) Rules 2019** and all other enabling laws seeking enforcement of various rights which they allege were violated by the Respondents.

[2] The grounds for the application were set out in the affidavits of **Mugenyi Steven** (2nd Applicant), **Mbabazi Harriet** (9th Applicant) and **Katusiime William** (10th Applicant) as well as other affidavits that were filed in the course of litigation but the relevant grounds for this ruling, briefly are;

1. **The Applicants are adult Ugandans of sound mind, members of the Nyamalebe landless Association, residents of Kisaranda and Nyamutende villages, Kiyandongo Sub-County, Kiryandongo district and victims of the Respondents' human rights violations complained herein.**
2. **The Applicants bring this suit on their own behalf as well as on behalf of over 300 families who are victims of the Respondents' forced and illegal evictions; and related human rights violations pursuant to Article 50(2) of the 1995 Constitution of the Republic of Uganda and S.3 of the Human Rights (Enforcement) Act, 2019 to enforce the threatened and/or violated fundamental human rights or freedoms.**
3. **That sometime in early 2012, the Applicants and other victims entered the eviction site through Nyamalebe Landless Farmers Association when Government allowed their settlement on the eviction site.**
4. **That the Applicants and their families and/or other similarly-situated persons on whose behalf they are suing ("the victims") were customary land owners, Bonafide owners and/or occupants of various plots of land registered on LRV 916, Folio 18, Ranches 20 and 21 A in Nyamutende and Kisaranda villages in Kiryandongo District ("eviction site"). Many of the affected persons/victims had enjoyed quiet possession of the eviction site for over 12(twelve) years.**

[3] The 1st and 2nd Respondents filed an affidavit in reply opposing the application and denying the Applicants' allegations.
It was contended that the application is prolix, abuse of court process, has no cause of action, lacks merit, was served out of time, and is misconceived. Counsel for the 1st and 2nd Respondents intimated that a preliminary objection would be raised at the hearing challenging the application.

Counsel legal representation

[4] The Applicants were represented by **Mr. Eron Kiiza, Ms. Achak Carol Kay** and **Mr. Ruzima David** while the 1st and 2nd Respondents were represented by **Mr. Solomon Sebowa** and **Mr. Muwonge** represented the 4th Respondent.

Preliminary Objections

[5] At the hearing of the Application, counsel for the 1st and 2nd Respondents raised the following preliminary objections, under **O.6 r.28 CPR;**

(a) That this Honourable court does not have the jurisdiction to entertain this application.

[6] The Applicants filed this application under the **Human Rights (Enforcement) Act and Rules 5(1) (a) & (d) of the Judicature (Fundamental Rights and Other Freedoms (Enforcement procedure) Rules 2019.** That under **Rule 5(1) of the said Rules**, actions that may be instituted under these Rules include an action in public interest. That **Rule 7(2) of the same Rules** provides that **a public interest action under Rule 5(1) (d) shall be filed in the Constitutional Court under Article 137 of the Constitution.** Counsel relied on the authority of **Muhindo Morgan Vs. U.C.C & A.G, H.C. Misc. Cause No.130/2021.**

[7] Counsel for the 1st and 2nd Respondents concluded that the Applicants having brought their application in public interest under **Rule 5(1) (d) of the Judicature (Fundamental Rights and Other Freedoms (Enforcement procedure) Rules 2019** ought to have filed this application in the Constitutional court as required by **Rule 7 (2)** and not the **High Court.** He prayed for the dismissal of this application on this preliminary objection.

b) That none of the Applicants have a cause of action against the 1st and 2nd Respondents.

[8] Counsel submitted that the Applicants failed to show in their pleadings that they enjoyed any right which was violated by the 1st and 2nd Respondents; **Auto Garage Vs Motokov (1971) E.A 514** and **Tororo Cement Co. Ltd Vs Frokina International S.C.C.A No.02 of 2001.**

Firstly, that the gist of the claim by the Applicants arises from their alleged ownership of the land comprised in **LRV 916, Folio 18, Ranches 20 and 21A at Nyamutende and Kisaranda** but that as members of the **Nyamalebe Landless Farmer's Association,** did not attach any proof

of how they acquired the land from which they claim interest and the basis of suing the Applicants on ground of violation of human rights.

2ndly, that the Applicants did not attach any proof of registration of the Association and that the only conclusion in the circumstances is that the **Nyamalebe Landless Farmers' Association** is a none existent entity/association.

3rdly, that the **1st, 2nd, 3rd, 4th, 5th, 6th** and **8th Applicants** were duly compensated by the 1st Respondent as evidenced by the receipts/proofs of payment annextures **B,C,D,E,F,G,H,I,K,L,M,N** and therefore, did not enjoy any right on the suit land as they did not have any legal or equitable interest on the land.

4thly, that in respect of the 1st, 3rd, 4th, 5th, and 6th Applicants' claims, amount to *res judicata* which is barred by **S.7 CPA.** That in **H.C.C.S. No.19 of 2019,** the **1st, 3rd, 4th, 5th, 6th and 2310** other Applicants reached a consent with the 1st Respondent to vacate the suit property within a period of one (1) month from the date of execution of the consent and the consent judgment was in full and final settlement of all claims by the plaintiff herein and or their successors in title, agents and or assignees in respect to the land comprised in **LRV 916, Folio 18 Ranches 20 and 21.**

5thly, that the **2nd, 7th, 10th** & **12th** Applicants have no cause of action against the 1st and 2nd Respondents because they do not show in their affidavits how they acquired the suit land and in what capacity they claim ownership of the land. That in the absence of any evidence or proof of how they came to acquire their alleged right to the land, they do not have a cause of action and the application in respect of the **2nd, 7th, 10th** and **12th** Applicants' claims ought to be dismissed.

Lastly, that deponents of affidavits named in **paragraph 71** of the 1st & 2nd Applicants' affidavit have no cause of action against the 1st and 2nd Respondents because they are not party to the application and therefore do not have the necessary locus standi to depone in an application in which they are not parties. Counsel prayed that the affidavits be struck out as they amount to an abuse of court process.

c) That the amended Notice of motion was filed without affidavits in support and therefore whether it can be sustained.

[9] Counsel submitted that the amended Notice of motion is stated to had been supported by the affidavit of **Mugenyi Steven, Mbabazi Harriet** and **Katusiime William.** He contended that the application is not supported by any affidavit of the above referred to applicants, that the affidavit of **Mbabazi Harriet** was filed 11(eleven) months after the amended Notice of Motion and therefore, it was defective for having been filed out of time and not served with the action as it was not part of the application; **Kaigana Vs Babu Boubou [1986] HCB 59.** Secondly, that the applicants cannot rely on the affidavits deponed in support of the original notice of motion because where a party amends its pleadings, it is estopped from relying on its original pleadings. In the premises, counsel invited this court to strike out the amended notice of motion for being without any supporting affidavit and dismiss the application for being incurably defective.

d) Incurably defective affidavits in support of the Application.

[10] Counsel gave a list of incurably defective affidavits in support of the Application. That the jurats in question appear on separate sheets and pages and therefore one doubts whether the jurat is part of the affidavit and whether the deponent appeared before a commissioner for oaths. While relying on **Twinamatsiko Onesmus Vs Agaba Aisa & E.C Election Petition No.07 of 2021.** Counsel prayed that these incurably defective affidavits be struck out.

e) Service of the amended Notice of motion out of time.

[11] Counsel submitted that under **O.5 r.1 (2),** service of summons is to be effected within 21 days from the date of issue, except that the time may be extended on application to the court, made within 15 days after the expiry of the 21 days, showing sufficient reasons for extension. While relying on **Hussein Bada Vs Iganga District Land Board & 3 Ors H.C.Misc. Application No.479/2011, Orient Bank Ltd Vs Avi Enterprises Ltd H.C.C.A No.02/2013** and **Ali Shafi Investiment Group Vs Abu Dhabi Islamic Bank & 2 Ors H.C.Misc. Application No.130/2021,** counsel prayed that the present Notice of Motion be struck out for the application being served out of time.

[12] Counsel for the Applicants while appearing to concede that the Application was served out of time, with various excuses opted to rely on **Section 6(5) of the Human Rights (Enforcement) Act** which is to the effect that no suit instituted under this Act shall be rejected or otherwise dismissed by the competent court merely for failure to comply with any procedure, form or technicality.

f) That the Human Rights Enforcement Act cannot be applied retrospectively.

[13] Counsel submitted that whereas the Applicants' claims arise from the period between 2016 and 2018, the Human Rights Enforcement Act was assented to by the president on the 31/10/2019. Counsel relied on the case of **Wambewo Simon Vs Mazelele H.C M.A No.128/2013** for the proposition that the Act cannot apply to claims arising before it was enacted.

Determination of the preliminary objections.

[14] Under **O.6 r.28 CPR,** a party is entitled to raise by his or her pleadings any point of law which when so raised is capable of disposing of the suit, be set down for hearing and dispose it of at any time before the hearing. In **Yaya Farajallah Vs Obur Ronald & 3 Ors, H.C.C.A No. 081 of 2018,** court observed that;

> *"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. In any preliminary objection therefore, there is no room for ascertainment of facts through affidavit or oral evidence."*

Preliminary objections relate to points of law, raised at the onset of a case by the defence without going into the merits of the case. Where there are facts that need to be established in determining the preliminary objection then it cannot be raised or sustained.

Issues for determination

Issue 1: Whether this court has the jurisdiction to handle this application.

[15] The Applicants filed this Application under the **Human Rights (Enforcement) Act and Rules 5(1) (a) & (d) of The Judicature (Fundamental Rights and other Human Rights and Freedoms) (Enforcement procedure) Rules 2019.**

Rule 5(1) provides as follows:

*"**5 Actions that may be instituted under these Rules:***

(1)The following actions may be instituted under these rules-

*(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.** "* (emphasis)

On the other hand, under, under **R.7 (2)** of the same,

"2. A public interest action under rule 5(1) (d) shall be filed in the Constitutional court under Article 137 of the constitution."

[16] It therefore follows that from the foregoing, if the application is brought in **public interest** under **Rule 5(1) (d) of the Judicature (Fundamental Rights and other Human Rights and Freedoms) (Enforcement procedure) Rules, 2019** it has to be filed in the constitutional court as required by **Rule 7(2)** and not High Court, see also **Muhindo Morgan Vs UCC and Anor H.C.Misc.Cause No.130/2021.**

[17] It is however the Applicants' case that this application is not a public interest action (though in the heading of the application, they cited **Rules 3, 5(1) (a) and (d).** Counsel for the Applicants submitted and argued that this application is in accordance with **S.3 (2) (b) of the Human Rights (Enforcement) Act, 2019** by

"a person acting as a member of or in the interest of a group or class of persons."

That the class for which the applicants sued in addition to themselves and without prejudice to their individual human rights claims, i.e, the applicants representing themselves and their families and other

similarly affected persons (the victims) of over 300 families that were forcefully evicted from their homes. That this is where a citizen represents a group of citizens in accordance not only with **Article 50 of the Constitution as amended** but also **S.3(2)(b) of the Human Rights (Enforcement) Act 2019.**

[18] Counsel for the Applicants further argued that according to **Article 50 of the Constitution of the Republic of Uganda 1995,** in the event of a human rights violation or infringement, the aggrieved person or organisation would seek redress from a competent court. **Section 4 of the Human Rights (Enforcement) Act** provides that the High Court shall hear and determine any application relating to the enforcement or violation of rights and freedoms enshrined in **Articles 44 and 45 of the Constitution.** The Constitutional court does not enforce fundamental human rights and freedoms. The Constitutional court is normally involved only in matters requiring interpretation of the constitution under **Article 137; Ismail Serugo Vs KCC & Anor Constitutional Appeal No.2 of 1998.**

[19] I have perused the application and the affidavit in support, I am in agreement with counsel for the applicant that this case being an application for enforcement of human rights and freedoms of the stated individuals, it being under **Ss. 3 & 4 of the Human Rights (Enforcement) Act** it is properly before this court.

[20] In the instant Application, the amended Notice of Motion is however to the following effect:
The 12 Applicants and over 300 families they represent under **the Human Rights (Enforcement) Act** and **the Judicature (Fundamental Rights and other Human Rights and Freedoms) (Enforcement procedure) Rules, 2019** are seeking the following reliefs against the respondents;

1. **A DECLARATION** that the Respondents' forced eviction or/and condonation of the forced eviction of the Applicants and their **families and/or other similarly-affected persons (the victims)** from their homes, shelter/houses and/or gardens on land…without a court order and prior adequate, prompt and fair compensation was arbitrary unfair, illegal and threatened or violated the Applicants' and other victims' fundamental Human rights and freedoms adumbrated by the 1995 constitution…

2. …
3. **AN ORDER OF RESTITUTION** authorizing the immediate and unconditional return of all victims to their houses and gardens on the eviction site.
4. **AN ORDER** directing the Respondents to jointly and/or severally to remedy legal injuries, suffered by the Applicants and other victims in terms of:
   a) General damages…
   b) Aggravated Damages…
   c) Punitive/exemplary damages…

[21] As can clearly be seen from the above application, the 12 Applicants are suing on their behalf and on behalf of other "similarly affected persons (the "victims"). This translates into a Representative action. As court observed in **Centre for law and peace Uganda & 3 Ors Vs B.O.U & Anor H.C.C.S No.370/2017**(Commercial Division),

> *"Where a large number of people have suffered a similar injury and are seeking a remedy in order to avoid numerous suits being filed or in order to obtain a decision on a common question, a representative suit is filed against one or more persons on behalf of themselves and others having the same interest in the suit…*
> *In representative suit, the following conditions must be satisfied; **(i)** the parties must be numerous**, (ii)** they must have the same interest; **(iii)** court must have granted permission or directions; and **(iv)**notice must have been issued to the parties whom it is proposed to represent…"*

[22] The procedure for representative actions is provided for under **O.1 r.8 CPR.** Under **S.17 of the Human Rights (Enforcement) Act,**

> *"The civil procedure Act and the rules made thereunder may, with necessary modifications apply to the enforcement of rights and freedoms under this act."*

[23] In the instant case, the Applicants opted to sue on behalf of themselves and others having the same interest in the suit/application, they are in the premises governed by **O.1 r.8 CPR.** It provides thus:

> *"Where there are numerous persons having the same interest in one suit, one or more of such persons may, with permission of the court, sue on behalf or for the benefit of all persons*

so interested. But court shall in such case give notice of the institution of the suit to all such persons either by personal service or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct."

In **James Rwanyarare & Ors Vs A.G Constitutional petition No.7 of 2002,** Court observed that,

> *"Under O.1 r.8 (1) Civil Procedure Rules, a person may bring a representative action with leave of the trial court. It would have been at the stage of seeking leave, that the first petitioner would have disclosed the identity of those to be represented and whether he had their blessings to do so. We cannot accept the argument of Mr. Walubiri that any spirited person can present any group of persons without their knowledge or consent..."*

[24] In regard to the Notice of the institution of the suit being given to all such persons suing in representative action, Justice Kiryabwire as he then was in **Buwembo & 2 Ors Vs M/s UTODA Ltd, H.C.C.S No. 064 of 2002** (Commercial Division) held that:

> *"The requirement to give proper notice cannot be regarded as a mere technicality or direction to be dispensed with. The notice by public advertisement must disclose the nature of the suit as well as the relief claimed therein so that the interested parties can go on record in the suit either to support the claim or defend it."*

[25] The import of the above decision is that nobody can bring an action on behalf of another person or person without seeking their informed consent and that it is mandatory to notify persons on whose behalf the intended suit is going to be instituted so that they are aware and can own up both the positive and the negative consequences of the suit.

[26] In the instant case, the Applicants disguised or purported to sue in a representative capacity on behalf of themselves and a number of people who have suffered a similar injury and are seeking a remedy. The Applicants did not name and or list the particulars of those people they purport to represent. The implication is that the Applicants did not seek their consent and lastly, the applicants did not advertise all the names of those people they represent. This in my view have far reaching consequences not limited to even an abuse of court process. Assuming the action is successful and sought reliefs of general damages and

punitive damages and costs are awarded, how are the undisclosed/unnamed represented persons to benefit? This is not a technicality that can be cured by **Section 6(5) of the Human Rights (Enforcement) Act.** It is a requirement of the law.

[27] The Applicants in this case filed a disguised representative action brought under **Ss.3 and 4 of the Human Rights (Enforcement) Act** and failed to meet the requirements of **O.1 r.8 CPR** thus rendered the application incompetent for lack of a representative order. I would dismiss this application on this ground.

Issue 2: Whether the Applicants have a cause of action against the 1st and 2nd Respondents.

[28] It is now a settled proposition of law that a suit discloses a cause of action if it shows that the plaintiff enjoyed a right, that right has been violated and that the violation is by the defendants. Any omission or defect may be put right by amendment; **Auto Garage Vs Motokov [1971] E.A 514.** In **Narottam Bhatia & Anor Vs Boutique Shazimi Ltd, S.C.C.A No.6 of 2009 [2010] UGSC 67,** it was held that

> *"In determining whether a plaint discloses a cause of action, court must look at the plaint and the annextures thereto with an assumption that all facts as pleaded are true."*

[29] In the instant case, a perusal of the amended Notice of Motion, the Applicants are the category/group/class who are seeking to enforce their constitutional rights and freedoms guaranteed under various Articles of the constitution. They pleaded that the same human rights and freedoms were violated and they hold the Respondents liable. The above in my view as pleaded in the application disclose a cause of action against the 1st and 2nd Respondents.

[30] The rest as regards who is the rightful owner of the suit land **LRV 916 Folio 18, Ranches 20 and 21A at Nyamutanda and Kisaranda** where the alleged violations of the Applicants' rights and freedoms took place, whether or not the Applicants were settled thereon by the Government and whether the money given out as compensation was sufficient or not are matters of both facts and law for trial of the matter on merit.

[31] As to whether the 1st, 3rd, 4th, 5th, and 6th Applicants claims amount to *res judicata* by virtue of the consent reached between the Applicants and 2310 Others and the 1st Respondent in **H.C.C.S No. 2018,** as Counsel for the applicants rightly submitted, this is not a matter of dispute over land. It is an application for enforcement of human rights and freedoms under **Article 50 of the Constitution of Uganda.** The Respondents have therefore in the premises failed to show that the application is *res judicata.*

[32] In conclusion of this issue, I quote the observation of Justice Mubiru in **Centre for law and peace Uganda & 3 Ors Vs B.O.U and Anor (supra).**

> *"Where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of a violation of any legal or constitutional right or in case of breach of any fundamental rights of such person or persons, any member of the public can maintain a suit in the High Court under Article 50 of the constitution of the Republic of Uganda, 1995, seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons."*

[33] The Applicants here seek remedies for alleged violations of their fundamental rights and freedoms under **Article 50 of the Constitution of the Republic of Uganda 1995**. They have disclosed the alleged violated rights and they hold the Respondents liable. The Applicants have accordingly disclosed the cause of action against the Respondents. The objection is accordingly overruled.

Issue 3: Whether the Amended Notice of Motion was filed without affidavits in support and therefore whether it can be sustained.

[34] In this case, the Applicants appear to concede that they filed the application without the supporting affidavits in question but filed them months later after the amended Notice of Motion. Counsel for the Applicants opted to save the application under **S.6 of the Human Rights (Enforcement) Act 2019** which provides thus:

> *"No suit instituted under this Act shall be rejected or otherwise dismissed by the competent court merely for failure to comply with any procedure, form or on any technicality."*

He cited the authority of **A.G & Anor Vs Human Rights Awareness And Promotion Forum, H.C.M.A No.482 of 2020** where Justice Elubu saved

affidavits filed out of time on the basis that the application was for enforcement of human rights.

[35] I have looked at the Amended Notice of Motion. It is dated 28/5/2020 and was filed in court on 29/5/2020. The grounds in support of the application are purportedly set out in the affidavits of **Mugenyi Steven, Mbabazi Harriet** and **Katusiime William.** I have however, not been able to see the affidavit of **Mugenyi Steven** and **Katusiime William** on record save for **Katusiime William's** affidavit in rejoinder filed on **30/5/2022** on his behalf and on behalf of others, the unnamed victims/deponents. The affidavit is without their authority, thus in my view renders the affidavit incurably defective **(O.1 r.12(1) CPR.** See also **Mukuye & Ors Vs Madhvan Group Ltd, H.C.M.A No.821/2013**.

[36] The available affidavit on record is that of **Mbabazi Harriet** filed on **30/4/2022**, eleven months from the date of filing of the application. Surely, I don't think that the Applicants expected to file an application and file supporting affidavits or any other affidavits endlessly, at leisure, at any time they wished, without leave of court.

[37] Under **O.52 r.3 CPR,**

> *"Every notice of motion shall state in general terms the grounds of the application and, where any motion is grounded in evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion."*

By law, under **O.5 r.1 (2) CPR,** the application is to be served within 21 days from the date of issue; **Kanyabwera Vs Tumwebaze [2005] 2 EA 86 at 93.** It follows therefore that the application in question which was filed on **29/5/2020** was served without the supporting affidavits for by then, none of the purported supporting affidavits of **Mugenyi Steven, Mbabazi Harriet** and **Katusiime William** were in place. Even if one is to go by the applicants' contention that due to **covid** restrictions they were not able to serve but served the 1st and 2nd Respondents on 22/3/22, still by then, the said affidavits in support were not yet in place.

[38] The Applicants' counsel however appeared to claim that the affidavits in question were attached to the original Notice of Motion and were served together to the 1st and 2nd Respondents.

[39] It is trite position of the law however, that where a party amends pleadings, the party is estopped from relying on its original pleadings as the court cannot rely on the original pleadings and yet there are amended pleadings on record.

The following persuasive decisions point to the above proposition of the law: **Viera Vs Viera (California Court of Appeal) [Civ.No.18196. Second Dist. Div. One. Oct.30, 1951]** citing **Darsie Vs Darsie 49 Cal. App. 2d 491, 493 [122 P.2d 64]**

> *"the law is established in California that an amended complaint supersedes the original complaint and thereafter the original complaint performs no function as a pleading."*

Collins Vs Scott Cal.446, 453 [34P.1085]

> *"The original complaint in the cause is set out in the record, and is referred to by counsel for the appellants in his brief.*
> *It was superseded by the amended complaint upon which the judgment appealed from was rendered, and hence forth filled no office as a pleading."*

After an amendment has been allowed, the superseded pleading performs no other function as a pleading; **Bray Vs Lowery 163, Cal. 256, 260, 124 Pac.1004,1006 (1912).**

[40] Besides, I have not been able to access the original Notice of Motion on record but even if I had accessed it, it ceased to be a pleading on record worth consideration. I find that the amended Notice Motion was filed and served without any supporting affidavit.

[41] In the case of **Kaingana Vs Dabo Bobou, [1986] HCB 59** it was held that;

> *"Where an application is grounded on evidence by affidavit intended to be used must be served with the action. In such a case, the affidavit becomes a part of the application.* ***The Notice of Motion cannot on its own be a complete application without the support affidavit.*** *Therefore in the instant case, the Notice of Motion alone was not enough and it is struck out."*

See also the case of **A.G Vs Kilembe Mines Ltd & Anor, H.C.M.A No.702/2008.**

[42] In the instant case, from the foregoing, I find that the instant application is incurably defective for not being supported by any affidavit. The Applicants cannot hide under **S.6 (5) of the Human**

Rights (Enforcement) Act 2019 to save this application which is a blatant travesty of the law, for to do so would be extremely prejudicial to the 1st and 2nd Respondents who had to file a reply within 15 days **(O.8 r.12 CPR).** See also **Stop & See (U) Ltd Vs Tropical Africa Bank H.C.M.A No.333 of 2010.**

[43] I would accordingly strike out the application for being incompetent and incurably defective.

Issue 4: Whether there are some incurably defective affidavits in support of the Application.

[44] **S.6 of the Oaths Act** and **S.5 of the Commissioner for Oaths Act** provide that;

> *"Every Commissioner of oaths before **whom any oath or affidavit is taken or made** under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."* (emphasis)

The above provisions clearly require an affidavit to be made before a Commissioner for Oaths. This position is also fortified by **R.7 of the Commissioner for Oaths Rules** which provide that:

> *"A Commissioner before taking an oath **must satisfy himself or herself** that the person named as the deponent and **the person before him or her are the same** and that the person is outwardly in a fit state to understand what he or she is doing."* (emphasis)

[45] According to **Muhammed Magyambere Vs Khadil, H.C.M.A No.727/2011 [2012] UGCommC 15,** failure to comply with the above requirement renders the affidavit incurably defective and must be struck out. Consequently, the application it purports to support becomes incompetent for lack of a supporting affidavit and it should be struck out with costs; **See Jayantilal Amratlal Bhimji & Anor Vs Prime Finance Co. Ltd, H.C.M.A No. 467 of 2007, Kaigana Vs Babu Boubou (supra) and A.G Vs Kilembe mines Ltd & Anor (supra**).

[46] In the instant case, it is the contention of counsel for the 1st and 2nd Respondents that affidavits purporting to be in support of the application are incurably defective as the jurat of each of these is detached, on a separate page, implying that the deponent signed what he or she did not read, and that it also raises doubts as to whether the

affidavit was made before a Commissioner for Oaths; Upon cross checking all the affidavits on record, I found the following affidavits falling into the category of the complaint.

1. **Mukarugyeza Grace**
2. **Mukamungu Lydia**
3. **Ngabire Scovia**
4. **Seroma Godfrey**
5. **Tayebwa John**
6. **Ecret Benard**
7. **Wasswa Richard**
8. **Zironda Simon**
9. **Grigore Muhammed Muhires**
10. **Mukama salimu**
11. **Rukundo Ezekiel**
12. **Kosia Karuhanga**
13. **Kainamura Karoli**
14. **Baija Rajab**
15. **Nakalema Edisa**
16. **Mukanyeze Nelson**
17. **Papa Potras**
18. **Katusabe Ruth**
19. **Raija Rajab**
20. **Akello Sarah**
21. **Ongewun Wilfred**
22. **Etyang Henry**
23. **Tumusime John**
24. **Byamukama Valenci**
25. **Gisa Daniel**
26. **Masiko Felix**
27. **Rwabusezi Augustine**
28. **Mugabe Godfrey**
29. **Mutesi Attesia**
30. **Achan Brenda**

[47] The jurats of the above affidavits were prepared and drafted and signed independent of the main body of the affidavits. The jurats are standing alone. As I observed in **Hon. Mujungu Jennifer Vs Tumwine Anne Mary & Anor, E.P No.005 of 2021 (Fort Portal)** an affidavit has to be a continuous document and the jurat as usual is placed on the last page. In affidavits which are glaringly lacking the jurat and the signatures of the deponent at the last page, it goes without saying that they were never commissioned by the Commissioner for Oaths. The available jurats are independent documents and one cannot ascertain whether they form part and parcel of the affidavits. Such affidavits were found offending the provisions of **SS.5 and 6 of the Oaths Act**, and were accordingly struck out.

[48] In the Kenyan case of **Re: Central Bank of Kenya & Anor, Nairobi (Mulimani) High Court, Civil Case No. 427 of 2000: [2002] 1 EA 31** cited in B**ayiga Michael Phillip Lulume Vs Mutebi David & Anor, E.P No.14 of 2016,** it was held that where the jurat in an affidavit appear on pages separate from the main text, it offends the provisions of the Oaths Act and Statutory Declarations Act and renders that affidavit defective. In **Twinamasiko Onesimus Vs Agaba Aisa & Anor, E.P No. 007 of 2021,** Court observed that the practice of placing the jurat on a

separate page leaving a gap or much space between the last paragraph of the affidavit and the jurat where it could have fitted were treated as a fraudulent intent and a sloppy practice where lawyers take advantage of such drafting to have unsuspecting declarants and affirmants to sign what they have not been read back to and understood.

[49] In the **Bayiga Vs Mutebi (supra) case,** Court observed and I agree, that,

> *"The format of the application is not fatal unless prejudice is caused. It was emphasized that striking out pleadings must be done with extreme care and caution."*

Being alive to the above caution, court found and observed further that;

a) **Otherwise, all the petitioner's affidavits are defective by reason of the jurat being separate from the text of the affidavit.**
b) **Leaving blank spaces in the middle of an affidavit text and or half pages to push the signature of the jurat to a separate page cannot be explained as good drafting style done in good faith.**
c) **The texts of the affidavits are deliberately without page numbers. It was doubted whether the deponent ever saw and read the texts since they are detached from the jurats. The signing on each page was recommended as a best practice so that deponents can see, read and own both the text body and signed pages hence the entire affidavit.**
d) **There is no reason to believe that those particular deponents physically appeared before the Commissioner for Oaths to administer the oath for them.**

[50] In the instant case, an affidavit of **Tumusime John** as an example, did not have even the standing alone jurat page. This surely implies that the jurats were done and conducted independent of the affidavits so that they are merely attached to the affidavit thereafter and therefore, the implication is that the deponents did not either read and own the affidavit texts or, the jurats were merely taken to the Commissioner for Oaths for endorsement without the deponents physically appearing before him or her.

[51] Counsel for the Respondents on the other hand submitted that the above affidavits are saved by **S.6(5) of the Human Rights (Enforcement) Act, 2019** which relaxes the rigidity of procedural laws for purposes of avoiding a situation where court through technicalities is used as a tool to further human rights violations.

[52] In my view, the practice of having a jurat typed and signed independent of the main body of an affidavit leaving a wide or large space where the jurat could have fitted is not a matter of form for which one can hide under **S.6(5) of the Human Rights (Enforcement) Act.** The practice is apt to abuse and therefore has to be abhorred by courts. Such affidavits are suspect and therefor, to allow them on the grounds that the defects in question are of form is to foment a ground for fraud and abuse and this in my view, greatly prejudices the parties to the suit.

[53] In the premises, relying on the authorities of **Hon. Mujungu Jennifer Vs Tumwine Anne Mary & Anor, E.P No. 05 of 2021, Bayiga Michael Lulume Vs Mutebi David David & Anor, E.P 14 of 2016** and **Re: Central Bank of Kenya & Anor (supra),** I find the impugned affidavits of the 30 identified deponents defective and I strike them off the record accordingly.

Issue No.5: Whether the Applicants' amended Notice of Motion is incurably defective for being served out of time.

[54] Counsel for the 1st and 2nd Respondents submitted that the amended Notice of Motion was filed by the Applicants in court on **28th May 2020** and it was sealed by the Registrar of this court on the **2nd June 2020**. Under **O.5 r.1 (2) CPR** such Notice of Motion ought to had been served by the **23rd June 2020.** In this case, it was served on **22nd March 2022,** a period outside the 21 days prescribed by the express provisions of **O.5 r.1(2) & (3) CPR.** As I have already observed, though with various excuses, counsel for the Applicants conceded that the Application was served out of time. He relied on **A.G & Anor Vs Human Rights Awareness and Promotion Forum H.C.M.A No.482 of 2020** where court dismissed an application to have affidavits struck out for being filed out of time on the basis that the application was for the enforcement of Human Rights, for the proposition that **Section 6(5) of the Human Rights (Enforcement) Act** would save this application. In my view, this cannot be the position of the law.

[55] Under **O.49 r.2 CPR,** Notices of Motions are served in a manner provided for service of summons. According to **O.5 r. 1(2) CPR,** such Notice of Motion must therefore be served within 21 days of issuance;

Michael Mulo Mulagussi Vs Peter Katabalo HCMA No.6 of 2016, Joy Kaigana Vs Dabo Boubou [1986] HCB 58.

[56] According to the Supreme Court authority of **Kanyabwera Vs Tumwebaze [2005] 2 EA 86,** all the provisions under **O.5 r.1 CPR** are of strict application since a penalty accrues upon default. The penalty for default, according to **O.5 r.1 (3) (c) CPR** is dismissal of the suit or application. Thus service of the Notice of Motion within the prescribed period is not a mere technicality but a legal requirement. As regards **Section 6(5) of the Human Rights (Enforcement) Act,** since **Section 17 of the Human Rights (Enforcement) Act** permits application of the **Civil Procedure Rules** with the necessary modifications, I do not think, it was intended to do away with the procedural rules and therefore could be used by litigants to circumvent the law. Agreeable, rules of procedure are flexible as they are meant to expedite, and not frustrate the trial of cases on their merit and that irregularities either in matters of form or substance should be, disregarded unless such indulgences and liberality will result in injustice, in this case a litigant is given an option under **O.5 r.1 (2) CPR** to apply for extension of time to effect service within 15 days after the expiration of the 21 days showing sufficient reasons for the extension. In this case, the Applicants did not apply for extension of time to effect service of the application.

[57] In this matter, the Applicants having inordinately defaulted on service of the Application upon the Respondents within time, I find that this application ought to be dismissed. The various excuses which counsel for the Applicants brought out ought to have been grounds in an application for leave to effect service of the application outside time. In the absence of an application for an extension of time under **sub rule 2 of O.5 CPR,** the application would stand dismissed for being served out of time. This preliminary objection therefore succeeds.

Issue 6: Whether the Human Rights (Enforcement) Act is applicable to the instant case.

[58] The Applicants pleaded categorically thus;

> *"9 In **December 2016,** the 1st Respondent's agents escorted by 12 (twelve) police officers commanded by the 3rd Respondent stormed the eviction site. They were armed with guns, tear gas, clubs…police officers tear gassed people and shot live bullets*

*wounding an 11 year old pupil at Kabyanga Memorial Primary School, **Ssewankambo Ponsiano**. They systematically beat, kicked, bludgeoned and arrested the 13th Applicant…"*

[59] Then in **paragraph 2 of the amended Notice of Motion**, the Applicants pleaded thus;

*"1a) The Respondents in **February 2018,** and at all material times, escorted by more than 10 police officers armed with guns and about 40 agents/workers of the 1st Respondent equipped with guns, caterpillars, bull dozers, sticks and hammers invaded the eviction site, bull dozed, demolished houses and burnt people's property, commercial buildings as well as schools belonging to the victims without sufficient notice, exposing them and their children to vagaries of nature."*

[60] As rightly submitted by counsel for the Respondents, the claims made by the Applicants arise way before the enactment of the **Human Rights (Enforcement) Act** ie from the period between **December 2016** and **February 2018**. It is trite,

It is a fundamental rule of interpretation that a statute other than one dealing with procedure shall not be construed so as to have retrospective effect unless the intention of the legislature that it should have such effect appears in clear terms and or by necessary implication.

See **Hon. Lukwago Erias & 13 Ors Vs E.C & 2 Ors, H.C.M.A No. 431/2013 [2020] UGHCCD 4** and **Wambewo Vs Mazelele HCMA No.128 of 2013.**

Consequently, a statute is presumed to apply to facts or circumstances which have come into existence after the existence of the statute unless it can be concluded unequivocally that the legislature intended to operate.

In **Union of India & Ors Vs M.C Punnose [2020] S.C.C, Supreme court of India online,** it was held that,

"The courts will not therefore, ascribe retrospectively to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature."

[61] In the circumstances of this case, the **Human Rights (Enforcement) Act** having come into force in **2019,** the applicants cannot invoke it to enforce human rights and freedoms allegedly violated before 2019. The

Act has no retrospective enforcement and as a result, this application is a non-starter and it is apt for dismissal. This preliminary objection is accordingly upheld.

Issue 7: What remedies are available to the parties.

[62] This court found and upheld the preliminary objections; **a)** that this application is a disguised Representative action brought under **Ss.3 & 4 of the Human Rights (Enforcement) Act** but failed to meet the requirements of **O.1 r.8 CPR, b)** that the amended Notice of Motion is unsustainable for having been filed without any supporting affidavit, **c)** that the application was filed out of time, and **d)** that this application was filed under the **Human Rights (Enforcement) Act, 2019** which Act cannot not applied retrospectively to the case whose events occurred around **2016 and 2017**, it follows therefore that the entire application is incurably defective and it is fit for dismissal. The applicants can only be saved of costs in view of the fact that this is a Human Rights and Freedoms Enforcement suit. I accordingly make no order as to costs.

Signed, Dated and Delivered at Masindi this **20th** day of **October, 2022**.

Byaruhanga Jesse Rugyema
JUDGE.