THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 089 OF 2022

(Arising from Misc. Application No. 843 of 2021)

(Arising from Misc. Cause No. 287 of 2021)

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

VERSUS

ATTORNEY GENERAL :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING ON PRELIMINARY OBJECTIONS

Introduction

[1] The applicant brought this application by Notice of Motion under Articles 1, 3(4), 28(1), 29(1), 38(1), 44(c) and 126(1) of the Constitution; and Sections 33 and 39 of the Judicature Act seeking orders that:

(a) The 15th February 2022 Orders by Judge Ssekaana Musa that the Applicant be arrested and imprisoned for 18 months be set aside.

(b) Costs be in the cause.

[2] The application was supported by an affidavit deponed to by the Applicant. The Respondent did not file a reply to the application.

[3] When the matter came up for hearing, the Applicant appeared in person while the Respondent was represented by Mr. Ebila Hillary Nathan (State Attorney). The Respondent's Counsel sought and was allowed to address the Court on matters of law, since no evidence had been presented to Court by way of a reply to the application. Counsel for the Respondent indicated to Court that he intended to raise preliminary objections to the application. Counsel for

the Respondent and the Applicant made oral arguments before the Court on the preliminary objections.

The Preliminary Objections

[4] The objections raised by the Respondent's Counsel were that;

(a) This Court has no jurisdiction to entertain this matter; and,

(b) The application has been brought in abuse of the court process.

Submissions on the Objections

[5] It was submitted by Counsel for the Respondent that the Applicant having preferred an appeal in the same matter, this court is not seized with jurisdiction to handle this matter. Counsel argued that this court cannot make orders that are likely to prejudice the handling of the same matter by a higher court. On the leg of abuse of the court process, Counsel argued that it was not open to the Applicant to take two concurrent options of seeking the setting aside of proceedings and orders of the court on the one part and appealing against the same proceedings and orders, on the other hand. Counsel argued that this amounted to forum shopping and was thus in abuse of the process of the court. Counsel prayed that the application be dismissed with costs.

[6] In reply, the Applicant challenged the locus by the Respondent's Counsel to address the Court in absence of a reply to the application. The Applicant argued that by their failure to respond to the application the Respondent had admitted to the facts alleged in the application. On the first objection, the Applicant submitted that the issue of jurisdiction does not arise since the law confers such jurisdiction on the court by virtue of Order 9 Rule 12 of the Civil Procedure Rules (CPR). The Applicant argued that under the said rule, the court is given wide powers to clean its house where concerns on breach of the right to a fair hearing have been raised by a party. The Applicant further argued that there was no bar for a party to take both options of appeal and

setting aside court proceedings and orders; and both options were legally available and the Applicant had a right to explore them.

[7] The Applicant also submitted that the Respondent's Counsel had not led any evidence to establish existence of any appeal and was unable to lead any such evidence since the Respondent had offered no response to the application. He further argued that in absence of proof of existence of a pending appeal, the arguments by the Respondent's Counsel alleging abuse of the court process could not stand. The Applicant prayed that the objections be rejected and the Court proceeds to consider the application on its merits.

Determination by the Court

[8] Let me begin with the contention that the Respondent had no locus to address the Court owing to the reason that they had not filed a response to the application. The Applicant had earlier on raised this matter in an application that was handled by this Court on this very case file. On that occasion I did indicate that there was no bar under the law for a party who has not filed a response to an application from participating in the matter on matters of law. The only bar that exists under the law is in regard to traversing matters of evidence adduced by way of affidavit to which a party has not responded by way of affidavit. The law is that such facts are taken by the court as admitted by the opposite party. This, however, is far from saying that such a party cannot be heard on matters where such evidence is not in issue. This is the settled position of the law as per decided cases, including the one relied upon by the Applicant of ***Lt. Col. John Kaye vs Attorney General, Constitutional Application No. 25 of 2012***. Also See: **H.G.Gandesha and another v G.J. Lutaya, SCCA No.14 of 1989.** It is therefore not true that because the Respondent had not filed an affidavit in reply to the application, they had no audience before the Court to raise matters of law.

[9] On the first point of objection, I will start by considering a question on the propriety of this application in so far as it is based upon the provision under Order 9 Rule 12 of the CPR as per the submissions by the Applicant. Although the Notice of Motion does not set out the procedural rule under which it was brought, it was pointed out by the Applicant in his submissions that the jurisdiction of this Court to handle this matter was derived from the wide powers given to the court under Order 9 Rule 12 of the CPR to vary or set aside ex parte judgments. *Order 9 Rule 12 CPR* provides as follows:

"Setting aside ex parte judgment.

Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under Order 50 of these Rules, the court may set aside or vary the judgment upon such terms as may be just."

[10] According to the Applicant, the preceding rule applicable to the present matter is rule 10 of Order 9 CPR. Rule 10 provides as follows:

"General rule where no defence is filed.

In all suits not by the rules of this Order otherwise specifically provided for, in case the party does not file a defence on or before the day fixed therein and upon a compliance with rule 5 of this Order, the suit may proceed as if that party had filed a defence."

[11] Clearly, rule 10 above applies where a defendant (or respondent for that matter) is served with court process and does not file a defence or response to the matter within time as prescribed. The rule does not apply where the opposite party has filed a response. Where a party has filed a response, rule 13 of Order 9 CPR, among other rules, come into play with the attendant different dynamics. *Order 9 Rule 13 CPR* provides as follows:

"Step in suit after defence filed.

Subject to Order 12 of these Rules, where a defendant has filed a defence under rule 1 of this Order, the court may set down the suit for hearing with notice to the parties."

[12] On the case before me, the record on M.A 843 of 2021 (from which this application arises) shows that the impugned proceedings were commenced by letter from the Attorney General. The application contained in the letter was supported by two affidavits verifying the facts contained therein. Based on the said application, the court issued a notice against the Applicant to appear and show cause as to why he should not be committed to prison for violating a court order dated 9th February 2022. Upon being served with the notice to show cause and the application, the present Applicant responded to the process by letter dated 10th February 2022 titled: **"Opposition to application to have me committed to prison for alleged violating a Court Order in M.A No. 843 of 2021 ..."** The said letter by the Applicant (then Respondent) was accompanied by an affidavit of the same date verifying the facts stated in the letter. The matter was therefore fixed for hearing by the court on 15th February 2022.

[13] When the matter came up for hearing on 15th February 2022, the Applicant was represented in court by an advocate, one Noel Nuwe. I take note of the fact that in his response, the Applicant had expressed intention to file other affidavit evidence; and that during the hearing, his lawyer made the same request and further asked the court for an adjournment to enable the presence of the Applicant who was in another court. The court, citing the particular circumstances of the case, refused to grant an adjournment and directed the matter to proceed. Counsel for both sides made their arguments. The court then made a decision in the matter leading to the impugned ruling and orders of 15th February 2022.

[14] In view of the above background, which is clear on the file before me, it is not true, either factually or legally, that the respondent in the impugned proceedings (the Applicant herein) did not file a response to the application subject of those proceedings. It is not true that the hearing of the matter proceeded ex parte within the meaning of Order 9 rules 10 and 11 (2) of the CPR. It is clear that the Applicant filed a response and the matter was set down for hearing inter partes in the manner directed under Order 9 rule 13 of the CPR. The rejection by the court of the request by the respondent (the present Applicant) for more time or for adjournment does not make those proceedings ex parte. That is a question of exercise of discretion by the court; which, if it is impugned for having not been done judiciously, the available option under the law is to appeal to a higher court. This court cannot be asked to set aside its own orders on account of wrong or questionable exercise of discretion. It is only a higher court that can entertain questions directed against alleged improper exercise of the discretion by a lower court.

[15] It is in regard of the foregoing that the question of jurisdiction arises. The question is whether this court has jurisdiction to entertain an application to set aside proceedings and orders that were not passed ex parte and that were based on exercise of the court's discretion. Clearly, rules 10 and 12 of Order 9 CPR are not applicable to orders arising out of such a proceeding. Neither do the other rules concerning ex parte proceedings under Order 9 of the CPR apply. As I have shown above, such exercise of discretion, if impugned, can only be challenged in an appellate court. I am therefore in agreement with the Respondent's Counsel that this court is not seized with the jurisdiction to entertain a matter seeking the setting aside of its own decision in circumstances where such a decision can only be impugned on appeal.

[16] In light of the foregoing, the first point of objection would be upheld by the court and I would strike out the application on that ground.

[17] Regarding the second point of objection, it was also argued by the Respondent's Counsel that for the Applicant invoking both the right to appeal and to set aside the same proceedings, he had acted in abuse of the court process. Under the law, abuse of the court process involves use of the process for an improper purpose. See: ***Uganda Land Commission vs James Mark Kamoga & Another, SCCA No. 08 of 2004***. It was argued by the Applicant that abuse of the court process could not be established in absence of evidence led by the Respondent herein. To the contrary, my view is that the material on the file before the court can suffice for the court to make a finding as to whether a claim for abuse of court process is made out or not.

[18] On the case before me, the record in M.A 843 of 2021 indicates that the Applicant filed a notice of appeal on 2nd March 2022 in this court expressing the intention to appeal against the impugned decision to the Court of Appeal. The notice was duly received and endorsed by this court. As such, the existence of the notice of appeal is a fact that is not in issue before this court.

[19] The Applicant raised a question as to the validity of the notice of appeal on the ground that no evidence had been adduced by the Respondent to prove that the notice had been served in accordance with the Court of Appeal Rules. With due respect, the question as to the validity of the notice of appeal cannot be subject of investigation and determination by this court. Under the Court of Appeal Rules, an appeal to the Court of Appeal is commenced by the filing of the notice of appeal. This court therefore is not seized with jurisdiction to inquire into and determine questions regarding propriety of an appeal lying before the Court of Appeal. For purpose of this court, all that is required is evidence of a notice of appeal duly filed and endorsed by the court. The same is on record.

[20] That being the case, it is apparent on the record that the Applicant had taken out two concurrent processes in two different courts; of appealing and

setting aside the same proceedings and orders. In absence of an enabling law to that effect, I agree that such conduct would amount to forum shopping and would tantamount to using of the court process for an improper purpose. It would thus be in abuse of the court process.

[21] I further find that such approach would be barred in law for being contrary to the settled principle of law which guards against approbation and reprobation. Under the law, the principle guarding against approbation and reprobation is said to be a species of the doctrine of estoppel. According to **Halsbury's Laws of England, Vol. 47 (2014) [paragraph 312 under Estoppel]**, the principle that a person may not approbate and reprobate seems to be intermediate between estoppel by record and estoppel by representation. The principle expresses two propositions:

(i) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile (spring back or rebound); and

(ii) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

[22] In ***Republic versus Institute of Certified Public Secretaries of Kenya, HCMA No. 322 of 2008***, the court cited the statement of **Sir Evershed** in the case of ***Banque De Moscou V Kindersley (1950) 2 All ER 549***, who in reference to such conduct stated;

> **"*This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold.*"**

[23] In the instant case, even if the application to set aside had been properly brought before this court, the Applicant would still have been barred from electing to take two concurrent proceedings of this nature. He would be caught up by the principle of estoppel by election. This position is not lessened even by the Applicant's claim that what is at stake is the right to a fair hearing that is non-derogable. It is no derogation of a person's right to tell him/her that 'you can go through either this or the other door but not both'. This is what estoppel does in this case. As such, the Applicant cannot claim that simply because the right to a fair hearing is involved, all principles of law and procedure should be ignored. Fundamental rights are enforceable within the set limits of the law and procedure.

[24] That being the case, my finding is that the approach employed by the Applicant in bringing this application and at the same time appealing to the Court of Appeal is barred in law for running contrary to the principle of law that guards against a party approbating and reprobating. This application would, therefore, be found to have been brought in abuse of the process of the court and would be struck out on this ground as well.

[25] In all therefore, both objections have been upheld by the Court. This application stands incompetent before the Court and is accordingly struck out. Since the Respondent did not file a response in the matter, they are not entitled to costs. I thus make no order as to costs. It is so ordered.

Boniface Wamala
JUDGE
01/04/2022