The Republic of Uganda
In the High Court of Uganda
Holden at Soroti
Misc. Application No. 10 of 2022

Labu Saidi Chepchulei :: Applicant

Versus

1. Ocen Ambrose
2. Soroti City
3. Soroti City, East Division :: Respondents

Before: Hon. Justice Dr Henry Peter Adonyo

Ruling

1. Background:

This application is brought by way of Notice of Motion under sections 3 and 4 of the Human Rights (Enforcement) Act, No. 18 of 2019, the Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019, Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71 and Order 52 of the Civil Procedure Rules (as amended) for orders that:

a) By refusing to grant the applicant the information within 21 days as stipulated by the law in respect of Plots 25 and 25A Cemetery Road, Soroti City East Division in Soroti City, which information is believed to be in the possession of the respondents, the respondents violated the applicant's Right of Access to Information as enshrined under Articles 20 and 41 of the Constitution of the Republic of Uganda (as amended).
b) By refusing to comply with the law to provide information to the applicant, the respondents were in violation of the Applicant's Civil Rights as enshrined under Articles 38 and 45 of the Constitution of the Republic of Uganda (as amended).
c) By refusing to give the applicant information he requested for, the respondents were in violation of the applicant's right to practice his profession, and to carry on any lawful occupation, trade or business he enjoys as enshrined under Article 40 (2) of the Constitution of the Republic of Uganda.

The applicant also prayed for court to make declarations and orders that the;

1. Respondents are declared guilty of violating the applicant's rights
2. Respondents comply with all applicant's request for information
3. Respondents pay the applicant the sum of UGX 150.000.000 (One Hundred Fifty Million Shillings) being the estimated value of the subject claim of the violated rights.

4. Respondents pays general damages
5. Respondents pay exemplary/punitive damages
6. Respondents pay aggravated damages
7. Interest on all monetary awards at 15% from the date of filling of this application until full payment of court's decree.
8. Costs of the suit.
9. Any other reliefs that the court deems fit to grant in respect of the said human rights violations.

The grounds of the application as set out in the application and explained in the supporting affidavit deposed by the applicant are briefly;

a) That the applicant practices as a human rights and social justice private consultant with interest in promoting transparency, accountability and good governance in the management of public affairs the reason he deposed this affidavit in that capacity in support of this application.
b) That the 2nd and 3rd respondents are public entities who by law are mandated to give information when requested by an individual.
c) That the 1st respondent is the City Town Clerk of Soroti, an employee and by law the overall supervisor and accounting officer of the 2nd and 3rd respondents and they all have the capacity to sue or be sued.
d) That the 2nd and 3rd respondents are public entities and are vicariously liable for the actions of the 1st respondent by virtue of their employment relationships.
e) That the respondents by law are mandated to ease access of information requested by the applicant.
f) That the applicant sought for information in possession of the respondents but the respondents refused to grant the applicant access within the specified period required by law.
g) That the respondents did not give him the notice for refusal as required by law.
h) That the respondents have never notified the applicant any action as required by law for extension of the period upon which the said information was to be availed.
i) That the respondents have occasioned the applicant general inconveniences.
j) That in view of the above circumstances, the subject claim of these human rights violations is estimated to be a sum of UGX 150,000,000 (One Hundred Fifty Million Shillings only) occurred within the jurisdiction of the Honorable Court.
k) That it is in the interest of justice and fairness that this application be granted.

In reply to the application, the respondents through Okaja Emmanuel, the Deputy Town Clerk of Soroti City stated as follows;

1) That the 1st and 2nd respondents have never received any request for information from the applicant.

2) That the Uganda Land Commission and its respective district land board are by law the custodians and proprietors of all public land in Uganda in accordance with the Constitution of the Republic of Uganda.
3) That the records or information on Plots 25 and 25A Cemetery road in Soroti City as Public land is within custody of Soroti District Land Board the custodians of all public land where the applicant ought to have requested the information from.
4) That the applicant was verbally informed by the records officer that the information sought is within the custody of the Soroti District Land Board the custodians of all public land in Uganda and advised to request for it from the right entity.
5) That the applicant negligently and without reasonable cause did not follow the prescribed format by law to request for information.
6) That its Public knowledge that all dealings in Public Land in Soroti are a preserve of Soroti District Land Board and the applicant as Consultant is well aware that such information is in their Custody.
7) That the respondents have not caused the applicant any mental anguish, humiliation and public embarrassment and are not liable to any damages suffered as such.
8) That this application should be dismissed with costs.

The applicant did not file a rejoinder to the application.

2. Representation:

The Applicant was represented by Mon Advocates while the Respondents were represented by the Attorney General's Chambers, Soroti Regional Office.

3. Submissions:

The parties filed written submissions, while they are considered accordingly, for brevity I will only refer to them as and when they are necessary. I shall not reproduce them entirely.

Counsel for the applicant submitted on four issues which shall be adopted by this Honourable Court in resolving the dispute.

4. Issues:

a) Whether the affidavit in reply is incompetent?
b) Whether the applicant's rights were violated?
c) Whether the 2nd and 3rd respondents are liable?
d) Whether the applicant is entitled to the prayers?

5. Resolution of the issues:

The applicant raised a preliminary objection on a point of law as formulated in issue 1 that the affidavit in reply is incompetent and went further to divide the objection in six preliminary objections as follows;

a) Respondents' affidavit in reply was filed but not served on the applicant offending O.8 r 19 of CPR.
b) The deponent in the affidavit in reply lacked lawful authority offending O.1 r 12 (1) (2) and O. 7 r 14 of CPR.
c) The respondents' affidavit in reply is misdirected and contains no rebuttals to the Applicant's affidavit in support of Notice of Motion offending O. 6 r 8 of CPR.
d) The respondents' Affidavit in reply lacks authenticity (lacks certificate of defence) offending O.9 r 1 (1) of CPR.
e) Respondents' affidavit in reply was filled out of time and without leave of court offending O. 8 r 2 and O. 51 r 6 of CPR.
f) The respondents' affidavit in reply contains glaring mistakes and errors on the face of record.

a. Counsels submission.

i. Respondents' affidavit in reply was filed but not served on the applicant offending O.8 r 19 of CPR:

The Counsel for the applicant submitted that the Civil Procedure Rules stipulate mandatory timelines within which parties are ordered to file a defence and subsequent pleadings and that the process entailing the filling of a defence is provided under O.8 r 19 of CPR which stipulates that

Subject to rule 8 of this order, a defendant shall file his or her defence and either party shall file any pleading subsequent to the filling of the defence by delivering the defence or other pleadings to the court for placing upon the record and by delivering a duplicate of the defence or other pleading at the address for service of the opposite party.

The applicant cited the case of **Simon Tendo Kabenge vs. Barclays Bank (U) Ltd and Anor (SCCA No. 17 of 2015) on para. 4, page 11** to buttress his point of the mandatory timelines of filing a defence thus the Justices of the Supreme Court observed that;

> ***"with greatest respect it was erroneous for the justices of the court of appeal to observe that it was the duty of counsel for the plaintiff by virtue of good practice to access a copy of the same on his own since he always checks the registry every now and then. This holding reads into and contravenes O.8 r 19 by shifting the burden of service of the written statement of defence from the defence counsel to the plaintiff's counsel. The law is clear on how the plaintiff is to receive the WSD and not even the so-called practice can override what the law dictates."***

The applicant then further submitted that the failure of counsel for the respondent to serve the applicant's counsel prevented him from making and filing a reply in rejoinder as required by

law wherefore the applicant prayed that the affidavit in reply be struck off the court record for non-compliance with the rules of filing.

Counsel for the respondents submitted that Order 18 rule 19 of the CPR cited by the applicants provides for time to serve the defence to the plaintiff if the defence contains a counterclaim which was not the case with the application before court. Counsel submitted that if court finds a defect in the process of filing the affidavit in reply, the court should find it curable under Article 126 (2) e of the constitution which is to the effect that substantive justice is to be administered without undue regard to technicalities.

He further submitted that the applicant's submissions with respect to this preliminary objection is misconceived, the law and cases cited do not provide for the mandatory timelines to which a defence and in this case a reply to the application should be served to the respondent. Order 8 rule 19 of the CPR only provides for time to serve the defence to the plaintiff if the defence contains a counterclaim which is not the case in this application.

The law provides for a time frame of filing a defence which was compiled by the respondents, the non-service of the affidavit in reply on the applicants does not offend order 8 rule 19 for it does not provide for a mandatory timeline to serve a defence/reply on the applicant.

Analysis:

The applicant's claim that the failure of the respondents to serve them made them fail to file a rejoinder cannot be argued at this point. The applicant or his counsel should have sought for Court's leave to have a rejoinder filed but opted to submit on the matter. Court finds this argument not necessary at this point to support this objection.

I agree with the respondents' counsel that there is no mandatory timeline in law to which a defence and in this case a reply to the application should be served to the respondent.

The law provides for a time frame of filing a defence (an affidavit in reply for this matter) which was compiled to by the respondents, I find that the non-service of the affidavit in reply on the applicants not offending order 8 rule 19 for it does not provide for a mandatory timeline to serve a defence/reply on the applicant.

ii. The deponent in the affidavit in reply lacked lawful authority offending O.1 r 12 (1) (2) and O. 7 r 14 of CPR:

The applicant submitted that the respondents' deponent Mr. Okaja Emmanuel the Deputy Town Clerk lacks capacity to depone the affidavit in reply on behalf of the respondents. He relied on O. 1 r 12 (1) (2) of CPR that provides that;

(1) where there are more plaintiffs than one any one or more of them may be authorized by any other of them to appear, plead or act for that other in any

proceeding, and in like manner, where are more defendants than one, any one or more of them may be authorized by any other of them to appear plead or act for that other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filled in the case.

The applicant also submitted that the 1st respondent Mr. Ocen Ambrose was sued in his personal capacity. The 2nd and the 3rd Respondents are vicariously liable for actions of the 1st respondent being *their* employee as the tort in the course of business. The affidavit in reply on court record was deposed by Okaja Emmanuel who without evidence on court record purports to be a Deputy Town Clerk. Okaja Emmanuel who swore the affidavit in reply on behalf of the respondent has no locus and more so he deposed the reply without written authority of the respondents on court record.

The applicant relied on the case of ***Binaisa Nakalema and 3 Ors vs Mucunguzi Myers; MA No. 460 of 2013*** where court guided that a person swearing on behalf of others ought to have their authority in writing which must be attached as evidence and filled on the court record.

The applicant submitted that the alleged affidavit in reply on court record without lawful authority is by Okaja Emmanuel who claims to be a deputy town clerk is fundamentally defective as it offends 0.7 r 14 of the CPR as no written authority from the respondents was attached from in the pleadings.

Counsel of the respondents in reply relied on Section 65(3) of the Local Government Act, Cap 243 which provides that; the provisions of Section 64 in relation to functions shall apply to the town clerk of a city. The office of the deputy town clerk is established under section 66 (3)

Section 64(2) of the Local Government Act Cap 243 provides that;

(1) The chief administrative officer shall be the head of public service in the district and the head of administration of the district council and shall be the accounting officer of the district.

(2) The chief administrative officer shall –

(a) Be responsible for all lawful decisions taken by the district council;

(b) Give guidance to local government councils and their departments in the application of the relevant laws and policies;

(c) Supervise, monitor and coordinate the activities of the district and lower council's employees and departments and ensure accountability and transparency in the management and delivery of the council's services; among others.

He submitted that Mr. Okoja Emmanuel is the deputy town clerk of Soroti city in that respect deputizes Ocen Ambrose the 1st respondent then as the Town Clerk.

The law under **section 67 (2)** of the Local Government Act Cap 243 clearly puts Okoja Emmanuel under the direct supervision of the area where the subject of this suit situates and its upon that background that he is competent to depone the respondents affidavit in reply to this application.

Furthermore, Counsel for the respondents submitted that the applicant's submissions on this preliminary point of law is misconceived. Counsel stated that the facts in ***Lena Binaisa vs Mucunguzi Myers Miscellaneous Application No. 0460 arising from Civil Suit No. 0211/2009*** are distinguishable from the ones in this instant case. In the said Nakalema Binaisa case the deponent stated in her affidavit that she had been authorized by the 2nd and 3rd applicants and swore the affidavit on their behalf.

Counsel also relied on the case of ***Esemu Nicholas and Anor Vs Mwitanirwa Kazaarwe H.C. Miscellaneous Application 952 of 2020*** where Hon. Lady Justice Olive Kazaarwe Mukwaya while overruling the preliminary objection, held that

> ***"...there is nothing to show that the 3rd Applicant was swearing the affidavit on behalf of the 2nd, 4th and 5th applicants. He deponed the affidavit as a witness who had knowledge and facts upon which the applicant's joint action is based, he did not state in his affidavit that he is swearing the affidavit on behalf of the other applicants. … I agree with the applicant's counsel that the case of Lena Nakalema Binaisa v Mucunguzi Myers is distinguishable from the circumstances of this application and are therefore not applicable in that regard. Court further held that this is not a representative suit as envisaged by order 1 rule 12 of the Civil Procedure Rules. As a party to the application in her own right, the 2nd applicant had authority to swear the affidavit to support the application with facts as she knew them. The fact that the contents pertained to the 1st application was irrelevant to her authority to swear the affidavit..."***

He further submitted that paragraph 1 of the respondents' affidavit in reply, Okaja Emmanuel stated that he is a male adult Ugandan and the deputy town clerk of Soroti City, and has perused the application and affidavit in support and is therefore competent to swear this affidavit. Furthermore, the Local Government Act also mandates him to represent the government in such cases. The nature of his job makes him well acquainted with facts pertaining to this case and therefore competent to swear the respondent's affidavit in reply.

Analysis:

I agree with Respondents' Counsel in submissions that the facts in Lena Binaisa VS Mucunguzi Myers Miscellaneous Application No. 0460 arising from Civil Suit No. 0211/2009 are distinguishable from the ones in this instant case because in the said Nakalema Binaisa case the deponent stated in her affidavit that she had been authorized by the 2nd and 3rd applicants and deposed the affidavit on their behalf.

I am also inclined to agree with the reasoning in ***Esemu Nicholas and Anor vs Mwitanirwa Kazaarwe H.C. Miscellaneous Application 952 of 2020*** that where there is nothing to show that the 3rd Applicant was swearing the affidavit on behalf of the 2nd, 4th and 5th applicants, he deponed the affidavit as a witness who had knowledge and facts upon which the applicant's joint action is based.

He did not state in his affidavit that he is swearing the affidavit on behalf of the other applicants and that this is not a representative suit as envisaged by order 1 rule 12 of the Civil Procedure Rules.

However, whereas I am also inclined to agree that the deputy Town Clerk per the cited Section 64(2) of the Local Government Act Cap 24, had capacity to depone the respondents' affidavit in reply, he did not need authority to depone the respondents' affidavit in reply for he was presenting facts that are within his knowledge as a witness. Be that as it may, the deponent of the affidavit in reply did not attach evidence of his appointment, which would speak to the capacity in which he allegedly deposed the affidavit.

In consequence thereof, whereas a deputy Town Clerk by law has the capacity to depone the respondents affidavit in reply, he did not need authority to depone the responds affidavit in reply for he was presenting facts that are within his knowledge and is also mandated by law to represent government in suits therefore the respondents' affidavit in reply did not offend O.1 r 12 (1) (2) and O.7 r 14 of the CPR but in the instant case, Okaja Emmanuel, the purported deputy town clerk should have attached evidence of his appointment to suffice as capacity in which he deposed the affidavit.

The preliminary point of law therefore succeeds in part, to the extent that the deponent did not attest or provide documentary proof to the capacity in which he deposed the affidavit.

iii. <u>The respondents' affidavit in reply is misdirected and contains no rebuttals to the Applicant's affidavit in support of Notice of Motion offending O. 6 r 8 of CPR:</u>

The applicant submitted that the respondents in a rare manner dodged or misdirected themselves and made reply to 11 paragraphs of the grounds of the application. The applicant's affidavit in support of Notice of Motion containing 23 paragraphs and annextures therein forming evidence to the applications remained unrebutted by the respondents. This offends O. 6 r 8 of the CPR which states that;

> **"It shall not be sufficient for a defendant in his or her own written statement to deny generally the grounds alleged by statement of claim, or for the plaintiff in his or her own written statement in reply to deny generally the grounds alleged in a defence by way counterclaim but each party must deal specifically with each allegation of fact of which he or she does not admit the truth except damages."**

The applicant relied on the case of ***Massa Vs Achen 1978 H.C.B 197*** where the court stated that where certain facts are sworn to in an affidavit the burden to deny them in on the other party, and if he does not they are presumed to be accepted.

That in ***Prof. Oloka Onyango and Ors Vs Attorney General*** it was held that failure to rebut a fact specifically transversed in an affidavit amounts to an admission of that fact. Now that the responds failed to reply to the affidavit amounted to total admission and this application remains un opposed.

The applicant further submitted that the respondents' failure to reply to the 23 paragraphs and annexures therein the applicant's main affidavit in support of the application for Notice of Motion rendered the entire Notice of Motion and affidavit unrebutted which infers to total admission of all the allegations and contents therein. That the application therefore remains unopposed.

b. Respondent Submission:

i. Respondents' affidavit in reply was filed but not served on the applicant offending O.8 r 19 of CPR:

Counsel for the respondents in his submission relied on order 6 rule 10 of the Civil Procedure Rules which provides that when a party in any pleadings denies an allegation of fact in the previous pleadings of the opposite party, he or she must not do so evasively, but answer the point of substance.

Order 8 rule 3 of the Civil Procedure Rules provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleadings of the opposite party, shall be taken to be admitted, except as against a person under disability; but court may in its discretion require any facts so admitted to be proved rather than by admission.

Order 6 rule 17 no objection shall be raised to any pleading on the ground of alleged want of form. Order 13 rule 6 of the CPR provides that any party may at any stage of a suit, where an admission of fact has been made, either on pleadings or otherwise, apply to court for such judgement or order as upon the admission he or she may be entitled to, without waiting for determination of any other questions between the parties; and court may upon the application make such orders, or give judgement, as the court may think just and that Order 13 rule 30 (1) provides that court may, upon application, order any pleadings to be struck out on ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgement be entered accordingly as may be just.

Counsel relied on the case of ***Kawalya Vs Sebanakitta Hamis (Civil Miscellaneous Application) 1534 of 2020) [2021] UGHCLD 78*** **(unreported)** where Lady Justice Alexandra Nkonge Rugabya held that:

"... in relation to the above principles, it is not in doubt that every statement of claim must be specifically dealt with in the defence. But it is also important to note that under Order 8 rule 3 of the CPR, an allegation of fact in a plaint which is not specifically denied is taken as admitted. Court however remains with some discretion under that rule to require any facts so admitted to be proved otherwise than by that admission..".

Court further held that where an admission of facts is made, a judgement on admission may, upon application by a party be entitled at any stage of the suit. That for court to enter judgment for a party such admission has to be clear and unambiguous, stating precisely what is being admitted.

That the respondent in this application denies some of the admissions made by him. That a denial by a defendant and consequently his admission of facts may not on their own operate to justify the striking out of the entire defence, especially where there is no rejoinder to the defence, as happened to be the case in this matter.

Failure to file a rejoinder by the applicant would therefore equally suggest that contents in paragraph 8 were admitted by the applicant/plaintiff. Where the court remains in doubt of certain facts, order 8 rule 3 of the CPR comes into play to exercise its discretion.

Counsel then submitted that, in the instant case the applicant did not file a rejoinder, in paragraph 2 of the respondents affidavit in reply it was stated that the 1st and 3rd respondent have never received an application for request of information from the applicant, in paragraphs 3 and 5, the respondent deny being with the information requested by the applicant and in paragraph 6 it is indicated that that the respondents' substantially disputed the whole of the applicant's claim and further puts a fault on the applicants.

The applicant in paragraph 7 of his affidavit in support averred that he made requests for information from the respondents, in paragraph 10, he stated that the respondent did not avail him with information he requested for in 21 days as stipulated by the law. In paragraph 18 he stated that he subjected to inconveniences.

I agree with counsel for the respondent that the respondents duly responded to the applicant's claim and the affidavit in reply contains a rebuttal to the applicant's affidavit in support of motion as the 1st and 3rd Respondent's denied receiving the applicant's application for information as indicated in paragraph 2 of the respondents' affidavit in reply.

In paragraphs 3 and 5 of the respondents' affidavit in reply, the respondents deny being in custody of the information the applicant requests for and in paragraph 6 the respondents contended that the applicant negligently did not make an application in a form prescribed by law.

On that basis, I find the respondent answered the substance of the applicants claim and therefore do not find any merit in the applicant's objection on this point of law.

ii. <u>The respondents' Affidavit in reply lacks authenticity (lacks a certificate of defence) offending O.9 r 1 (1) of CPR.</u>

The applicant submitted that an affidavit in reply is a form of defence which arises upon being served with a summons from the court. The applicant relied on the case of **Kaur Vs City Auction Mart Ltd 1967 EA 108** where it was held that;

> ***"...the procedure governing suits is laid down under O. 5 of CPR and practice in the court had been to use and treat Notice of Motion as summons. Therefore, where a Notice of Motion is not signed by a Judge and sealed by a court seal as required by O. 5 r 3 then this is a fundamental defect which is incurable and a nullity".***

The applicant also relied on the case of ***Kwesiga George Versus Iganga Municipal Council and Anor (2019)***, where the learned Hon. Justice Micheal Elubu held on page 3 paragraph 7 of his judgement that; by virtue of section 2 of the CPA a motion falls under the definition of civil proceedings under CPA Cap 71

The applicant then submitted that the meaning of this is that O. 5, O. 8 r 1 (2), 19 and O.9 r 1(1) of the CPR applies to affidavits in reply which are a form of written statement of defence in respect to a Notice of Motion,

The applicant also submitted that from the foregoing the affidavit in reply on court record failed to comply to the rules relating to filling of defence as provided O.9 r 1 (1) (3) of CPR which provides that;

A defendant on or before the day fixed in the summons for him or her to file a defence shall file a defence by delivering to the proper officer a defence in writing dated on the day of its filling, and containing the name of the defendant advocate or stating that the defendant defends in person and also the defendant's address for service.

In such a case he or she shall at the same time deliver to the officer a copy of the defence, which the officer shall seal with the official seal showing the date on which it is sealed and then return it to the person filling the defence, and the copy of the defence so sealed shall be a certificate that the defence was filled on the day indicated on the seal. The applicant also relied on the case of ***Kyagulanyi Coffee Ltd Vs Waboka Fredrick & 2 Ors (2019.***

The applicant then submitted that what is on the court record suffers from a lack of integrity and authenticity. the respondent lacks a certificate of defence dully signed by a proper officer usually a registrar and sealed. The failure by a party to comply with mandatory requirement renders the affidavit on court record invalid.

The respondent submitted that the applicant's submissions on this preliminary objection are misconceived, the applicants failed to distinguish a notice of motion from a defence and Affidavit or affidavit in reply and further assumed that the law that applies on all is the same.

A notice of motion is a mode instituting a case/matter in court while an affidavit as a mode submitting evidence and does not need a seal of court.

An affidavit is authentic if sworn voluntary, signed, dated and duly commissioned.

Counsel submitted about the purported authority of Kwesiga George Vs Iganga Municipal Council and another are misleading and he did not provide a proper citation for the case. However the case of ***Kwesiga George Vs Iganga Municipal Council and another (Miscellaneous Cause 3 of 2016) [2019]*** is on the subject of service application not authenticity of affidavit or an affidavit in reply and there is no such holding of justice Micheal Elubu as purported in the applicant's submission.

He then submitted that the respondents' Affidavit in reply is authentic and does not offend order 9 rule 1 (1) of the CPR for it is authentic and duly signed by officers as mandated by law. Its our humble prayer that this preliminary objection be overruled and find the affidavit of the respondent to have requisite requirement and authentic.

He added that the applicant raises this objection in bad fair for his affidavit in support of notice of motion does not have the requirements he claims the respondents should have in their response.

Analysis:

I agree with Counsel for the respondent that the case of Kwesiga George Vs Iganga Municipal Council and another (Miscellaneous Cause 3 of 2016) [2019] is on the subject of service of the application not authenticity of an affidavit.

I further agree with counsel for the respondents that the respondents' Affidavit in reply is authentic and does not offend order 9 rule 1 (1) of the CPR for it is authentic and duly signed as mandated by law.

I therefore overrule the applicant's preliminary objection and find the affidavit of the respondent to have requisite requirement and authentic apart from the deponent providing evidence of his appointment as a deputy town clerk, the capacity in which he deposed the affidavit.

iii. Respondents' affidavit in reply was filed out of time and without leave of court offending O. 8 r 2 and O. 51 r 6 of CPR:

The applicant relied on Order 8 r 1 (2) which reads that where a defendant has been served with a summons in the form provided by rule 1(1) (a) of Order V, of these rules, he or she shall unless some other further order is made by the court, file his or her defence within 15 days after service of the summons.

The applicant submitted that the respondents were served with a notice of summons on 14th/07/2022. The respondents should have filed the affidavit in reply on the 28th/07/2022.

The respondents filed the replies on the 29th/07/2021 the 16th day outside the 15 days prescribed by the law under O.8 r 1(2) of Civil Procedure rules and no reason was given by the respondent for the delay in making the said reply. The respondents out to have sought leave of court to extend time to file the replies under O. 51 r 6 of the CPR than smuggling it improperly and into court record.

The applicant relied on the case of ***Patrick Senyondwa and Ors Vs Lucy Nakito [2019],*** where Hon. Justice Kaweesa remarked that

> ***"it was noted that a reply or defence to an application must filed within 15 days failure, which puts the affidavit in reply having been filed out of time. Because the affidavit in reply, in this case, was filed outside time without leave of court, I have no option but to find that it is improperly before this court. I am unable to exercise the leniency sought by counsel for the respondents as such would encourage sloppy behaviour and non-compliance with court procedures. This is especially where no reason was furnished while the respondent did not exercise the option of seeking leave to file out of time. Consequently, a strike out the respondent's affidavit in reply"***

The applicant also relied on the case of ***URA Vs Uganda Consolidated Properties Limited [2011]***, where it was held by the court of appeal that: time limits set out by statutes are matters of substantive law and not mere technicalities and must be strictly complied with.

The applicant then further submitted that the respondents' affidavit in reply is improperly before this court having been filed out of time on the 16th day from the date of service without leave of court.

Counsel for the respondents relied on the case of ***Twinomuriisa Vs Mugume (Miscellaneous Application 2127 of 2021*** (unreported) where Justice Henry Kawesa while overruling the applicant's objection courted section 34 (1) (a) of the Interpretation Act that it excludes the day in which any act or thing is done in reckoning time.

This means that the 22nd day of November when service was done upon the respondent is excludable. The result is that the respondent filed his reply within 15 days of service of the application.

He submitted that the 1st and 3rd respondents were not served, the 2nd respondent was served on the 14th day of July 2022, and the respondents filed a reply on the 29th day of July 2022. While following the guidance in the Twinomuriisa case, the days for the respondent to file their reply started counting on the 15th of July 2022 therefore the 29th was the 15th day. In that respect the respondents filled their reply within 15 days warranted by law to file a reply.

He also submitted that its trite law that the rule to file a defence within 15 days to file is not applicable to an affidavit in reply. He relied on the case of ***Lam-Lagoro Vs Muni University Civil Cause 7 of 2016 [2017] UGHCCD 85*** Justice Stephen Mubiru rightly held that there is

no requirement for an affidavit in reply to being filed within 15 days but ought to be filed within a reasonable time before hearing of the case.

The respondent's affidavit in reply was filed on 29th July 2022 within a reasonable time of the scheduled hearing date.

Analysis:

On the court record has an affidavit deponed by the Joel Makibwe and an annexure of the notice of motion received by the Soroti City Clerk. It is therefore not true that the 1st respondent was not served. However, there is no proof of service for the 2nd and 3rd respondents. However, a reply was filed by the respondents. The 1st respondent was served on the 14th day of July 2022, and the respondents filed a reply on the 29th day of July 2022.

Madrama J(As he then was) in ***Stop and See (U) Limited Vs Tropical Africa Bank HCMA No. 333 of 2010*** stated that the rules of procedure are meant to give parties timelines within which to file and complete their pleadings. The timelines that apply to a plaint and written statements of defense also apply to applications and affidavits in reply and rejoinder. A reply to an application must be filed within 15 days from the date of service of the application. Failure to file that affidavit in reply within 15 days puts the reply out of time prescribed by the rules. Once a party is out of time, he or she must seek leave of court to file the affidavits in reply outside the prescribed time.

Therefore, Order 8 r 1 (2) reads that where a defendant has been served with a summons in the form provided by rule 1(1) (a) of Order V, of these rules, he or she shall unless some other further order is made by the court, file his or her defence within 15 days after service of the summons is applicable to instant case relating to filing the affidavit in reply.

That being the case, my interpretation would be in favour of the applicant's arguments that the respondents should have filled the replies on the 28th/07/2022 rather than the 29th/07/2022 the 16th day outside the 15 days prescribed. The days begun running against them on 14/07/2022 and ended on 29/07/2022, the date he filed his defence.

Therefore, the days within which the respondents filed their affidavit in reply lapsed on 28th/07/2022, an indication that the affidavit in reply which was filed on 29th/07/2022 is time-barred, and therefore not the affidavit in reply ought to be struck out with costs. The preliminary objection is sustained in favour of the applicant because the affidavit in reply was filed on the 16th day and offends Order 8 r 1 (2) Civil Procedure Rules. Be it as it may Article 126 (2) (e) of the constitution of the Republic of Uganda is not intended to regard procedural irregularities.

Since the affidavit in reply stands struck out, I move forward to consider the merits of the application.

iv. <u>The respondents' affidavit in reply contains glaring mistakes and errors on the face of the record:</u>

The applicant submitted that the applicant's title of notice of motion, affidavit in support and summary of evidence on court record relates to Misc. Cause No. 10/2022.

Shockingly the respondent's joint affidavit in reply and summary of evidence on court record though showing similar parties relates to Misc. Application No. 71/2021 arising from Misc. Cause No. 13/2021.

This is the highest level of negligence, recklessness and an abuse of court process by the respondents who on court record are well represented.

The applicant relied on the case of ***Levi Outa Vs Uganda Transport Company,*** court held that, the expression ***"Mistakes or error apparent on the face of record"*** refers to an evident error which does not require extraneous matter to show its incorrectness so manifest and clear that no court would permit such an error to remain on record. It may be an error of law but the law must be definite and capable of ascertainment. And that court went ahead and stated that if an error is not self-evident and detection, thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 rule 1 of the civil procedure rules and section 80 of the Act…

The plaintiff then submitted that in the instant case, the mistake or error on the face of record on the deference in file numbers on the court record is evident requiring no extraneous matter to show its incorrectness. It is barely open in the premise of errors apparent on the face of the record that even article 126 (2) (e) of the constitution may not offer the respondent and their counsel refuge in law to justify the said mistake or error on the face of the record. The applicant also relied on the case of Byaruhanga and company advocates Vs Uganda development bank, S.C.C.A No. 2 of 2007 (unreported) where supreme court decided in that case that a litigant who relies on the provisions of article 126 (2)(e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to have undue regard to a relevant technicality. Article 126 (2)(e) is not a magical wand in the hands of defaulting litigants.

Counsel for the respondents submitted that the applicant's submissions on the preliminary objection are misleading. The applicant cited the case of Levi Outa Vs Uganda Transport Company however he did not provide the citation so as to ascertain validity of his submission however on reading his submission in his purported said case, it is evident that the case is about appeals not mere mistakes.

Section 100 of the Civil Procedure Act Cap 71 provides that court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceedings. Order 6

rule 17 of the CPR provides that no objection shall be raised to any pleading on the ground of alleged want of form. Article 126 (2) e of the constitution which is to the effect that substantive justice is to be administered without undue regard to technicalities.

In the case of ***Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd [1969] EA 696*** it was held that a preliminary objection consist of an error on the face of pleadings which arises by clear implication out of pleadings and which if argued as a preliminary objection may dispose of the suit. Example of which includes, an objection to the jurisdiction of the court, a plea of limitations or a submission that parties are bound by contract giving rise to the suit to refer the suit to arbitration.

An error that is not so grave can be cured by Article 126 (2) e of the constitution which is to the effect that substantive justice is to be administred without undue regard to technicalities. In the case of ***Re Namatovu Tebajjukira [1992 - 93] HCB 85*** it was held that administration of justice requires that the substance of dispute should be investigated and decided on their merits and those errors and lapses should not necessarily debar a litigant from the pursuit of his right.

In a related case of ***Nanjibhi Prabhudas and Co. ltd V Standard Bank Ltd [1968]*** it was held that the court should not treat an incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature.

The error on the title of the reply where the respondets indicated Miscellaneous Application No. 71 of 2021 arising out of Micella instead of Miscellaneous Cause No. 10/2022 does not warrant raising a preliminary objection for it is not on a point of law and may not dispose of the suit/application as O.6 r 17 prohibits preliminary objection on want of form like it is in the instant application, it also further follows that the substance of response by the applicant is for an affidavit in reply to the applicants claim and it will be in the interest of justice that parties be heard.

The court can evoke its inherent powers under section 100 of the Civil Procedure Rules to amend the error on the respondents' affidavit in reply to Misc Application No. 71 of 2021 arising out of Misc Cause 13/2021 to Miscellaneous Cause No. 10/2022 and proceed to determining the real issue raised by the pleadings so that justice may be reached in this application.

I agree with counsel for the respondent that the error in the title of the reply where the respondents indicated Miscellaneous Application No. 71 of 2021 arising out of Micella instead of Miscellaneous Cause No. 10/2022 does not warrant raising a preliminary objection for it is not on a point of law and may not dispose of the suit/application, O.6 r 17 prohibits preliminary objection on want of form like it is in the instant application.

It is true that the indication Miscellaneous Application No. 71 of 2021 arising out of Micella instead of Miscellaneous Cause No. 10/2022 was an error.

In the interest of justice, I would invoke my authority under section 100 of the Civil Procedure Act Cap 71 to amend the defect.

I, therefore, find no merit in the preliminary objection. It is overruled.

I now proceed to resolve the issues in this application. Since the affidavit in reply was struck off by my decision in preliminary objection (e), I proceed to consider the Miscellaneous Cause on its merits.

a. Whether the applicant's rights were violated.

The applicant submitted that the applicant alleges that the respondent violated his rights enshrined under articles 20, 38, 40 (2), 41 and 45 of the constitution of 1995 as amended.

The applicant stated that Article 20 of the constitution 1995 as amended provides that

(1) fundamental rights and freedoms of the individua are inherent and not granted by the state.
(2) The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted all organs and agencies of government and by all persons.

The applicant divided the issue into 3 categories of violations of rights as follows;

a) Violation of rights to information
b) Violation of applicant's civic rights and activities under Art. 38 and 45 of the constitution 1995.
c) Violation of applicant's economic rights.
d) Violation of rights to information
We address them as follows;
a) Violation of rights to information

The applicant submitted that Article 41 of the Constitution of the Republic of Uganda provides that every citizen has a right to access to information in the possession of the state or any other organ or agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right of the privacy of any other person.

That section 5 of the Access to Information Act 2005 provides that

(1) every citizen has a right of access to information and records in the possession of the state or any public body except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person.

(2) For the avoidance of doubt, information and records to which a person is entitled to have access under this Act shall be accurate an up to date so far as it is practicable.

Section 6 of the same act provides that a person's right of access is, subject to this act, not affected by –

a) Any reason the person gives for requesting for access; or
b) The information officer's belief as to what the person's reasons are for requesting access.

Section 16(1) of the right of access to information Act 2005 provides that an information officer to whom a request for access has been made shall as soon as reasonably possible comply within 21 days after the request is received unless an extension is sought under section 17 (1) of the same Act.

The applicant relied on the case of ***URA Vs Uganda Consolidated Properties LTD (2011),*** where it was held by the court of appeal that time limits set out of statutes are matters of substantive law and not mere technicalities and must be strictly complied with.

The applicant also relied on the South African case of the ***President of the Republic of South Africa Vs M & G Media*** and Article 19 of the Universal Declarations of Human Rights, Article 9 (1) of the Africa Charter on Human and Peoples Rights.

The applicant then submitted that in paragraphs 7 and 17 of the affidavit in support of the notice of motion made requests to the respondents on the 14th/02/ 2022 and expected feedback within the 21 statutory periods. The respondents never took any step to comply with any of the rules to communicate reasons for the refusal or delay in granting the information sought by the applicant and that this act amounted to violation of the applicant's right to information as enshrined under article 41 of the constitution 1995 as amended.

Counsel for the respondent submitted that the applicant's right to information was not violated because his purported undertaking with the respondent was not in line with the law so as to want the applicant a right capable of being violated.

Section 11 (i) of the Access to information Act of 2005 provides that a request for access to a record or information shall be in writing in prescribed form to the information officer of the public body in control of the record or information required and shall provide sufficient details to enable an experienced employee of the public body to identify the record or information.

Section 11 (2) of the Access to information Act of 2005 provides; that the form for a request for access prescribed under subsection (i) shall require the person requesting access -

(a) To provide sufficient particulars to enable the informing officer to identify –
(i) The record or records requested; and

(ii) The person requesting the information;

(b) To indicate which applicable form of access referred to in section 20 (2) is required;

(c) To specify the address of the person requesting the information; and

section 24 (i) of the Access to information Act of 2005, provides that a person is entitled to access information or a record of a public body if that person complies with all the requirements in this Act relating to request for access to that information or record and access to that

Counsel then submitted that the applicant did not make a request with any of the respondents in this matter. The applicant in paragraph 7 of his affidavit in support of the application avers that he made a request to the respondents requesting for information specifically on plot 25 and 25A situated on cemetery road, city Eastern Division, Soroti. He annexed official letters received by Central Region Soroti City which letters he annexed and marked as LSC 3 and 4. He also stated in paragraph 17 that he wrote a reminder and the reminder letter he annexed and marked as annexure LSC 5, and he purports that this amounted to a request to access as mandated by law.

However, the request by the applicant offends section 11 (1) of the Access to Information Act of 2005 for it is not in a prescribed form and did not provide sufficient details to enable the 2nd respondent to identify the subject and does not provide particulars to identify the record requested, the particulars of the person requesting and the applicable form of access in section 20 of the Access to Information Act of 2005 and the address of the person requesting for the information.

As if that's not enough the application letter is on a headed paper of Mareena Associates and signed by the applicant thus indicating two persons. This further offends section 5 of the Access to Information Act of 2005.

The applicant did not comply with sections 5 and 11 of the Access to Information Act of 2005 and therefore in light of section 24 (i) of the Access to Information Act of 2005, the applicant is not entitled to access to information or a record of the respondents or public body or get assistance as required by law.

In paragraph 5 of the applicant's affidavit in support of this application, the applicant averred that the respondent is the custodian of public information and is by law mandated to enable him to access information timely in his possession when requested for. In paragraph 7 he stated that on the 14th of February 2022, he made 2 requests to the respondents requesting information specifically on plots 25 and 25A situate on Cemetery Road, City Eastern Division, Soroti from the respondents.

In paragraph 10, he states that the information he requested was not given to him within 21 days as stipulated by law.

The applicant in paragraph 7 annexed a copy of acknowledgements of requests on a headed paper of Mareena Associates Human Rights Consultants located on the 3rd Floor Conrad Plaza, Room 01 next to Garnish Plaza Entebbe Road; the contents of which are a request for a certified record of information relating to plot 25 Cemetery Road, Soroti City East and another requesting for a certified record of information relating to plot No. 25A Cemetery Road, Soroti City East. Both requests are received by Soroti City Central Registry.

The applicant's requests are signed by Labu Said Chepchulei, the applicant but under Mareena Associates and therefore do not provide for the applicant as the person requesting for the information.

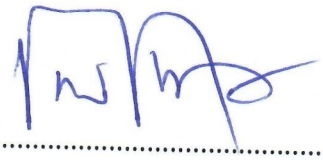
This shortfall faults the requirements of section 11 (2) (iv) and (f) of the Access to information Act 2005 as it is not in a prescribed form and did not provide sufficient details to enable the 2nd respondent to identify the subject.

Accordingly, it is the finding of the court that the applicant's requests did not meet the requirements of sections 11 and 5 of the Access to Information Act 2005 and was not entitled to information or a record of the respondents. On that basis, I resolve this issue in the negative.

Having resolved that the applicant was not entitled to information sought his having not complied with the law, I am therefore reluctant to resolve the remaining issues.

In the result, this application fails on all grounds and I hereby dismiss it with costs to the respondents.

I so order.



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Hon. Justice Dr Henry Peter Adonyo

Judge

23rd January, 2023