THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 203 OF 2021

(ARISING FROM CIVIL SUIT NO. 202 OF 2020)

LAW DEVELOPMENT CENTRE :: APPLICANT

VERSUS

HON. MICHAEL MABIKKE :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Applicant brought this application by Notice of Motion under Section 17(2) of the Judicature Act Cap 13, Sections 5, 7 & 98 of the Civil Procedure Act Cap 71, Order 6 rules 29 & 30, Order 7 rules 11(d) & (e), and Order 50 of the Civil Procedure Rules S.I 71-1, seeking orders that;

a) The plaint in High Court Civil Suit No. 202 of 2020 be rejected and struck out.
b) High Court Civil Suit No. 202 of 2020 be dismissed with costs to the Applicant.
c) The Respondent be ordered to pay costs of the application.

[2] The grounds of the application as summarized in the Notice of Motion are that High Court Civil Suit No. 202 of 2020 (hereinafter to be referred to as the **"main suit"**) is an abuse of court process in so far as it is res judicata; time barred; its plaint is incompetent in so far as it is a suit for defamation; the plaint is incompetent in so far as it alleges contempt of a ruling of the Supreme Court; the plaint is incompetent in so far as it is filed to allegedly enforce previous court judgments/ rulings as test suits; the plaint is incompetent and incapable of proper adjudication as it concurrently seeks remedies rooted in both private and public law; the main suit is disguised as an application for

judicial review cum enforcement of human rights firmly rooted in public rather than private law; and the plaint is prolix, argumentative, disjointed, embarrassing and offensive to the rules of pleadings. It is in the interest of justice and equity that the application is allowed.

[3] The application is supported by an affidavit deposed by **Lukyamuzi Hamis Ddungu**, the then Ag. Secretary of the Applicant, who stated that the Respondent was awarded a post graduate diploma in legal practice by the Applicant on 3rd September 2010. Following numerous complaints about examination malpractice in the Applicant institution, the Director of the Applicant appointed an audit committee to conduct a preliminary investigation of the allegations of examination malpractice between 2004 and 2011. In its preliminary report, the audit committee found, among others, that there were discrepancies in the award of the post graduate diploma to the Respondent. The audit committee prepared a forensic audit report and another committee headed by the Rtd. Hon. Justice Kania was appointed to investigate and hold hearings on the findings of the Report. But in January 2013, the Respondent filed HCMA No. 0002 of 2013 (Hon. Mukasa Mbidde & Micheal Mabike v Law Development Centre) challenging the constitution of the Audit Committee and the Justice Kania Committee; the Applicant being functus officio after a making award of the Diploma to the then applicants; and failure of the Audit Committee to observe the rules of natural justice.

[4] The deponent stated that the court found that the appointment of the Audit Committee was lawful and that the present Applicant had power to revoke diplomas in Legal Practice but the court recommended that another sub-committee be constituted in place of the Justice Kania Committee. The Applicant's Management Committee then constituted a sub-committee headed by Dr. Pamela Tibihikira Kalyegira (hereinafter to be referred to as **"the Dr. Pamela Committee"**) to hold hearings on the forensic audit report. The Dr.

Pamela Committee held hearings on the Forensic Audit Report from June 2015 to November 2015 and submitted a report on 30th November 2015 wherein it was recommended, among others, that the post graduate diploma in legal practice awarded to the Respondent be revoked. The said recommendation was adopted by the Applicant's Management Committee in a meeting held on 11th February 2016.

[5] In January 2020, the Respondent filed the present main suit on grounds that the decision by the Applicant Management Committee revoking his post graduate diploma in legal practice was unconstitutional; wrongful, unjust, illegal, null and void in as much as it was arbitrary and contrary to the principles of natural justice. The Applicant avers that the matters raised in the main suit regarding the Forensic Audit Report were the same matters adjudicated upon vide HCMA No. 2 of 2013 and the same were conclusively resolved. Whereas the Respondent appealed to the Court of Appeal, the appeal was dismissed with costs while the appeal in the Supreme Court was withdrawn by the present Respondent. The Applicant further avers that the Respondent made a claim in defamation in the main suit but did not follow the rules of pleadings in a case for defamation and, as such, the suit is incompetent. The deponent also averred that Supreme Court Civil Application No. 15 of 2015 filed by the present Respondent in the Supreme Court seeking an interim order of stay of execution was dismissed without any orders against the present Applicant (then Respondent) and, therefore, the allegation of contempt of court in the main suit is unfounded.

[6] It is further averred in the affidavit in support that in the main suit, the Respondent herein seeks to enforce previous judgments to which he was not a party on the ground that they are test suits which is incorrect. The Respondent also seeks remedies founded in both public and private law in the plaint which matters are incapable of proper adjudication. The plaint in the main suit thus

offends the rules of pleadings, is prolix, repetitive, circuitous, disjointed, argumentative and incurably defective and it ought to be struck out.

Opposition to the Application

[7] The Respondent filed two affidavits in reply; one deposed by **Luwalira Muhamad**, an advocate working with the firm representing the Respondent, filed on 27th April 2021; and another by himself filed on 2nd September 2021. The Respondent also filed a supplementary affidavit on 4th July 2022. The gist of the averments in the affidavits in reply is that the Audit Committee appointed by the Applicant's Management Committee did not conduct its activities lawfully and did not exercise the rules of natural justice and fair hearing. The Respondent denied that the main suit is res judicata since it is premised on a different cause of action from MA No. 2 of 2013. He further stated that the recommendation to revoke his Diploma Award was reached without exercising the rules of natural justice. He stated that the claims of defamation in the main suit are well founded since the publication in various newspapers were unfair and prejudicial to the Respondent's legal career and professional reputation.

[8] The Respondent further averred that it was the finding of the Supreme Court in **MA. 15 of 2015; Hon Mukasa Mbidde and Hon. Micheal Mabike vs LDC** that no court will condone cancellation of anybody's Diploma in Legal Practice without allowing them their right to be heard. He went further that there are several decisions where the court has quashed the decision of the Applicant's Managing Committee for being marred with bias, arbitrariness and procedural impropriety; and that those are in essence test suits for the instant suit. It is also averred that the main suit is based largely on declaratory judgment relating to the cancellation of the Respondent's Diploma which was not only unconstitutional but was also wrongful, unjustified and illegal. He concluded that the main suit is not time barred, it discloses a cause of action

and seeks remedies founded in both private and public law; which ought to be investigated accordingly.

[9] The Applicant filed an affidavit in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

[10] At the hearing, the Applicant was represented by Mr. Agaba Kenneth appearing on brief for Mr. John Musiime while the Respondent was represented by Mr. Justin Ssemuyaba. The hearing proceeded by way of written submissions which were duly filed by both Counsel and have been adopted and relied on by the Court. The application raised several preliminary points of law which Counsel argued under distinct headings. I will handle the points accordingly, although with necessary modifications.

A. Defectiveness of the Affidavits in Reply and the Supplementary Affidavit

Submissions

[11] It is submitted by Counsel for the Applicant that by the time the 2nd affidavit in reply was filed by the Respondent, the Applicant had already filed a rejoinder to the 1st affidavit in reply and therefore did not have an opportunity to respond to the 2nd affidavit in reply since the pleadings had since closed. Counsel therefore submitted that the 2nd affidavit in reply was an ambush with the effect that the Applicant was denied a chance to respond to it. He prayed that the 2nd affidavit in reply should not be permitted by court as it has the effect of prejudicing the Applicant's rights.

[12] Counsel for the Applicant went further that the affidavit deponed by Luwalira Mohamed is also incurably defective in so far as it is not confined to matters within his personal knowledge and where it is based on information

and belief, it does not state the source of the alleged information and belief. Besides, the said affidavit is argumentative and offends Order 19 of the CPR. Similarly, it is submitted that the said affidavit is offensive since it is sworn by an advocate without the authority of the Respondent hence contravening the Advocates Professional Conduct Regulation SI 267-2 and Order 3 of the CPR. Counsel referred to the authorities of **Male H. Mabirizi Kiwanuka v AG and Mugoya Construction and Engineering Company Ltd vs Central Electricals International Ltd MS 699/2011.** Counsel therefore invited the court to strike out both affidavits and treat the application as unopposed.

[13] In reply, Counsel for the Respondent started by making a prayer seeking leave to admit his affidavit in reply filed on 2nd September 2021 on the ground that at the time of filing Luwalira's affidavit in reply, the Respondent had travelled to USA, where he got held up owing to the Covid-19 pandemic lockdown. Counsel also implored the Court to admit the supplementary affidavit stating that he was unable to file the same earlier due to Covid-19 related restrictions and the lockdown that had been declared throughout the country. He therefore invited the court to allow the same in the interest of justice. Counsel made reference to the decision in **Stop and See (U) LTD Vs Tropical Africa Bank, HCMA No. 333/ 2010; Kuluo Joseph Andrew & Others vs AG, HCMA No. 106 of 2010.**

[14] In answer to the objections regarding the affidavits filed by the Respondent, Counsel submitted that the affidavit filed by Luwalira is not defective as alleged by the Applicant since the said deponent is an advocate in M/S Semuyaba, Iga & Co. Advocates and the deponent alluded to matters within his personal knowledge. It is submitted that as an advocate, the deponent could therefore swear an affidavit based on knowledge of the client's facts upon instructions by the said client. Counsel made reference to Order 3 CPR, The Advocates Professional Conduct Regulations, and the case of **Kizito**

vs Kampala Financial Services Ltd & 3 Others, CS No. 30 of 2016. Counsel further submitted that the affidavit sworn by Luwalira is neither argumentative nor prolix as alleged by the Applicant. In the alternative, Counsel invited the court to adopt the notion of severance of offending parts from the affidavit. Counsel made reference to **Dr. Kizza Besigye v Museveni & Another, SC Election Petition No. 001 of 2001.** Counsel for the Respondent also argued that after the Respondent's 2nd affidavit in reply, the Applicant had a chance to file another rejoinder since the pleadings had not closed and the said affidavit was filed on the same day on which the Applicant's affidavit in rejoinder had been filed.

[15] In their submissions in rejoinder, Counsel for the Applicant also objected to the supplementary affidavit which the Respondent filed on 4th July 2022 long after pleadings had closed and the case was at submissions level. This affidavit was filed on the same day as the Respondent's submissions and without leave of the Court. Counsel prayed that the supplementary affidavit be rejected by the Court as well.

Determination by the Court

[16] I will start with the contentions raised regarding the 1st affidavit in reply deposed by Muhammad Luwalira and filed on 27th April 2021. The argument by Counsel for the Applicant is that the said affidavit is incurably defective in so far as it is not confined to matters within the deponent's personal knowledge and where it is based on information and belief, it does not state the source of the alleged information and belief. It is also argued that the said affidavit is offensive since it is sworn by an advocate without the authority of the Respondent hence contravening the Advocates Professional Conduct Regulation SI 267-2 and Order 3 of the CPR.

[17] The deponent of the 1st affidavit in reply, Muhammad Luwalira, was at the material time said to be an advocate working with the firm representing the Respondent in the present application, the main suit and in earlier matters concerning the same subject matter. He stated in the affidavit that he possessed full knowledge of the facts of the case and was competent enough to depose to those facts. I have perused the said affidavit in reply and I have found no averment that could amount to hearsay. The averments therein are based on the deponent's knowledge of what had transpired in earlier proceedings and also from contents of documents which are part of the record. I therefore do not find anything in the affidavit that is offensive to the provisions under Order 19 of the CPR.

[18] The other contention was that the deponent made the said affidavit as an advocate without proof of authority of the Respondent. This argument appears to me to have no basis in law. Under the law, an advocate has authority to do all things permitted under the law for the progress of the client's case. It is not disputed that Luwalira Muhammad was an advocate in the firm representing the Respondent. Once he is a member of the firm, he does not need authority to depose to a matter that is within his personal knowledge. *Order 3 rule 1 of the CPR* is crystal clear on this. It authorizes any act that may be done by a party to be done by an advocate duly appointed to act on that person's behalf. Instructions by a client are given to a firm and not to a single advocate in a firm unless otherwise expressly stated. An advocate in a firm representing a client can only be barred from giving evidence in a matter where the matter is contentious and is at the same time appearing in court for the client. In such a case, the advocate has to choose whether to appear as counsel or as a witness. That is the import of *Regulation 9 of the Advocates (Professional Conduct) Regulations*. In the present case, Luwalira Muhammad is not in any way barred from giving evidence on behalf of the Respondent. This part of the objection is therefore not made out.

[19] The affidavit of Luwalira Mohammad was also attacked on the ground that it is prolix, argumentative and offends Order 19 of the CPR. Prolixity was defined by the Supreme Court in ***Male H. Mabirizi Kiwanuka vs Attorney General, SC Misc. Application No. 7 of 2018 (arising from Constitutional Appeal No. 2 of 2018)***, while quoting the **Black's Law Dictionary, 9th Edition, at page 1331**, as the **"unnecessary and superfluous stating of facts and legal arguments in pleading or evidence**." The Court cited Order 19 rule 3 of the CPR and held that an affidavit should contain facts and not arguments or matters of law. An affidavit supporting an application should adduce evidence supporting the application and not argue the application. The length of the affidavit is also a matter that can be taken into account when determining prolixity although such by itself cannot be the determining factor.

[20] On the case before me, the affidavit of Luwalira Muhammad, in my view, does not contain those offensive features. It contains 30 paragraphs which are not so lengthy. It contains a narrative of the background facts and averments stating the Respondent's case and contentions. I do not find it argumentative. While it is in some parts repetitive and incoherent, such is at a level that can be ignored or severed from the substantive averments of the deponent. I am therefore not satisfied that the affidavit in reply deposed by Luwalira Muhammad is offensive on account of being prolix and argumentative. This part of the objection also fails.

[21] The next issue regards the 2nd affidavit in reply deposed by the Respondent himself and filed on 2nd September, 2021. To begin with, it is not procedurally correct to depone to more than one affidavits in reply to one affidavit sworn in support of an application. Where an affidavit in reply has been filed, the other affidavits should come in as supplementary affidavits. This is with the exception of where the application was supported by numerous affidavits; in which case, the Respondent can file as many affidavits in reply. In this case,

the application was supported by one affidavit. The Respondent was not procedurally right to depone to another affidavit in reply in a manner that purports to ignore the affidavit in reply earlier filed or that would make one of the affidavits superfluous.

[22] The second and indeed more pertinent issue is the time at which the 2nd affidavit in reply was filed and the fact that no leave of the Court was first sought. The said affidavit in reply was filed on 2nd September 2021. This objection also applies to the supplementary affidavit which was filed on 4th July 2022 at the same time as the Respondent's submissions in reply. *Order 12 rule 3(2) of the Civil Procedure Rules SI 71-1* provides that *"service of an interlocutory application to the opposite party shall be made within fifteen (15) days from the filing of the application, and a reply to the application by the opposite party shall be filed within fifteen (15) days from the date of service of the application and be served on the applicant within fifteen (15) days from the date of filing of the reply"*. This provision was extensively interpreted in the case of ***Stop and See (U) Limited vs Tropical Africa Bank Limited, HC Miscellaneous Application No. 333 of 2010*** wherein **Madrama J.** (as he then was) held that a "reply or defence to an application has to be filed within 15 days. Failure to file within 15 days would put a defence or affidavit in reply out of the time prescribed by the rules. Once a party is out of time, he or she needs to seek leave of court to file the defence or affidavit in reply outside the prescribed time."

[23] In the instant case, there is no evidence on record as to when the Notice of Motion was served upon the Respondent. However, there is evidence that it was filed on 16th March 2021 and that on 27th April 2021, the 1st affidavit in reply was filed on behalf of the Respondent. There was no contation before the Court regarding the timeliness of the said affidavit. That being the case, even if the court were to count the 15 days from the 27th April 2021, they would have

elapsed by 12th May 2021. Filing an additional affidavit in reply on 2nd September 2021 without leave of the court was way out of time. Filing a supplementary affidavit on 4th July 2022 without leave of the court was worse. Such procedural defect cannot be cured even by the wildest extension of the rules of substantive justice. The two affidavits have to be struck off the record.

[24] In the circumstances, the objection concerning the Respondent's affidavits partly succeeds. While the affidavit of Luwalira Muhammad is saved, the affidavit in reply by the Respondent and the supplementary affidavit were irregularly filed and are accordingly struck off the record.

B. The Objection based on the Doctrine of Res judicata

Submissions

[25] It was submitted by Counsel for the Applicant that the main suit filed by the Respondent seeks, among others, to challenge the Forensic Audit Report made by the Committee appointed by the Applicant's Management Committee and all the decisions made on its basis, particularly on aspects such as the constitution of the audit committee, and the conduct leading to the recalling of the Respondent's post graduate diploma in law. Counsel submitted that all these matters were resolved by the Court in **Hon. Mukasa Mbidde and Hon. Michael Mabike vs Law Development Centre, HCMA No. 2 of 2013.** Counsel submitted that the Respondent herein appealed against the decision in the Court of Appeal and lost. He then appealed to the Supreme Court but later on withdrew the appeal in the Supreme Court. Counsel maintained that all the issues raised in the main suit have already been resolved by the court and any attempt to re-introduce the matter amounts to res judicata. Counsel invited the court to consider the provisions of Section 7 of the CPA and the authority in **Maniraguha Gashumba vs Sam Nkundiye, CACA No. 23 of 2005**.

[26] In reply, Counsel for the Respondent submitted that the main suit is not res judicata. He submitted that the main suit seeks, among others, to challenge the manner in which the "Pamela Sub-committee" of the Applicant was constituted and the procedure of recalling the Respondent's Diploma Award by the Applicant. These matters have never been resolved by any previous suits as alleged by the Applicant. Counsel argued that the main suit is about investigations that were commissioned by the Applicant from 2013 and in particular the one of 2015; while the proceedings in the High Court, Court of Appeal and the Supreme Court were based on the forensic audit report which later formed the basis of the Dr. Pamela Committee. Counsel further argued that the Dr. Pamela Committee report and the subsequent decisions of the Applicant were not subject of adjudication in the earlier proceedings.

Determination by the Court

[27] The doctrine of *res judicata* is codified in the provision under *Section 7 of the Civil Procedure Act* which provides as follows:

> *"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by that Court."*

[28] The above cited provision is supported by a number of explanations but for the purpose of this matter, I will make reference to explanations 1, 3 and 4, as follows;

> *"Explanation 1: The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it.*
>
> *……*

Explanation 3: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation 4: Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit."

[29] The position of the law on res judicata has also been succinctly put by the Court of Appeal in ***Ponsiano Semakula Vs Susane Magala & Others, 1993 KALR 213*** which was cited with approval in the latter case of ***Maniraguha Gashumba Vs Sam Nkundiye, CA Civil Appeal No. 23 of 2005***; where the Court had this to say:

"The doctrine of res judicata, embodied in S.7 of the Civil Procedure Act, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine (is) succinctly expressed in the well-known maxim: 'nemo debet bis vexari pro una et eada causa' (no one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by res judicata appears to be that the plaintiff in the second suit is trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

[30] The above dictum properly surmises the doctrine. It follows, therefore, that the essential elements of the doctrine of res judicata are that;

a) There was a former suit between the same parties or their privies;
b) The matter was heard and finally determined by the court on its merits;
c) The matter was heard and determined by a court of competent jurisdiction; and
d) The fresh suit concerns the same subject as the previous suit.

(See: *Bithum Charles Vs Adoge Sally, HCCS No. 20 of 2015* which relied on ***Ganatra v. Ganatra [2007] 1 EA 76; Karia & Another v. Attorney General & Others [2005] 1 EA 83 at 93 -994;*** and ***Attorney General & Anor vs. Charles Mark Kamoga MA 1018 of 2015*****)**.

[31] On the case before me, the Respondent and another (Hon. Mukasa Mbidde) in M.A No. 002 of 2013 challenged the forensic audit report of a committee that had been established by the Applicant's Management Committee on basis of constitution of the committee and its failure to adhere to the rules of natural justice. After presentation of the forensic audit report, the Applicant's Management Committee had formed another committee to conduct investigations based on the data that had been gathered by the forensic audit committee and put in its report. This latter committee was headed by Hon. Justice Augustine Kania (Rtd) and has been referred to as the "Justice Kania Committee". So, the applicants in M.A No. 002 of 2013 also challenged the constitution of the "Justice Kania Committee".

[32] The High Court found that the forensic audit committee had been properly constituted by the Applicant's Management Committee, that it was a fact finding and not an investigative body and, as such, it was not required to hear any particular persons. That being the case, it could not have been expected to comply to any rules of natural justice. Its report was therefore upheld by the Court. The Court, however, found that the "Justice Kania Committee" had not

been properly constituted as the same had been appointed in violation of the relevant law. The Committee was, therefore, set aside and the Applicant was advised by the Court to appoint another committee in line with the relevant legal provisions. This is what led to the appointment of another committee headed by Dr. Pamela Tibihikira-Kalyegira, which is referred to as "the Dr. Pamela Committee". This is the committee that carried out investigations based on the forensic audit report and recommended, among others, the cancellation of the Respondent's post graduate diploma in legal practice.

[33] It is clear from the above facts that matters concerning the legality and/or propriety of the forensic audit committee report and the Justice Kania Committee were subject of adjudication in M.A 002 of 2013 and finally determined between the same parties, by a court of competent jurisdiction. A fresh suit concerning the same subject as the previous suit cannot therefore be entertained by the Court and is barred on account of the doctrine of res judicata.

[34] On the other hand, it is clear that by the time the previous matter was heard and determined by the High Court, the "Dr. Pamela Committee" was not in existence and the same was constituted pursuant to the decision of the court in the previous suit. As such, the activities and the report of the said committee could not have been subject of the appeals in the Court of Appeal and the Supreme Court. There is no way any issue concerning the conduct and report of the Dr. Pamela Committee could have been litigated in the previous suit. The issues concerning this committee including the cancellation of the Respondent's post graduate diploma in legal practice have never been litigated and are, therefore, outside the domain of res judicata.

[35] In the circumstances, this point of objection partly succeeds. Part of the suit is res judicata while the other part is not.

C. The Plaint is incompetent as it does not disclose a suit in defamation.

Submissions

[36] It was submitted by Counsel for the Applicant that under the law, to found a cause of action in defamation, a plaintiff must reproduce the allegedly defamatory words verbatim for proper consideration by the court. Counsel referred the Court to the case of **John Kizito vs The Red Pepper Publication, HCCS No. 624 of 2016**. Counsel submitted that in the main suit, the plaint does not contain a reproduction of the purportedly defamatory words as required. The Respondent merely attached copies of newspaper articles and does not show the parts that are defamatory. Counsel therefore concluded that the plaint does not disclose a cause of action for defamation and offends Order 7 of the CPR. Counsel prayed that the same ought to be rejected under Order 7 rule 11(a) of the CPR. Counsel for the Respondent made no specific response to this submission by the Applicant.

Determination by the Court

[37] It is a settled position of the law that in a suit for defamation, the words that are allegedly defamatory ought to be clearly set out to enable the court assess whether they are indeed, defamatory. In ***Rtd. Col. Kiiza Besigye vs EC & Anor, Presidential Election Petition No. 1 of 2006***, Odoki CJ (as he then was) citing **Bullen and Leake, and Jacobs Precedents of Pleading, 12th Ed. (1975) at page 626**, made the following preposition:

> ***"The libel must be set out verbatim in the statement of claim, it is not enough to set out its substance or effect as the precise words of the documents are themselves material … Where the defamatory matter is part of a longer passage, the defamatory part only need to be set out provided the remainder of the passage would not vary the meaning of the defamatory matter…"***

[38] I have perused the plaint and the annexures there to. Whereas a copy of a newspaper article was attached to the plaint under the heading, ***'Mbidde, Mabikke law diplomas fake – report;*** the Respondent did not labour to quote the defamatory words in the plaint as required. As indicated above, the law requires that the allegedly defamatory words must be set out verbatim in the plaint, failure of which makes the claim for defamation unfounded and incompetent. This point of objection is therefore upheld in the circumstances.

D. The Plaint is incompetent in as far as it is based upon an alleged contempt of a Ruling of the Supreme Court.

Submissions

[39] It was submitted by Counsel for the Applicant that the contempt of court alleged in the plaint arises out of a ruling of the Supreme Court vide **SC MA No. 15 of 2015: Hon. Mukasa Mbidde & Hon. Michael Mabikke vs LDC**. Counsel submitted that it is trite that all contempt proceedings are matters between the Court and an alleged contemnor. Proceedings for civil contempt are regarded as a form of execution and enforcement of the order alleged to have been violated. Counsel concluded that, as such, it was improper to bring, in the High Court, an action for contempt of court proceedings over an order passed by the Supreme Court.

[40] In reply, it was stated by Counsel for the Respondent that in **SC MA No. 15 of 2015**, the present Applicant was ordered to conduct a thorough investigation and inquiry into the allegations of gross malpractices involving a number of students and that no court would condone cancellation of the Respondent's Diploma in Legal Practice without allowing him to exercise his right to be heard; that it was urgent and of great public importance that the Applicant cleans up its systems; and that it would only be fair that the cases of all students who would like to clear their names through an exhaustive committee of inquiry should not remain in suspense. Counsel submitted that

the Applicant's Management Committee did not heed to the above directives and conducted a process that led to the cancellation of his Diploma in contempt of the said orders of the Supreme Court.

Determination by the Court

[41] While Counsel for the Respondent agreed with the legal position that proceedings for civil contempt are regarded as a form of execution and enforcement of the order alleged to have been violated, Counsel did not respond to the aspect as to why the Respondent opted to bring the action for contempt of an order of the Supreme Court to the High Court. It is clear to me that a party cannot found a cause of action in contempt of court in a court other than the court that passed the order; more so where the two courts in issue are at different levels. Such raises an issue as to jurisdiction. That aside, I have perused the decision of Hon. Justice Jotham Tumwesigye (JSC) in **SC MA No. 15 of 2015 (supra)**, and it appears to me that the matters cited by the Respondent were more of findings than orders passed by the Court. The application before the Supreme Court sought for an interim order of stay of execution, injunction and stay of proceedings. The application was dismissed with an order that the costs would abide the result of the substantive application. No other orders were passed by the Court. The matters cited by the Respondent upon which he bases his claim for contempt were stated in the Ruling as findings on what recommended practice the present Applicant would take to streamline the issues that had caused controversy at the institution. The said statements were not made as and did not form part of the orders of the Court in that matter.

[42] As such, even if the matter of jurisdiction to enforce the alleged orders was not in issue, this objection would still have failed on account of absence of express, clear and unequivocal orders of the Court capable of being complied with by the Applicant. See: ***Angelina Lamunu Langoya vs Olweny George***

William HCC Misc. Application No. 30 of 2019 on elements that must be established before the Court can find a contempt of a court order. In the circumstances, I am in agreement with the objection raised by the Applicant that the plaint in the main suit is incompetent in as far as it is based upon an alleged contempt of a Ruling of the Supreme Court. This point of objection is accordingly upheld.

E. The plaint is incompetent in as far as it seeks to enforce previous court judgments/ rulings as test suits.

Submissions

[43] It was submitted by Counsel for the Applicant that it is claimed in the main suit that several suits earlier filed and listed in the plaint ought to be used to dispose of the main suit since they were declaratory judgments which can essentially be used as test suits. Counsel submitted that the said suits, however, do not fall within the ambit of test suits as provided for under Order 39 CPR since they were all filed, heard and determined before the filing of the main suit herein. There is no record of proceedings indicating that any of the said suits was a test suit for the present suit. Additionally, the rulings/ judgments in those suits do not lend credence to the Respondent's assertions. Counsel made reference to **Law Development Centre vs Akampurira Godfrey HCMA No. 172 of 2020**.

[44] In reply, Counsel for the Respondent stated that the Dr. Pamela Committee Report has been quashed in several cases and the decisions rendered in the several previous suits would dispose of the present suit as the said suits have already set a legal precedent that is applicable and useful to this actions as they are test suits. Counsel invited the Court to take note of the fact that all the decisions in the listed cases were delivered in 2016 and copies of the same were filed along with the plaint in the main suit

Determination by the Court

[45] The law on selection of a test suit is well set out under Order 39 rule 1 of the CPR as follows;

> *"Where two or more persons have instituted suits against the same defendant and those persons under the provisions of rule 1 of Order I of these Rules could have been joined as co-plaintiffs in one suit, upon the application of any of the parties the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues."*

[46] It is clear from the above provision that a suit does not automatically turn into a test suit. A number of conditions must exist, namely; (i) two or more persons must have instituted suits against the same defendant; (ii) those persons could have been joined as co-plaintiffs in one suit; (iii) selection of a test suit is done by the court upon the application of any of the parties; (iv) the court has to be satisfied that the issues to be tried in each suit are precisely similar; (v) the court may then make an order directing that one of the suits be tried as a test suit; (vi) the court shall then stay all steps in the other suits until the selected suit has been determined, or has failed to be a real trial of the issues. See: ***Kasaija & Another vs Barclays Bank Uganda Ltd, HC MA No. 88 of 2011 [2011] UGCOMMC 199 (8 April 2011)***.

[47] In the instant case, the main suit was not filed at the same time with the alleged previous suits; there was no motion before the court asking for any of the previous suits to be taken as a test suit; and the subject matter in the present case is not precisely similar with the previous suits since the suits in issue were/are based on each individual's qualification for award of an

academic qualification. In matters that involve scrutiny as to whether someone sat for an examination and passed it, without indulging in a malpractice, it would be a fertile imagination for one to argue that since a person in one case was found to have been wrongly disqualified, it follows that all affected persons fell in the same category. As such, even if the other conditions had been satisfied, this is not a case where selection of a test case would have been successful. I am again in agreement that the plaint is incompetent in as far as it seeks to enforce previous court judgments/ rulings as test suits. This point of objection also succeeds.

F. The plaint is unnecessarily prolix, argumentative, disjointed, embarrassing and offensive to the rules of the pleadings.

Submissions

[48] It was submitted by Counsel for the Applicant that the plaint in the main suit contains 71 wordy, argumentative and repetitive paragraphs. Counsel submitted that the same ought to be dismissed as it is prolix and offensive to the rules of pleading. Counsel submitted that the very Respondent was already faulted by the Supreme Court over these manner of pleadings in **SC M.A No. 16 of 2015: Michael Mabikke vs LDC** wherein the Court held that an application and submissions that are prolix are an abuse of the court process. In reply, Counsel for the Respondent stated that the plaint is not prolix but a mere statement of facts.

Determination by the Court

[49] Prolixity has already been defined herein at paragraph 19 above. The plaint in the main suit indeed contains 71 wordy, argumentative and repetitive paragraphs. As a matter of fact, the plaint makes very difficult reading and one cannot fail to lose their way while trying to comprehend the averments. It is a product of a bad drafting style which Counsel ought to review. I am compelled to make this remark seeing that a similar remark was made by the Supreme

Court in **SC M.A No. 16 of 2015: Michael Mabikke vs LDC** but no change has been registered in the drafting style. In that case, the Applicant had by Notice of Motion brought an application for leave to adduce additional evidence on appeal, among other reliefs. While dismissing the application, the Court remarked as follows;

> **"We also fault the applicant for filing in court very long meandering pleadings. The pleadings were wordy, argumentative and repetitive (77 grounds) which was a blatant violation of the rules and practice of this court and is thus improper and unacceptable ..."**

[50] The exact comment would suit the plaint in the main suit. I therefore find that the plaint is an abuse of the court process for being unnecessarily prolix, argumentative and offensive to the rules of pleadings. This point of objection succeeds as well.

G. The Main Suit is a disguised judicial review application and is time barred.

Submissions

[51] Counsel for the Applicant submitted that the Respondent in the main suit seeks to challenge the Applicant's administrative decision of recalling his diploma award on the basis that the decision was arrived at in a manner that was illegal, irrational and procedurally improper. Counsel argued that what the Respondent seeks in the main suit are prerogative writs which the court can only issue under judicial review. Counsel stated that the main suit is a comingled claim in both private and public law. Counsel further argued that having realized that the application for judicial review was time barred, the Respondent brought the suit by way of plaint as a means of circumventing the judicial review timelines. Counsel therefore submitted that the suit is therefore time barred on that account.

[52] In reply, it was submitted by Counsel for the Respondent that the Respondent herein does not seek prerogative orders in the main suit. Instead, the Respondent seeks to challenge the Applicant's administrative decision of recalling his diploma award in a manner that was illegal, irrational and procedurally improper. It is further submitted that there are several suits of the same nature like the present main suit which were filed by way of ordinary plaint namely, **Asiimwe Phiona vs LDC; and Mutebi vs LDC**. It is further submitted that Section 3 of the CPA does not limit the court's power to entertain the suit dependent on the procedure used.

Determination by the Court

[53] It is not in dispute that the Applicant is a public body whose activities are controllable under judicial review. It is also correct that the subject matter in the main suit is not simply about enforcement of private law rights but involves claims based on public law principles. Although the plaintiff's main concern in the main suit is the decision leading to cancellation of his Diploma, such a decision is an administrative decision of a public body which a party cannot impeach and recall solely on account of personal interest. For such a decision to be challenged and recalled, the court must be called upon to exercise its power to grant prerogative remedies. The exercise of prerogative powers is only available to the High Court through the power of judicial review. The Prerogative remedies sought to be invoked cannot be accessed in any other way.

[54] The above position is based on the express provision under rule 3(1) of the Judicature (Judicial Review) Rules, S.I No. 11 of 2009 which provides that;

"An application for—

(a) an order of mandamus, prohibition or certiorari; or

(b) an injunction under section 38(2) of the Judicature Act restraining a person from acting in any office in which the person is not entitled to act,

shall be made by way of an application for judicial review in accordance with these Rules" [Emphasis added].

[55] The writs of mandamus, prohibition and certiorari, among others, are the main prerogative remedies available. There is no other way under the law in which such remedies can be accessed other than through invocation of the court's power of judicial review. Yet in this case the Respondent categorically states that, in the main suit, he seeks to challenge the Applicant's administrative decision of recalling his diploma award in a manner that was illegal, irrational and procedurally improper. There is no way under the law the court can be moved to conduct such an exercise except through the power of judicial review. It is therefore correct that although the Respondent brought the main suit as an ordinary suit by way of a plaint, it is a disguised application for judicial review. Since the application is not a judicial review application, the point of time limitation raised by the Applicant becomes inconsequential. This point of objection also succeeds and is upheld.

H. The Main Suit is a disguised application for Human Rights Enforcement.

Submissions

[56] Counsel for the Applicant submitted that in the main suit, the Respondent seeks enforcement of rights under Article 50 of the Constitution and under the Human Rights (Enforcement) Act, 2019. Counsel submitted that the above law requires an applicant to institute the suit by way of Notice of Motion and not a plaint as in the instant case. Counsel referred the Court to the case of **Seguya (acting through his recognized agent Male H. Mabirizi K. Kiwanuka) vs Attorney General HCMC 261 of 2019**. Counsel for the Respondent made no specific response to the above submission.

Determination by the Court

[57] Enforcement of human rights is undertaken pursuant to the provisions under *Article 50 of the Constitution*, *the Human Rights (Enforcement) Act 2019* and the *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019*. Article 50(1) of the Constitution provides that any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation. Under Article 50(4) of the Constitution, Parliament is enjoined to make laws for the enforcement of the rights and freedoms under Chapter 4 of the Constitution. Pursuant to the above provision, the Human Rights (Enforcement) Act 2019 was enacted to "to give effect to article 50 (4) of the Constitution by providing for the procedure of enforcing human rights under Chapter Four of the Constitution; and for related matters" according to its long title.

[58] Under Section 4 of the Human Rights (Enforcement) Act, applications for human rights enforcement within the domain of the High Court shall be in the form prescribed by Regulations. Under Section 18(1) of the Act, the Rules Committee is given power to make rules to give effect to the provisions of the Act. The *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019* were passed by the Rules Committee and came into force on 31st May 2019. Under Rule 7(1) of the *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019*, it is provided that "every application for an action under these Rules, shall unless specifically provided for to the contrary, be made by motion on notice supported by an affidavit in the form prescribed in the Schedule to these Rules". There is no contrary provision as regards enforcement of human rights by the High Court.

[59] In terms of the general rules of procedure, Section 19 of the Civil Procedure Rules provides that every suit shall be instituted in such manner as may be prescribed by the Rules. "Rules" under the Act means "rules and forms made by the rules committee to regulate the procedure of courts". This includes the Civil Procedure Rules (CPR) S.I No. 71 – 1 and other Rules passed by the Rules Committee to regulate the procedure of the courts. As such, for an action for human rights enforcement before the High Court, the procedure specifically provided for is by Notice of Motion in accordance with Rule 7(1) of the *Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019*. These are mandatory and substantive rules of procedure that cannot be circumvented.

[60] In the premises, bringing an action for enforcement of human rights by way of an ordinary suit through a plaint is an incurable defect. This point of objection also succeeds.

[61] Lastly, it was claimed by the Respondent that the main suit was brought seeking for a declaratory judgment and according to the provision under Order 2 rule 9 of the CPR, a suit shall not be open to objection on the ground that merely a declaratory judgement or order is sought and the court may make binding declarations of right whether any consequential relief is or could be claimed or not. The above rule could be applicable if the Respondent/plaintiff was in position to establish, by the main suit, any right of his that was infringed upon which the Court would base to make any declaration(s).

[62] In the instant case, however, all the grounds upon which the Respondent's claim in the main suit is based have been found incompetent. The part of the claim that seeks to impeach and quash the report and proceedings of the Dr. Pamela Committee is wrongly before the Court since it could only be properly pursued by way of judicial review. This mainly includes the part that was saved

under the doctrine of res judicata. Such a claim cannot be entertained by this Court under the ordinary civil procedure even if all that the plaintiff was seeking were declaratory orders. The Court would have no basis to make any findings for purpose of considering the issuance of any declarations. Similarly, the part seeking enforcement of human rights was also wrongly brought by plaint and, for the reasons shown above, the same cannot be sustained before the Court. The other part was an action in defamation whose fate has also been clearly stated herein above.

[63] In the circumstances, therefore, the points of objection raised by the Applicant have substantially succeeded. For the reasons stated herein above, I find that the plaint in HCCS No. 202 of 2020 is an abuse of the court process and is incompetent. The application is accordingly allowed with an order that the plaint is struck out as prayed for by the Applicant. The costs of the application and of the main suit shall be met by the Respondent.

It is so ordered.

Dated, signed and delivered by email this 31st day of March, 2023.

Boniface Wamala
JUDGE