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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: JUSTICE S.T. MANYINDO DCJ, JA; JUSTICE G.M. OKELLO, JA;
LADY JUSTICE A.E. MPAGI BAHIGEINE, J.A.; J. BERKO, JA;
JUSTICE A. TWINOMUJUNI, JA

CONSTITUTIONAL PETITION NO.7/97

BETWEEN

UG. JOURNALISTS SAFETY COMMITTEE	1ST	PETITIONER
MR. MOHAMED KATENDE	2ND	PETITIONER
MR. PETER BAHEMUKA	3RD	PETITIONER

AND

THE HON. ATTORNEY GENERAL	RESPONDENT
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RULING OF THE COURT

This petition was brought by three petitioners.

The 1st petitioner is the Uganda Journalists Safety Committee and is stated to be an NGO registered under the NGO Registration Statute of 1989. It is further stated to be charged with advocating for the rights of journalists, defending democracy, protection of the media and defence of freedom of expression.

The 2nd petitioner Mohamed Katende is the Chairman of the 1st petitioner while Peter Bahemuka the 3rd petitioner is its Secretary.

According to its title the petition was brought under both Articles 50 and 137 of the Constitution but in para 7 of the Petition it is specifically stated that the Petition is brought under Article 50 only.

The petitioners claim that the following provisions of the Press

and Journalists Statute 1995 to wit SS 6, 8, 10, 16(2) (3); 18(b) (c), 27, 28, 29, 30, 31, 32, 34, 35, 40, 41, 42, 43 and 45 are inconsistent with the provisions of Article¹, 29(1) (a) (b), 30, 41 and 45 of the Constitution of Uganda and as such are null and void and unenforceable.

They allege that they are aggrieved and are likely to be aggrieved by the aforementioned provisions.

The petition is supported by two affidavits deposed^{to} by the 2nd and 3rd petitioners.

An affidavit in reply in support of the Respondent's answer was deposed to by Lucien Tibaruha Esq, Ag, Director Legal Advisory Services Ministry of Justice/Attorney General's Chambers.

At the commencement of the hearing, Mr. Nasa Tumwesige, Director of Civil Litigation raised three preliminary objections.

He first challenged the procedure adopted by the petitioners in proceeding under both Articles 50 and 137, and seeking a declaration under Article 50 under the circumstances.

Secondly he contended that the petition does not disclose any cause of action.

Thirdly he attacked the affidavits in support of the 2nd and 3rd Petitioners on the ground that they were defective and attacked the 1st Petitioner's Petition on the ground that it was not supported by an affidavit as required by Rule 3(6) under Legal Notice No.4 of 1996.

We now turn to consider the first objection.

Mr. Tumwesige argued that the petition was wrongly brought under both Articles 50 and 137. He submitted that since the petition was seeking a declaration upon interpretation of the Constitution

it ought to have come under only Article 137, Clause 3. He argued that the procedure prescribed for the interpretation of the Constitution under Article 137(3) is governed by Special Rules under Legal Notice No.4 of 1996 "The Rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions, 1996". He pointed out *sent.* Article 50 is for enforcement of the Fundamental Rights and Freedoms for which any petitioner could petition the High Court or any other competent court under a different procedure. Citing KASIRYE, BYARUHANGA & CO. ADVOCATES VS UGANDA DEVELOPMENT BANK, CIVIL APPEAL NO.2 OF 1997, Supreme Court, (unreported), he submitted that the correct rules of procedure had to be followed in order to assist the court adjudicate upon the issues properly and that this error was not a mere technicality which could be ignored by the court.

While Mr. K. Kakuru for the petitioners agreed that the correct rules had to be followed in order to assist court he contended that in Constitutional cases the court must not only look at the form but the substance as well. He said that the rules of procedure must not hinder the court from applying substantive justice in Constitutional cases. He sought to distinguish Kasirye's case (Supra) in that it was not a Constitutional case but an ordinary Civil Suit. He also referred us to Tinyefuza Vs Attorney General- Constitutional Case No.1 of 1996 (unreported), where this Constitutional Court held that formalism should not deter a court from doing substantive justice where the liberty of the individual was at stake. He argued that it was correct to cite both Articles 50 and 137 because both did apply. He said that as the court interpreted the Constitution it would state the redress sought simultaneously. He submitted that the rules had been complied with and prayed court to overrule the objections and proceed to hear the petition without being impeded by technicalities as stipulated by Article 126(2)(e) that substantive justice shall be administered without undue regard to technicalities.

Article 137 of the Constitution reads in part as follows:

- 1) Any question as to the interpretation of the

Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.

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(3) "A person who alleges that:

(a) an Act of Parliament or any other law or anything in or done under the authority of any law;

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is inconsistent with or in contravention of a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

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(5) Where any question as to interpretation of this Constitution arises in any proceedings in a court of law other than a Field Court Martial, the court may, if it is of the opinion that the question involves a substantial question of law, and

(b) shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with clause (1) of this Article.

The petitioners are alleging that the aforementioned provisions of the Press and Journalists Statute are inconsistent with the Constitution. They are seeking a declaration to that effect. They are asking the court to interpret the Constitution vis a vis the Statute.

As rightly submitted by Mr. Tumwesige the rules of procedure for coming to the Constitutional Court for a declaration or redress

under Article 137(3) are prescribed by Legal Notice No.4 of 1996 and are cited as "The Rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions, 1996.

However where the Constitutional Court is exercising its jurisdiction under clause 5 of Article 137 to interpret the Constitution pursuant to a reference from a lower court different rules do apply - These are cited as The Interpretation of the Constitution (Procedure) Rules, 1992 (Modification) Directions 1996 under Legal Notice No.3 of 1996. They were modified from S.I. No.25 of 1992 The Interpretation of the Constitution (Procedure) Rules 1992.

Therefore under Article 137 the Constitutional Court can sit to interpret the Constitution as follows:

- 1) under Clause 3 at the instance of a party; as in the instant case.
- 2) under Clause 5 on any question referred to it arising out of proceedings in any court of law other than a Field Court Martial.

By para 7, the Petition is stated to have been brought by virtue of the Provisions of Article 50 of the Constitution. This Article reads:

- (1) 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.
- (2) Any person or organisation may bring an action against the violation of another person's or group's human rights.

- (3) Any person aggrieved by any decision of the court may appeal to the appropriate court.
- (4) Parliament shall make laws for the enforcement of the rights and freedoms under this Chapter -

We were informed by Mr. Tumwesige that Parliament has not yet made any laws under Clause 4 of Article 50. That is so. Therefore under Article 273 the usual rules of Civil Procedure applicable to any Courts of Judicature do apply as the existing law under Rule 13(1) Legal Notice No.4 of 1996 except where any question for interpretation arises and is referred to the Constitutional Court under Article 137(5). Under Clause 5 the rules applicable are contained in the Schedule to Legal Notice No.3 of 1996 and are cited as The Interpretation of the Constitution (Procedure) Rules 1992 (Modifications) Directions 1996.

We do not agree with Mr. Kakuru for the Petitioner that the case of Kasirye, Byaruhanga & Co. Advocates is not relevant because it is an ordinary suit and not a Constitutional matter. We think that the principle stated by the Supreme Court in that case that Rules of Procedure must be adhered to equally apply to Constitutional Cases. Therefore the Rules contained in Legal Notice No.4 of 1996 had to be complied with.

Regarding Tinyefuza's case (supra), this court following the decision in Commissioner of Prisons ex parte Matovu (1966)EA 514 decided to ignore the minor irregularities because the petition prima facie disclosed a cause of action and the liberty of the individual was at stake. These irregularities did not include proceeding under the wrong provisions of the law.

It is therefore clear that for Enforcement of the Rights and Freedoms under Article 50 one has to seek redress in a competent court and this court is not one because it derives its

jurisdiction from Article 137.

In view of the foregoing we uphold Mr. Tumwesige's objection. The petitioners should have proceeded only under Article 137(3) and not both Articles 137 and 50. The two Articles cater for different situations.

Concerning the 2nd objection that the petition failed to disclose a cause of action Mr. Tumwesige pointed out that para 5 thereof merely stated that the petitioners were aggrieved or likely to be aggrieved by the said provisions of the Press and Journalists Statute. He said that it was never stated in either of the two affidavits accompanying the petition how they were aggrieved or were likely to be aggrieved. He argued that since the two affidavits contained the only evidence available on the issue, the Petition could not be allowed to stand. He cited rule 12(1) of the Schedule to Legal Notice No.4 of 1996 which states:

"All evidence at the trial in favour of or against the petition shall be by way of affidavit in open court."

He submitted that none of the 2 affidavits disclosed what the grievances were in accordance with Rule 3(6) of the Schedule to Legal Notice No.4 of 1996 which provides:

3(6) "The petition shall be accompanied by an affidavit setting out the facts relating to grievances complained of by the petitioner and the redress prayed for in the petition."

Referring to the affidavit of the 2nd petitioner Mohamed Katende, Mr. Tumwesige pointed out that para 4 thereof merely claimed^{that} the provisions of the Statute were restrictive, prohibitive and unconstitutional but did not show how restrictive, prohibitive or unconstitutional they were.

He further contended that by para 5, the 2nd petitioner did not show why or how he could not practice as a journalist. Similarly

the 3rd petitioner made this averment without any further explanation.

Both petitioners averred that many journalists were out of work, had been harassed and intimidated by security operatives. Mr. Tumwesige pointed out that the affidavits did not name the journalists harassed nor the security operatives but merely claimed that the provisions were unconstitutional.

Mr. Kakuru did not specifically comment on these last two objections.

Rule 3(2) (b) of the Schedule to Legal Notice No.4 of 1996 states:

Every petition shall -

3(2) (b) "state the grievance of the petitioner together with the statement of the grounds relied upon to sustain the prayer in the petition."

We accept Mr. Tumwesige's submission that the Petition does not disclose any cause of action.

We also agree that a petition must be accompanied by an affidavit under (Rule 3(6)) referred to above in order to disclose the cause of action so that the petition is not filed on flimsy grounds.

We note that the 1st petitioner who is the principal petitioner did not file any affidavit. A petition cannot stand without a supporting affidavit. The affidavit is mandatory. Therefore the petition in respect of the 1st petitioner stands struck out with costs on ground of being null and void, for lack of an accompanying affidavit.

Mr. Tumwesige attacked the two accompanying affidavits by the ~~1st~~^{2nd} and ~~2nd~~^{3rd} petitioners for lack of disclosure. He submitted that

both affidavits were based on information and belief but failed to disclose the source of their information or the grounds of their belief. He submitted that they were defective and should not be relied upon.

Para 9 of the affidavit of the 2nd petitioner states:

"That all I have stated herein above is true and correct to the best of my knowledge" while Para 8 of the 3rd petitioner's affidavit reads:

"That I swear this affidavit in support of the petition herein what I have stated herein above in paragraph 1, 2, 4, 5, 6 and 7 as true and correct to my knowledge and paragraph 3 is true to the best of my information and belief."

As correctly submitted by Mr. Tumwesige a court should not act on an affidavit which did not distinguish between matters stated on information and belief and matters to which the deponent swears from his own knowledge. See CASPAIR LTD V HARRY GANDY (1962) EA 414.

It is correct that the deponents distinguished between matters stated on information and belief but they did not make such disclosure.

Where averments are based on information, the source of information should be clearly disclosed. Where the statement is a statement of belief the grounds of belief should be stated with sufficient particularity. All this is to enable the court to judge whether it would be safe to act on the deponent's affidavit. See PREMCHAND RAICHAND LTD AND ANOR V QUARRY SERVICES OF EAST AFRICA LTD & ORS (1969) EA 514.

We agree with Mr. Tumwesige that failure to disclose the source of information will normally render the affidavit null and void and cannot be used in any judicial proceeding. It has been held that an affidavit is not evidence unless it complies with the

above mentioned legal requirements. This is not merely a matter of form but goes to the essential ^{value} making of the affidavit. See PHAKEY V WORLD WIDE AGENCIES, C/A NO.25 OF 1947; RE J.L. YOUNG MANUFACTURING CO. (1900) 2 CH.753 C.A.

In view of the foregoing the affidavits of both the 2nd and 3rd petitioners have not satisfied the nondisclosure rule and are therefore of no effect. Consequently the petition cannot stand as it fails to satisfy Rule 3(6) which is mandatory. It is accordingly struck out with costs.

We so order.

Dated at Kampala this ^{19th}.....day of ^{December}.....1997

S.T. Manyindo
S.T. MANYINDO,

DEPUTY CHIEF JUSTICE

G.M. Okello
G.M. OKELLO

JUSTICE OF APPEAL

A.E. Mpagi Bahigeine
A.E. MPAGI BAHIGEINE

JUSTICE OF APPEAL

J. Berko J A -
J. BERKO

JUSTICE OF APPEAL

A. Twinomujuni
A. TWINOMUJUNI

JUSTICE OF APPEAL

19/12/97