THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT KAMPALA

MISCELLANEOUS APPLICATION NO. 1302 OF 2000

(Arising from an Order of the High that dismissed HCCS No. 385 of 1996)

FRANCIS AYO……APPLICANT/PLAINTIFF

VERSUS

ATTORNEY GENERAL……..RESPONDENT/DEFENDANT

BEFORE: THE HON. MR. JUSTICE E.S. LUGAYIZI

RULING

This ruling is in respect of an objection that was raised by counsel for the respondent just before Court heard Miscellaneous Application No. 1302 of 2000. That application was intended to seek an order to set aside Court's order dated 6th June 2000 which dismissed High Court Civil suit No. 385 of 1996.

However, before Court goes into the merits of the objection it is important to understand its background which is briefly as follows. The applicant (a police officer) sued the Attorney General in respect of injuries he sustained when a police car (i.e. 999) in which he was traveling, in the course of his employment, on 24th December 1994 had an accident. In his WSD the Attorney General denied liability. Subsequently, the suit was fixed for hearing but on a number of occasions it never took off. On 23 February 2000 the applicant's advocate (Mr. Emesu) was present in court when Court once again fixed the suit for hearing on 6th June 2000. When that day came, the respondent's counsel (Ms. Mayanja) attended Court but the applicant and his advocate did not show up. Accordingly, Court dismissed the suit for lack of interest on the applicant's part. Following the dismissal the applicant applied to have the said order set aside and

the suit reinstated. He did so by way of Notice of Motion under Order 9 rules 19 and 20 and Order 48 rules 1 to 3 of the CPR. His application was accompanied by an affidavit dated 6th September 2000 that was sworn by the applicant himself. Eventually Court fixed the application for hearing on 6th July 2001. However when that day came the hearing did not take place because the State Attorney (Ms. Mayanja) who represented the Attorney General raised a preliminary objection which is the subject of this ruling. That is the background to the preliminary objection.

In her submission in respect of the objection Ms. Mayanja pointed out that the application referred to above could not stand for two reasons. Firstly, that the application was fundamentally defective because it was brought under the wrong law, that is to say, Order 9 rule 19 of the CPR which has nothing to do with setting aside an order of dismissal of a suit. Secondly, that the application was a futile exercise since it was made in respect of a suit that was filed pre-maturely. Ms. Mayanja argued that because the applicant was a civil servant he was supposed to obtain permission from his Permanent Secretary before he sued Government. However, she pointed out that the applicant did not obtain the required permission; and that means that he breached the Public Service Standing Orders (Chapter 1 Section Y-c paragraph 2). For that reason (Ms. Mayanja concluded) that it is futile to seek to set aside the order that dismissed High Court Civil Suit No. 385 of 1996 for there is no proper suit to reinstate anyway.

Mr. Emesu disagreed with the above submissions. On his part he submitted that citing the wrong law per se does not make the Notice of Motion fundamentally defective. Secondly,

Mr. Emesu submitted that since the Attorney General did not show, in his WSD, that it was vital for the applicant to obtain permission from his employer before he filed the suit in question, the Attorney General is deemed to have waived that requirement. He cannot turn round now and insist upon it. For those reasons Mr. Emesu called upon Court to over-rule the objection.

Court will deal with Ms. Mayanja's two grounds of objection in the order in which she presented them. With regard to the first objection Court has this to say. In the case of **Brooke Bond Liebig (T) Ltd v Mallya [19751] E.A. 266 at page 268,** when the Court of Appeal for East Africa was

faced with **a** similar situation to the one at hand (that is to say, where the Notice of Motion cited the wrong rule of procedure) it had this to say,

> *"...the rules of procedure are designed to give effect to the rights of the parties and once the parties are brought before courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in the vitiation of proceedings…."*

In addition to the above, Article 126 (2) (e) of the Constitution enjoins courts to resolve disputes on their merits, but not on the basis of legal technicalities. It provides as follows,

"126 (1)...

(2) in adjudicating cases of both of a civil and criminal nature the courts shall subject to the law, apply the following principles

(a)
(b)...
(c)

(d)...
(e) substantive justice shall be administered without undue regard to technicalities."

The question to answer now is whether the citation of Order 9 rule 19 of the CPR the Notice of Motion is a mere irregularity which could be ignored because it will not cause any injustice? Ms. Mayanja was of the opinion that the above lapse is a fundamental irregularity which cannot be ignored because it would cause injustice. However, Court thinks otherwise; and these are its reasons. Firstly, in her submission Ms. Mayanja simply alleged that the citation of the wrong law by the Notice of Motion would cause injustice. She did not endeavour to prove that what she alleged would happen. The law is that he who alleges the existence of certain facts must prove them if he is to succeed. **(See sections 100, 101 and 102 of the Evidence Act - Cap. 43).** Secondly, despite the fact that the Notice of Motion cited the wrong law, it is undisputed that at the same it cited Order 9 rule 20 of the CPR which is the correct law to proceed under when

applying for an order to set aside a dismissed suit. Thirdly, the contents of the Notice of Motion and the accompanying affidavit leave no doubt in any one's mind that the purpose of the Notice of Motion is to set aside the order of dismissal of High Court Civil Suit No. 385 of 1996 and to have that suit reinstated. For the above reasons, therefore, Court thinks the citation of Order 9 rule 19 of the CPR by the Notice of Motion is a mere irregularity which can be ignored because it will not cause any injustice. The first ground of objection must therefore be overruled.

With regard to the second ground of objection, first of all Court wishes to point out that it is not true to say that the respondent implicitly waived, in his defence, the requirement on the applicant's part to obtain consent before filing High Court Civil Suit No. 385 of 1996. It is clear from the respondent's WSD *that* he did not waive that requirement. Indeed, paragraph4 of the WSD reads as follows,

"4. The defendant shall aver that this Suit is contrary to established) law and procedure ... in the Police Standing Orders, and is therefore incompetent,"

That aside, before proceeding further, it is important to understand what the "Standing Orders" in question are and whether they have the force of the law. It is common knowledge that the responsibility to make laws in Uganda is the preserve of Parliament. **(See Article 79 of the Constitution).** However, from time to time, Parliament, through an Act of Parliament, delegates that responsibility to some person or a body. Section 24 of the Public Service Act (Act 18 of 1969) that appears to have given rise to the Standing Orders in question, reads as follow,

> *"24. The Minister may make Standing Orders providing for the administration and conduct of the Public Service and the terms and conditions of service ...*"

Byne's Law Dictionary defines the term "Standing Orders" at page 833 as follows,

> *"Standing Orders are rules and forms regulating the procedure of the two Houses of parliament, each having its own. They are of equal force in every Parliament, expect so far as they are altered or suspended from time to time."*

Also Collin's English Dictionary defines the above term in its singular form as follows: *"….a rule or order governing the procedure, conduct, etc of an organisation."*

For the purpose of this ruling, therefore, the term "Standing Orders" means rules and orders regulating the manner of transacting business in the Public Service. Those rules and orders are a form of delegated or subsidiary legislation which has the force of law. In her submission, Ms. Mayanja relied on paragraph 2 of the Standing Orders in Chapter 1, section Y-c of the Public Service General Standing Orders which provides as follows:

> ***"2. Legal Proceedings instituted by Public Officers.*** *An officer may wish to institute legal proceedings because of circumstances connected with his or her official position or because of action taken in the course of his or her official duties. Except in circumstances set out in sub-paragraph 3(2) below, no officer may, however, institute civil proceedings in these circumstances without the prior consent of the responsible Permanent Secretary who may withhold consent for important reasons of public policy, or f the Solicitor General advises, on legal grounds that the case should not be pursued."*

The exception referred to above (i.e. sub-paragraph 3(2) reads as follows:

> *"(2) if the officer decides to institute legal proceedings without Government financial assistance, or if he or she goes ahead to institute legal proceedings before obtaining definite approval from the Responsible Permanent Secretary of an application made under sub-paragraph (1) above, or if after getting a response from the Responsible Permanent Secretary to an application made under sub-paragraph (1) above, this turns out to be in the negative then he or she will not expect to obtain any financial assistance from the Government."*

Paragraph 3 where the contents of the above sub- paragraph are found is entitled **"Actions for defamation".** In Court's opinion that paragraph must be read subject to paragraph 2. However, those two paragraphs (i.e. paragraphs 2 and 3) were drafted in **a** confusing way. When one closely examines them one finds that the exception paragraph 2 refers to, is in reality not an exception to the contents of the paragraph. It is merely a continuation of paragraph 3. Consequently, if a logical interpretation of those two paragraphs is to be had, sub-paragraph 2 of

paragraph 3 must be read only as part of paragraph 3. That means that paragraph 2 simply states a general rule which does not have an exception. That general rule is as follows. Where an officer (of Government) wishes to institute legal proceedings because of circumstances connected with his or her official position or because of action taken in the course of his or her official duties, he or she must obtain the consent of the Responsible Permanent Secretary before instituting the legal proceedings. The vexed question is whether that general rule remains good in the face of the Constitution? Article 21 of the Constitution provides as follows,

> *"21(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.*
>
> *(2) Without prejudice to clause (1) of this article a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing..."*

Clearly, although the above provisions of the Constitution proclaim equality of all persons before the law, equal protection of all persons by the law and freedom from being discriminated against "on the ground of ... social or economic standing", paragraph 2 of the Standing Order in question does not give room for those rights to be enjoyed by the civil servants. In essence, that paragraph creates this scenario. While the rest of the population in Uganda is free to sue in all circumstances where they are wronged, the civil servants do not enjoy that unfettered right. For example, where they wish to institute legal proceedings because of circumstances connected with their official positions or because of action taken in the course of their duties, they cannot lawfully do so unless the Responsible Permanent Secretary has given them consent. That means that the civil servants stand on unequal ground before the law as against the rest of the population; and they do not enjoy equal protection of the law. In other words, they are discriminated against. However, the remedy for that unhappy state of things for the civil servant lies in the supremacy of the Constitution over all other laws (See **Article 2(1) of the Constitution).** Indeed, the fate of any other law that is inconsistent with the Constitution is well known, for such other law is "void" to the extent of inconsistency. (See **Article** 2(2) **of the Constitution).** Consequently, because paragraph 2 of the above Standing Order is inconsistent

with the provisions of Article 21(1) and (2) of the constitution, it is void to the extent of inconsistency. That means that by virtue of Article 21(1) and (2) of the Constitution the civil servants now stand on equal footing with the rest of the population in Uganda. They are free to sue in all circumstances where they are wronged. Even in circumstances connected with their official positions or because of action taken in the course of their official duties, they do not need to obtain the consent of their Responsible Permanent Secretary before they sue.

In conclusion, the above boils down to this. It was not necessary for the applicant to obtain consent from his Responsible Permanent Secretary before he filed High Court Civil Suit No. *385* of 1996. It follows, too, that it is not futile for the applicant to apply to set aside the order that dismissed High Court Civil Suit No. 385 of 1996 and to seek to reinstate that suit. The second ground of objection is therefore also over-ruled.

The respondent's objection must therefore be over-ruled with costs; and it is so ordered.

E.S. LUGAYIZI

(JUDGE)

31/10/2001