

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CIVIL APPEAL NO. 223 OF 2018**

**(Coram: R. Buteera, DCJ, Bamugemereire & Gashirabake JJA)**

- 1. FRANK MUGISHA**
  - 2. DENNIS WAMALA** :::::::::::::::::::::::::::::: **APPELLANTS**
  - 3. SSENFUKA JOANITA MARY**
- VERSUS**

**UGANDA REGISTRATION  
SERVICES BUREAU** :::::::::::::::::::::::::::::: **RESPONDENT**

*(An appeal against the decision of Patricia Wasswa Basaza J in Misc. Cause No. 96  
of 2016 at High Court Civil division dated 14th June 2018)*

**JUDGMENT OF CATHERINE BAMUGEMEREIRE, JA**

**Background**

The appellants applied to the respondent for reservation of the name **“Sexual Minorities Uganda” (SMUG)** with a view to incorporating it as a company limited by guarantee. The respondent declined to reserve the name by way of letter dated 16<sup>th</sup> February 2015, on the ground that the name was against public policy and labeled criminal under section 145 of the Penal Code Act Cap 120.

The appellants by way of a Miscellaneous Cause sued the URSB citing violation by the respondent of their human rights and freedoms guaranteed under Articles 20, 21, 29 and 42 of the Constitution of Uganda, 1995. The trial Judge dismissed the appellants’ claims and held that the respondent was justified in its decision, which was taken in public interest within the ambit of Article 43 of the Constitution. Dissatisfied, the appellants lodged this appeal with the following grounds:

**Grounds of appeal**

- 1. That the learned trial Judge erred in law and fact when she misconstrued the Constitution of Uganda and the law holding that association for unlawful purposes and practices by LGBTI persons is prohibited in Uganda.**
- 2. That the learned trial Judge erred in law and fact when she speculatively held that the name “Sexual Minorities Uganda” and the objectives of the proposed company**



were to promote behavior that contravenes section 145 of the Penal Code Act and Article 31 (2) (a) of the Constitution of Uganda, 1995.

5 3. That the trial Judge erred in law and fact when she held that the appellants proposed name" sexual minorities Uganda' and the objectives of the proposed company go against the values, norms morals and aspirations of the people of Uganda and public interest.

10 4. The learned trial Judge erred in law and fact when she held that the respondents impugned action was a justifiable limitation within the ambit of article 43(1) of the Constitution of Uganda 1995.

15 5. That the learned trial Judge erred in law and fact when she held that the inordinate delay by the respondents to respond to the appellants' application for reservation of the name sexual minorities Uganda did not violate article 42 of the Constitution of Uganda, 1995.

20 6. That the trial Judge erred in law and fact when she awarded costs to the respondent in an application for enforcement of fundamental rights and freedoms guaranteed under the constitution of Uganda.

### **Representation**

25 At the hearing of the appeal, Mr. Francis Tumwesigye and Dr. Adrian Jjuuko represented the appellants while Ms. Cynthia Mpoza represented the respondent. Counsel for both parties sought leave of court to adopt their written submissions in consideration of the appeal. We have considered the submissions by both parties in determining this appeal.

### **30 Submissions for the Appellant**

Counsel for the appellant addressed grounds one and two together.

35 1. That the learned trial Judge erred in law and fact when she misconstrued the Constitution of Uganda and the law holding that association for unlawful purposes and practices by LGBTQI persons is prohibited in Uganda.

2. That the learned trial Judge erred in law and fact when she speculatively held that the name "sexual Minorities Uganda" and the objectives of the proposed company



were to promote behavior that contravenes section 145 of the Penal Code Act and Article 31 (2) (a) of the Constitution of Uganda, 1995.

5 Counsel submitted that the actions of the respondent in rejecting the reservation of the name of the proposed company contravened **Articles 20 (1) (2), 21 (1) (2), 29 (1) (e) and 42 of the Constitution**. Counsel invited this court to examine the name and objectives of '*Sexual Minorities Uganda*' vis a vis the penal laws and constitutional provisions  
10 relied on by the respondent and trial Judge. It was counsel's submission that the principal objectives of the appellant's proposed company were to promote the welfare and protection of human rights and freedoms of all people including LGBTI people in Uganda. Counsel argued that these objectives do not either directly or indirectly entail commission of offences  
15 prohibited under **section 145 of the Penal Code Act** neither do they contravene the prohibition in Article 31 (2a) of the Constitution. Counsel further argued that Article 31 (2a) of the Constitution only prohibits same sex marriages and nothing in the name or objectives of the proposed company proposes that the organization was to be formed to advocate for  
20 same sex marriages.

Counsel submitted that **section 145 of the Penal Code Act** implies that the sexual orientation or gender identity of the person is not what matters. He argued that what matters is the commission of the act that is expressly prohibited under the law. Counsel submitted that any  
25 organization that seeks to promote the fundamental human rights, health, wellbeing and dignity for all persons, including LGBTQI persons cannot be reasonably said to be engaged in promotion of 'carnal knowledge against the order of nature'.

It was counsel's submission that in holding that the proposed company  
30 would be an organization formed to protect and promote an assembly or association of persons, LGBTQI and homosexuals whose practices and beliefs contravene the laws of Uganda, the trial Judge descended into speculation, conjecture and guess work as opposed to relying on the evidence placed before her.

35 Counsel cited **Thuto Rammoge & 19 Others v Attorney General of Botswana, (MAHGB-000175-13)**, urging this court to be persuaded by the same. In **Thuto (supra)**, the High Court of Botswana "the purpose of LEGAGIBO (lesbians, gays and bisexuals of Botswana) is not for



registration of their society for the purpose of having same sex relationships but rather for agitating for legislative reform so that same sex relationships would be decriminalized.”

5 Counsel similarly relied on the Kenyan authority of **Eric Gitari v NGO Coordination Board & Ors, Constitutional & Judicial Review Division Petition No. 440 of 2013**) where the court affirmed that LGBT people were entitled to freedom of association with the only qualification being whether they were human and once it was found that they were human, then it follows that they are entitled to all the rights.

10 Counsel further submitted that the right to freedom of association applies to every person including LGBTQI persons, and that it is not criminal to promote and protect the rights of such persons as sexual minorities Uganda sought to do and the objectives of the proposed organization do not show any intention to assist or condone the  
15 commission of criminalized acts. Counsel added that Uganda is bound by international obligations enshrined in international treaties. He referred to the ICCPR, ACHPR and African Commission guidelines which all provide for freedom of association.

20 Counsel submitted that the proposed company sought to pursue its objectives in an organized, legal and regulated way by seeking to come under government oversight through the Company's Registry and subsequently the bureau for Non-Governmental Organizations but instead the respondent rejected and dismissed them insisting that they  
25 cannot form an association subject to government regulation because they are LGBTQI. Counsel submitted that this position violated their right to freedom of association protected under Article 29 of the Constitution.

30 It was counsel's contention that the denial of the appellants a right to reserve a company name and register their organization violated their right to equality and freedom from discrimination in contravention of Article 21 of the Constitution.

35 **Ground No. 3: That the trial Judge erred in law and fact when she held that the appellants proposed name, 'Sexual Minorities Uganda' and the objectives of the proposed company go against the values, norms morals and aspirations of the people of Uganda and public interest.**



Counsel submitted that the values that govern Uganda are laid down in the National objectives and Directive principles of state policy in the Constitution. Counsel cited article 8A (1) of the Constitution, which requires that Uganda shall be governed based on principles of national interest and common good enshrined in the National Objectives.

Counsel submitted that objective 1 provides that the objectives and principles shall guide all organs and agencies of the state, all citizens, organizations and other persons in applying and interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society. He added that objective 5 provides for upholding fundamental human rights and freedoms and requires the state to guarantee and respect the independence of non-governmental organizations, which protect and promote human rights. Counsel submitted that the framers of the Constitution who laid down the values of Ugandans ensured that all of them require the protection of the fundamental human rights of all persons and as such, they clearly align with the requirement to register an organization that seeks to promote and protect the human rights of a marginalized community.

**Ground 4: The learned trial Judge erred in law and fact when she held that the respondents impugned action was a justifiable limitation within the ambit of article 43(1) of the Constitution of Uganda 1995.**

Counsel contended that the trial Judge's decision, upholding the respondent's refusal to reserve the name Sexual Minorities Uganda consequently prevented its registration as a company and subsequently as an organization, which was erroneous.

Counsel submitted that the issue of morals came up in the trial Judge's decision where the judge found that public interest includes morals. Counsel contended that the morality referred to as a limitation to human rights under constitutional law is not popular morality but rather constitutional morality. He cited the Indian decision in **Navtej Singh Johar & Others v Union of India The Secretary Ministry of Law & Justice, AIR 2018 SC 4321** where court held that;

*"The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society."*



Counsel submitted that the respondent's actions of refusing to reserve the name and register, '*Sexual Minorities Uganda*' could not be justified under Article 43 (1) of the constitution.

5 **Ground No. 5: That the learned trial Judge erred in law and fact when she held that the inordinate delay by the respondents to respond to the appellants' application for reservation of the name sexual minorities Uganda did not violate article 42 of the Constitution of Uganda, 1995.**

10 Counsel argued that the inordinate delay by the respondents to respond to the appellants' application for reservation of their violated Article 42 of the Constitution. Counsel submitted that the appellant's application to reserve the name was made on 28<sup>th</sup> November 2012 and was returned with the comment "name not clear." Counsel submitted that the  
15 appellants lodged a complaint on 12<sup>th</sup> December 2012, which was not responded to till March 2013. Counsel added that the appellants provided an explanation of the name and objectives of the proposed organization by a letter dated 2<sup>nd</sup> September 2013 but received no response from the respondents. Further, a follow up letter was written on 3<sup>rd</sup> February 2015  
20 and the final position from the respondent was received on 16<sup>th</sup> February 2016, two and half years from the time the appellants had proved the explanation sought.

It was counsel's submission that even when the trial Judge found the delay to be inordinate, she held that it did not amount to a violation of  
25 the constitutional guarantees to administrative justice because the appellants had not shown what caused the delay. Counsel contended that this was erroneous as the trial Judge transferred the burden of proof to the appellants instead of the respondent.

Further, that the inordinate delays in carrying out statutory functions  
30 are not only dilatory but also a violation of Article 42 of the constitution. Counsel urged this court to find that the inordinate delay was in contravention of Article 42 of the Constitution.

35 **Ground No. 6: That the trial Judge erred in law and fact when she awarded costs to the respondent in an application for enforcement of fundamental rights and freedoms guaranteed under the constitution of Uganda.**



Counsel submitted that the trial Judge's order awarding costs against the appellants is not only unfair and unjustified but also will impede public interest litigation, which is a hallmark of our Constitution.

5 Counsel cited authorities where the Constitutional Court declined to award costs in public interest litigation matters reasoning that there is no personal interest in the matters. He cited **Advocates for Natural resources Governance & 2 Others v Attorney General Constitutional Petition No. 40 of 2013, Attorney General v Maj. General David Tinyefuza Constitutional Appeal No. 1 of 1997** among others.

10 Counsel implored us to resolve this ground in the appellants' favor reasoning that it is a public interest matter, and the respondent is a tax payer funded government body defending itself against violations of fundamental human rights and freedoms.

15 In conclusion counsel for the appellants prayed that the court examines the record afresh and holds in favour of the appellants.

### **Submissions for the Respondent**

20 Counsel raised a preliminary objection to the effect that the application on which the appeal arises was filed improperly before the court. She contended that the right procedure was for the appellants to bring an application for Judicial review under the **Judicature (Judicial review) Rules, 2009, section 33 & 36 of the Judicature Act Cap 13 and section 98 of the Civil Procedure Act.**

25 Counsel submitted that the decision of the respondent to reject reservation of the appellants' name was an administrative decision by a public authority with sufficient remedies provided for under judicial review.

30 **Regarding Grounds No. 1 and 2** of the appeal, Counsel submitted that incorporating a company must be for a lawful purpose and that the reservation of a company name as the initial step to incorporation is conducted within the meaning of **section 36 of the Companies Act, 2012** to the effect that the Registrar may, on written application reserve a name pending registration of a company.

35 Counsel submitted that the appellants sought reservation of the name '**SMUG**' for purposes which were intended to promote the sexual rights of minorities classified as LGBT. The activities the LGBT are involved in



are unlawful and have been criminalized and therefore under the statute the Registrar exercised her discretion judiciously in rejecting the name in public interest.

5 Counsel contended that the appellants' rights to expression, association, assembly, political participation and equality were not in jeopardy. She added that Article 43 of the Constitution recognizes that the exercise of individual rights can be validly restricted in the interest of the wider public as long as the restriction does not amount to political persecution and is justifiable and acceptable in a free democratic society.

10 Counsel argued that the restriction of the appellants' rights to register an undesirable company name was on the basis that the objective was the promotion of an illegality in the exercise of their rights. Counsel added that the prevention of promotion of illegal acts is justifiable in a free and democratic society under the law.

15 It was counsel's submission that the LGBTI are a group whose practices, ideals and beliefs contravene section 145 of the Penal Code Act.

20 Counsel further submitted that section 21 of the Penal Code Act prohibits one to directly or indirectly incite, encourage or assist the commission of the offence or to conspire with others to commit the offence regardless of whether the offence is committed or not.

25 Counsel submitted that the respondent rejected reservation of the name SMUG as its use would amount to promotion of a criminal offences, emphasized under the company's objectives in clause 3 which read as *3 (c) promoting, protecting the wellbeing and dignity of LGBTI persons and combat discrimination in policy, law and practice.*"

30 Counsel submitted that the persons the company intends to support and promote are engaged in activities labeled criminal acts under section 145 of the Penal Code Act. She invited this court to uphold the ruling of the trial court.

**In response to Ground No. 3;** Counsel defined public interest according to **Black's Law dictionary 9<sup>th</sup> Edition** as the general welfare of the public that warrants recognition and protection, something in which the public as a whole has a stake. Counsel submitted that the proposed company name and objects go against the values and norms of the Ugandan people and are prejudicial to public interest. He cited **The King v Registrar of Joint Stock Companies (1931) 2 KB Page 197**



to 203 where the Court of Appeal affirmed the lower court decision and held that a company cannot be formed whose proposed Constitution necessarily involves an offence against the general law.

It was counsel's contention that the respondent's decision was taken in public interest and the public has a stake, common interest in the ideas or actions of an individual group of persons to the extent that they may affect the morality of others.

Counsel implored this court to uphold the trial Judge's decision that the name and objectives of the proposed company were against the values, norms and aspirations of the people of Uganda and public interest.

**On Ground No. 4;** Counsel submitted that Article 43 of the Constitution permits limitations of human rights in the public interest. It was counsel's submission that the right to freedom of expression, freedom of association, assembly and equality do not fall within the category of non-derogable rights provided for under Article 44 of the Constitution. Counsel contended that Article 43 recognizes that the exercise of these rights can be restricted in the interest of the wider public as long as this restriction does not amount to political persecution, is justifiable and acceptable in a free democratic society.

Counsel cited **Onyango Obbo v Attorney General Constitutional Petition No. 15 of 1997** for the proposition that rights conferred are not absolute and must be exercised in accordance with the existing law.

**In reply to Ground No. 5;** Counsel submitted that the appellants made an application for reservation of name on 28<sup>th</sup> November 2012 and the respondent sought further information from them before the name could be reserved or rejected in accordance with **section 36 of the Companies Act, 2012**. Counsel contended that the appellants contributed to the inordinate delay by failing to respond to the Registrar's query in a timely manner.

Counsel submitted that the appellants failed to show how they were unfairly or unjustly treated as provided for under Article 42 of the Constitution. Counsel prayed that this court upholds the trial Judge's ruling that the appellants failed to prove that they were unjustly treated.

**On Grounds No. 6 and 7;** Counsel submitted that costs are discretionary in nature and the appellants cannot benefit from an illegality. She submitted that the recognition of the name SMUG would amount to an illegal act. Counsel contended that the trial Judge was



right in dismissing the appellants' application as they failed to prove on a balance of probabilities any unlawful infringement by the respondent. Counsel prayed that the appeal should be dismissed with costs.

5 **Determination by the Court**

I have considered the submissions of both parties; the laws and authorities relied on and I had occasion to study and I have cited other decisions not referred to by counsel but which are relevant to this appeal. Counsel for the respondent raised a preliminary objection to the effect  
10 that the application on which this appeal arises was filed improperly before court. Counsel contended that the appellants should have filed an application for judicial review in the High Court since their application arose out of a decision of an administrative body. Counsel for the appellants did not respond to the preliminary objection.

15 First, I will handle the preliminary objection.

According to *Black's Law Dictionary 11<sup>th</sup> Edition Page 1013*, Judicial review is defined as a court's power to review the actions of other branches or levels of government; especially the court's power to invalidate legislative and executive actions as being unconstitutional.

20 **Rule 3 of the Judicature (Judicial Review) (Amendment) Rules, 2019** defines judicial review to mean the process by which the High Court exercises its supervisory jurisdiction over proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of  
25 public acts and duties.

In **Commissioner General Uganda Revenue Authority v Zain International BV CACA No. 11 of 2012**, the court while drawing a distinction between an appeal and judicial review made reference to two  
30 distinguished scholars.

**Stanley Alexander de Smith - Judicial Review of Administrative Action**, at page 436-437 and **Prof. Wade, Administrative Law**, at pages 712-713. In **Zain International BV** (supra) the court referred to the writings of Professor S. A de Smith whose views on judicial review  
35 were that,

“Judicial review is not only judicial scrutiny and determination of the legal validity of acts, omissions, decisions and transactions but also the making of declaratory orders and judicial determinations



by which administrative acts are held not as void but as voidable. Prof S.A de Smith further detected a reluctance to exercise discretionary power to protect the individual by restrictive interpretation of executive power lest such interpretation might work contrary to the public interest.”

5 **Prof Wade, (supra)** at page 713 states:

*“Review is the primary mechanism for enforcing the rule of law under the inherent jurisdiction of Court while appeal is a statutory adjunct with no such fundamental role.”*

10 The test of legality, fairness and rationality that is often applied to judicial review was articulated by another academic, **Hilary Delany (2001)** in his book, **Judicial Review of Administrative Action** where he propounds the theory that,

15 “Judicial review is concerned not with the decision, but the decision-making process. Essentially, judicial review involves an assessment of the manner in which the decision was made. It is not an appeal and the decision is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality.”

20 Judicial review is principally the process by which courts carry out their oversight role over public bodies or over persons acting under governmental authority. In judicial review the court does not consider the merits of a matter. The merits are left to matters in ordinary suits.

25 In a judicial review the court will consider issues of natural justice, failure to act with procedural fairness towards a person who is otherwise affected by that decision. Judicial review is concerned with the exercise of or abuse of power by those in office.

30 In the instant case, the appellants applied to the Uganda Registration Services Bureau for reservation of a name “Sexual Minorities Uganda” (SMUG) with a view of incorporating it as a company limited by guarantee. The respondent declined to reserve the name. Being aggrieved by the decision of the Registrar, who acted in their capacity as an officer of government, the appellants moved the High Court by way of

35 Notice of Motion seeking to enforce their rights and claimed violations of several rights as guaranteed under the Constitution of Uganda (1995). Basing on constitutional provisions, order 52 rule 1 of the Civil Procedure Rules and authorities cited above, the appellants challenged



the constitutionality of the decision of the Registrar on grounds that it breached article 50 of the Constitution by denying the applicants their right to just and fair treatment, their administrative decisions and equal protection before the law. I agree with the respondents that judicial review was the most suitable procedure for challenging the administrative acts of the Registrar, an officer of the Government of Uganda. Indeed, the appellant ought to have filed a motion by way of judicial review against the actions of the officer. However, I also agree that the respondent did not raise this point of law at the trial and now seeks to benefit from it on appeal. Raising this objection at this stage on appeal would be unfair to the appellants for reason that the objection was raised late in the day, the preliminary objection is overruled.

I now proceed with the merits of the appeal. I note that this is a first appeal. The duty of a first appellate court is set out in the law as well as in decided cases. It has been stated that the duty of a first appellate court is to re-appraise the evidence on record and draw its own inferences. (See **rule 30 (1) of the Judicature (Court of Appeal Rules) Directions SI 13-10**).

The Supreme Court set out this duty in **Kifamunte Henry v Uganda, SCCA No. 10 of 1997** as follows:

*"The first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

I have looked at the submissions of both counsel and they, in my opinion raise similar concerns. I shall resolve grounds 1,2,3 and 4 together.

**Grounds; 1,2,3 and 4**

1. That the learned trial Judge erred in law and fact when she misconstrued the Constitution of Uganda and the law holding that association for unlawful purposes and practices by LGBTI persons is prohibited in Uganda.

2. That the learned trial Judge erred in law and fact when she speculatively held that the name "sexual Minorities Uganda" and the objectives of the proposed company were to promote behavior that contravenes section 145 of the Penal Code Act and Article 31 (2) (a) of the Constitution of Uganda, 1995.



3. That the trial Judge erred in law and fact when she held that the appellants proposed name "sexual minorities Uganda" and the objectives of the proposed company go against the values, norms morals and aspirations of the people of Uganda and public interest.

4. The learned trial Judge erred in law and fact when she held that the respondents impugned action was a justifiable limitation within the ambit of article 43(1) of the Constitution of Uganda 1995.

I reiterate that this matter pertains to the appellants' application to reserve a name under the Companies Act, 2012 and consequently the Registrar's refusal to reserve the same. **Section 36 (1) of the Companies Act, 2012** provides that the Registrar may, on written application, reserve a name pending registration of a company. The Registrar, however, has the discretion not to reserve a name if the name is considered in his or her discretion undesirable. **Section 36 (2) of the Companies Act, 2012** provides that, "*No name shall be reserved, and no company shall be registered by a name, which in the opinion of the registrar is undesirable.*"

The registrar General has the mandate to assess the name presented by interested applicants and has the discretion to allow or reject it if found undesirable.

In the present case, the registrar declined to reserve the appellants' name *SMUG (Sexual Minorities Uganda)* in a letter dated 16<sup>th</sup> February 2016 for reasons that the company was formed to advocate for the rights and wellbeing of lesbians and gay among others, which persons are engaged in activities labeled criminal acts under section 145 of the Penal Code Act.

I had the opportunity to carefully examine the objectives of the proposed company (SMUG). In its proposed Memorandum of Association, the objectives are listed as follows:-

- a. Defending and promotion of fundamental human rights for all irrespective of their status.
- b. Research and documentation of violations of fundamental human rights of LGBTI people in Uganda,
- c. Promote protection, wellbeing and dignity of LGBTI persons and combat discrimination in policy, law and practice,



- d. Providing security response and safe space to the members in case of a crisis,
- e. Providing health care services for the LGBTI people in Uganda.
- 5 f. To provide support and promote development initiatives for LGBTI persons in Uganda.

10 The 1<sup>st</sup> appellant in his affidavit in support of the application stated that SMUG is promoted by the applicants and other members as a vehicle that will help advocate for the constitutional rights and freedoms of persons who are lesbians, gay, bisexual, transgender, intersexual and other sexual minorities.

15 The trial Judge accepted counsel for the Respondent's argument that the activities of the LGBTI persons are against government policy and are considered unlawful in Uganda. **Section 145 (a) of the Penal Code Act** criminalises activities the group seeks to protect and advocate for. It provides that any person who has carnal knowledge of any person against the order of nature commits an offence and is liable to imprisonment for  
20 life.

It is not in doubt that the SMUG is associated with the promotion and protection of the rights of LGBTI, which according to the laws cited are proscribed acts in Uganda. It is indeed true that the National Objectives and directive principles of state policy which are part of the Constitution  
25 espouse the view that pronounced values of population should be respected. In **Tinyefuza v Attorney General, Constitutional Petition No. 1 of 1996** the court held that the entire Constitution has to be read as a whole and no one particular provision overrules the other but each sustaining the other.

30 Further, **Article 43** provides for the general limitation on fundamental and other human rights and freedoms. It provides as follows: -

35 "(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit-

(a) political persecution; (b) detention without trial; (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter



beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.” The onus of proving that a limit on a right or freedom guaranteed by the charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. The respondent in this case had the onus to justify why he would reject the reservation of the appellants’ name, SMUG. The respondent reasoned that the name ‘*Sexual Minorities Uganda*’ was against public policy due to the fact that the company was formed for activities which were against public policy and not in the public interest. I looked carefully at the authorities cited by the appellant by which we were to be persuaded. They are indeed quite persuasive authorities, but I do not find their relevance with the issues at hand. In a more pertinent appeal, I would perhaps apply them to pertinent facts. This appeal was not about the abrogation of any particular behaviour in our society. I have already found that the appeal was about the reservation of a name. The learned trial Judge did not err when she found that the respondent was justified in its decision, which decision was taken in the public interest.

Based on the above discourse, I find that the respondent was well within its mandate to disallow the name proposed by the appellants under **section 36 (2) of the Companies Act.**

In the premises I find that grounds 1,2,3 and 4 of the appeal fail.

**Ground 5: That the learned trial Judge erred in law and in fact when she held that the inordinate delay by the respondents to respond to the appellants’ application for reservation of the name sexual minorities Uganda did not violate Article 42 of the Constitution of Uganda, 1995.**

**Article 42 of the Constitution** provides that:-

“Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.” Basing on the court record, the appellants’ application to reserve the name was made on 28<sup>th</sup> November 2012 and was returned with the comment “*name not clear.*” On 12<sup>th</sup> December 2012, the appellants lodged a complaint to the respondent seeking clarity on why their name was rejected. On 5<sup>th</sup> March 2013, the respondent wrote to the appellants



seeking more clarity on the name to be reserved. By a letter dated 2<sup>nd</sup> September 2013 the appellants provided a clarification on the meaning of the name, "*Sexual Minorities Uganda*."

A follow up letter was written on 3<sup>rd</sup> February 2015 and the final position from the respondent was received on 16<sup>th</sup> February 2016.

It is evident from the above correspondence that there was a delay in responding to the appellants' letter. The respondent argued that the appellants contributed to the inordinate delay when they delayed responding to the registrar's query in a timely manner. The appellants did attribute the delay to unfair treatment as per Article 42 of the Constitution. The trial Judge found that the respondent's delay was inordinate. She however held that it did not imply that the appellants were treated unequally or unjustly within the meaning of Article 42 of the Constitution. I find no reason to disagree with the learned trial Judge that the delay was inordinate. Ground 5 succeeds.

**Ground 6: That the trial Judge erred in law and fact when she awarded costs to the respondent in an application for enforcement of fundamental rights and freedoms guaranteed under the Constitution of Uganda.**

Counsel for the appellants submitted that the trial Judge's order awarding costs against the appellants is not only unfair and unjustified but also will impede public interest litigation, which is a hallmark of our Constitution. Counsel for the respondent submitted that costs are discretionary in nature and the appellants cannot benefit from illegality.

**In *Iyamuleme David v Attorney General SCCA No.4 of 2013*.** Court held that: -

***"While it is trite law that the award of costs is on the discretion of the Court, the award of costs must follow the event unless the Court, for good reasons orders otherwise, according to Section 27 of the Civil Procedure Act."***

**In *Kwizera v Attorney General SC Constitutional Appeal No. 1 of 2008*** it was found that:- ***"It is clear that while accepting that the principles inherent in Section 27 of the Civil Procedure Act apply***



to *Public Interest Litigation* cases, costs in *Public Interest Litigation* cases should only be awarded in rare cases; that a court must balance the need to compensate the successful litigant and the value (s) underlying *Public Interest Litigation* such as growth of constitutional jurisprudence which would be stifled if potential litigants know that there is a possibility of being saddled with costs in the event of the case being dismissed.”

The appellants filed the above human rights cause for a specific purpose. To cause the reservation and registration a company name for an organization, the SMUG organization. This is public interest litigation to the extent that the parties believe they are fighting for a just cause not for their own benefit. In this appeal the appellants were successful in two grounds while the respondents were successful in four grounds. I, however, do not find this to be a good case for the award of damages to either of the parties. It would be unjust to penalise the appellants for accessing the court on issues dear to them. The order for the award of damages is therefore vacated. I would not find this to be a matter deserving the award of costs. I would order that each party therefore bear its own costs.

Dated at Kampala this 12<sup>th</sup> day of March 2024.



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CATHERINE BAMUGEMEREIRE  
JUSTICE OF APPEAL



**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**Coram: [R. Buteera, DCJ, C. Bamugemereire & C.  
Gashirabake, JJA]**

**CIVIL APPEAL NO. 223 OF 2018**

1. **FRANK MUGISHA**
2. **DENNIS WAMALA**
3. **SSENFUKA JOANITA MARY**       :.....:       **APPELLANTS**

**VERSUS**

**UGANDA REGISTRATION  
SERVICES BUREAU**       :.....:       **RESPONDENT**

**JUDGMENT OF RICHARD BUTEERA, DCJ**

I have had the benefit of reading in draft the judgment of my learned sister C. Bamugemereire, JA and I agree with her Judgment, declarations and orders she proposed.

As C. Gashirabake, JA also agrees with her judgment and orders of C. Bamugemereire JA the appeal is allowed in the terms set out in her lead Judgement.

Dated at Kampala this .....<sup>12<sup>th</sup></sup> day of .....<sup>March</sup>..... 2024.

.....  


Richard Buteera  
**DEPUTY CHIEF JUSTICE**



**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

*(Coram: R. Buteera, DCJ, C. Bamugemereire, & C. Gashirabake, JJA)*

**CIVIL APPEAL NO. 223 OF 2018**

1. FRANK MUGISHA  
2. DENNIS WAMALA  
3. SSENFUKA JOANITA MARY } ..... APPELLANTS

**VERSUS**

**UGANDA REGISTRATION**

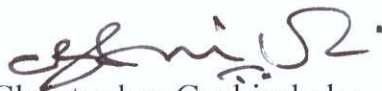
**SERVICE BUREAU:.....RESPONDENT**

**JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA.**

I have had the benefit of reading in draft the judgment of Hon. Lady Justice Catherine Bamugemereire in the above mentioned Appeal.

I concur with the judgment and the orders proposed and I have nothing useful to add.

Dated at Kampala the 12<sup>th</sup> day of March.....2024.

  
Christopher Gashirabake  
**JUSTICE OF APPEAL.**