

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[CIVIL DIVISION]
MISC. CAUSE NO. 96 OF 2016

1. FRANK MUGISHA
2. DENNIS WAMALA
3. SSENFUKA JOANITA WARRY

APPLICANTS

VERSUS

UGANDA REGISTRATION SERVICES BUREAU

RESPONDENT

BEFORE: HON. LADY JUSTICE P. BASAZA – WASSWA

RULING

Representation:

Mr. Ladislaus Rwakafuuzi and Ms. Patricia Kimera for the Applicants.

Mr. Vincent Katutsi and Mr. Kalwani Ronald for the Respondent.

Background:

[1] The applicants; *Mugisha, Wamala and Ssenfuka* brought this application on 1st June, 2016, against *Uganda Registration Services Bureau (URSB)*, under Articles 20 (1) & (2), 21 (1), (2),

29 (1) (b),(d) & (e), 32(1) & (2), 36, 38, 42 and 50 (1) of the Constitution of the Republic of Uganda and Order 52 rule 1 of the Civil Procedure Rules (CPR).

[2] The stated Articles of the Constitution provide for the fundamental rights and freedoms of individuals and groups. These include; the right to equality and freedom from discrimination, the right to protection of freedom of conscience, expression, assembly and association, State affirmative action in favour of marginalized groups, protection of rights of minorities, civic rights and activities and the right of any person to just and fair treatment in administrative decisions.

[3] *Mugisha and Ors* represented themselves to be promoters of a proposed Company limited by guarantee, to wit, *Sexual Minorities Uganda* (hereinafter referred to as "*the proposed company*").

Museveni u/b

- [4] *URSB* is an autonomous statutory body established under Cap. 210 of the Laws of Uganda, charged to carry out several functions that include carrying out all registrations required under relevant laws.
- [5] On 22nd November 2012, *Mugisha & Ors* applied to *URSB* under the provisions of section 18 of the Companies Act, 2012, for the reservation of the name of *the proposed Company*.
- [6] By its letter of 16th February, 2015¹, *URSB* rejected their application on the ground that the name was undesirable and un-registrable because *the proposed company* was to be formed to advocate for the rights and well-being of lesbians and gay persons, among others (LGBTIs), which persons are engaged in activities labeled criminal acts under *sec. 145 of the Penal Code Act (PCA)*. *URSB* also cited *sec. 36 of the Companies Act, 2012 (CA)*. (*The rejection of the application by URSB shall be referred to in this Ruling as “the impugned action”*)

¹The letter of *URSB* bears the date 16/02/2016 but both parties acknowledged that the date the letter was written was 16/02/2015 and not 16/02/2016. The date of 16/02/2016 was acknowledged as a typographical error.

[7] The objectives for which the proposed company was to be formed were shown in an extract of its proposed Memorandum of Association attached to the motion of *Mugisha & Ors*, to include *inter alia*, the following;

- a) *Research and documentation of violations of fundamental human rights of LGBTI people in Uganda*
- b) *Promote protection, wellbeing and dignity of LGBTI persons and combat discrimination in policy, law and practice.*
- c) *Providing security response and safe space to the members in case of a crisis*
- d) *Providing health care services for the LGBTI people in Uganda*

[8] In their motion, *Mugisha and Ors* seek the following declarations and Orders;

1. A declaration that *the impugned action* and consequently rejecting to register *the proposed Company*, was a violation by

URSB of Articles 21 (1) & (2), 29 (1) (a), (b), (d), (e), 32 (1), 36 and 38 (2) of the Constitution of Uganda.

2. A declaration that the delay to respond to their application to reserve the name of *the proposed company*, was a violation by *URSB* of Article 42 of the Constitution.
3. An Order that the Registrar General of *URSB* reserves the name and registers *the proposed company* with the objectives or like objectives already filed with *URSB*.
4. An Order that *URSB* pays the costs of the application.

[9] This Court was addressed by way of written submissions filed by *Learned Counsel* for each party.

Issues:

[10] The following are the issues for this Court's determination:

1. Whether the refusal by *URSB* to reserve the name of *the proposed Company* and consequently to register *the proposed*

Company, to wit, "*Sexual Minorities Uganda*", contravened the Constitution of Uganda²?

2. Whether *Mugisha & Ors* are entitled to the remedies sought?

The Applicants' Case:

[11] The gist of the Applicants' (*Mugisha & Ors*) case as contained in their motion and a supporting affidavit, sworn on 27th May, 2016 by *Mugisha*, is that;

1. On 28th November 2012, they applied through M/s Human Rights Awareness and Promotion Forum (HRAPF) to *USRB* for reservation of the name of *the proposed Company*.
2. Upon the request of the Registrar General, they explained that the objects of *the proposed company* included setting up an organization to advocate for the rights and freedoms of

² This issue was amended and framed by court under the provisions of Order 15 rule 5 (1) of the CPR. Each party had singly framed the same issue differently. Harmonization was found necessary.

persons who may *inter alia* be lesbians, gay or bisexual, transgender and intersexual, referred to as LGBTI interests.

3. The Registrar General did not respond to their application till after eighteen (18) months, which delay amounted to unfair and unjust treatment.
4. *The impugned action* was a violation of their Constitutional rights and guarantees.

The Respondent's Case:

[12] The gist of *URSB's* case, as contained in their affidavit in reply sworn on 22nd August 2016, by a one *Mugabe*, who is stated to be the Manager Business Registration of *URSB*, is that;

1. On 28th November, 2012, *URSB* received the Applicants' application and made a comment requiring the Applicants to clarify on the name sought to be reserved.

2. The applicants provided the clarity sought and on 16th February, 2015 *URSB* rejected the name. Any delay in obtaining the Registrar's decision was caused by the Applicants' delay in providing clarity.
3. The objectives indicated in the Memorandum and Articles of Association of *the proposed company* were to promote behavior not in line with the Laws of Uganda. This formed the basis for the Registrar's finding the name undesirable under the Companies Act, 2012.
4. *The impugned action* by *URSB* was done and taken in accordance with the Laws of Uganda and in good faith in performance of its duties.

Arguments of Counsel:

[13] *Learned Counsel* for *Mugisha and Ors*, argued in their written submissions that;

Mase William 14/6.

1. Despite identifying as persons who sought to register an organization working on issues of LGBTI persons, *Mugisha & Ors* are entitled to freedom of association and that right can only be limited in accordance with *Art. 43 (2) (c) of the Constitution*. Learned Counsel relied on the following cases and provisions;

i) *Sam Lyomoki & 6 Ors vs. Attorney General*³

ii) *Eric Gitari vs. NGO Cordination Board & Ors*⁴

iii) *Attorney general vs. Thuto Ramogge & 19 Ors*⁵

iv) *Article 10 of the African Charter on Human and People's Rights (ACHPR) and guidelines 10, 12 and 14.2 thereunder*

3. The phrase "all persons" under *Art. 21 (1) & (2) of the Constitution* includes LGBTI persons. The right to equality and

³ [2005] KALR 376

⁴ High Court of Kenya Constitutional and Judicial Review Division Petition No. 440 / 2013

⁵ Botswana Court of Appeal (2014) CACGB-128-14

non-discrimination applies to all persons including LGBTI persons and that therefore by the impugned action, *URSB* violated the right to equality and freedom from discrimination under *Art. 29 (1) (e) of the Constitution*. For this proposition, learned Counsel relied on the following

- i) *Adrian Jjuuko vs. Attorney General*⁶
- ii) *Toonen vs. Australia*⁷

4. That a delay of twenty months, without *URSB* responding to several reminders to reserve the name was a violation of *Art. 42 of the Constitution*. Counsel cited *Tony Katungi vs. Attorney General & Anor*⁸
5. Citing *Charles Onyango Obbo & Anor vs. Attorney General*⁹ and *Muwanga Kivumbi vs. Attorney General*¹⁰, learned Counsel argued that the limitation of the enjoyment of Constitutional

Handwritten signature

⁶ Constitutional Petition No. 1 of 2009

⁷ (ICCPR Communication 488 of 1992, CCPR/C/50/D/488/1992

⁸ HCMC No. 266 of 2016

⁹ [2004] KALR 142

¹⁰ [2008] KALR 419

rights and freedoms under Art. 43 (2) (c) does not apply to the circumstances of the present case. That it must be shown that such a limitation addresses a substantial public concern and the right of freedom should be impaired only to the extent desirable to fulfil the objectives of the law.

[14] In reply, *Learned Counsel for URSB* argued that;

1. The application is without merit.
2. It was reasonable and justifiable for the Registrar to conclude that the reservation of the name of *the proposed company* would only give a green light to *the proposed company* to engage in practices prohibited by *sec. 145 and 21 of the PCA*. *The impugned action* was taken in public interest.
3. *Sec. 145 of the PCA* prohibits same-sex / homosexual acts and an undesirable name in the opinion of the Registrar cannot be reserved under *sec. 36 (2) of the Companies Act, 2012*.

4. It is a principle of criminal law that in addition to the substantive offense, it is also prohibited to directly or indirectly encourage or assist the commission of the offence or to conspire with others to commit it regardless of whether the offence is actually committed or not. *Learned Counsel* cited *sec. 21, 390, 391 and 392 (f) of the PCA*.

5. *Art. 43 of the Constitution* permits limitations of human rights in public interest. The right to freedom of expression, political participation, freedom of association, assembly and equality before the law are guaranteed to all persons but do not fall under the category of non-derogable rights under *Article 44 of the Constitution*. *Learned Counsel* cited *Onyango Obbo & anor vs. Attorney General*¹¹

6. Promotion of morals is widely recognized as a legitimate aspect of public interest which can justify restrictions. Under

Masrahman 14/6.

¹¹ Constitutional Petition No. 15 of 1997

our domestic law, the heading of Chapter XIV of the PCA is "*Offences against Morality*" and under that chapter several acts including homosexual acts are prohibited.

7. Criminal law by its nature is concerned with public interest and aims at safeguarding it.
8. The law prohibits homosexual acts and persons who promote those acts cannot allege that the actions taken to prevent their breach of the law amount to denial of equal protection before the law as law abiding people were not equally restricted.
9. *Mugisha & Ors* are not entitled to the declarations and orders they seek.

[15] In rejoinder, it was argued for *Mugisha & Ors* that;

1. Incitement, promotion and conspiracy to commit a crime do not arise in the circumstances of this case.

2. *The proposed Company* was to be incorporated to carry out lawful activities.
3. The objectives of *the proposed company* do not include engaging in same -sex practices or encouraging people to do so.
4. The High Court of Uganda in *Kasha Jacqueline & Others vs. Rollingstone newspaper & Anor*¹², has held that *sec. 145 of the PCA* does not criminalize "gayism" *per se* but just sexual acts. The interpretation of *Sec. 145 of the PCA* by *URSB* is absurd as it implies that anything done for the benefit of LGBTI persons would amount to incitement, promotion and conspiracy
5. The restriction of fundamental rights under Art. 43 of the Constitution should not go beyond what is necessary to achieve the objective of the restriction. There are less

Kasha Jacqueline vs/b

¹² HC MC 163 of 2010

restrictive measures of dealing with the offences envisaged under *sec. 145 of the PCA*.

Decision of this court:

[16] Fundamental rights and freedoms of the individual are inherent and are not granted by the State. (*Art. 20 of the Constitution of Uganda*)

[17] It is however trite that not all fundamental and other human rights and freedoms are absolute. A distinction must be drawn between non-derogable and derogable fundamental rights and freedoms. It is explicit in the Constitution (*Art. 44*) that only the following rights and freedoms are non-derogable;

- a) *Freedom from torture and cruel, inhuman or degrading treatment or punishment*
- b) *Freedom from slavery or servitude*
- c) *The right to a fair hearing*
- d) *The right to an order of habeas corpus*

[18] The right to a fair hearing (Art. 44 (c)) entails *inter alia*, the right of all persons to equal, just and fair treatment and protection of, before and under the law. (Art. 21 (1), 28 (1) and 42 of the Constitution).

Article 3 of the African Charter on Human and Peoples' Rights (ACHPR) similarly provides that every individual shall be equal before the law and shall be entitled to equal protection of the law.

[19] In respect of all other rights and freedoms not prescribed under Art. 44 of the Constitution, a general limitation on their enjoyment is stipulated under Art. 43 of the Constitution. The focus of this Ruling is on that general limitation.

[20] Article 43 (1) of the Constitution provides that

"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".

[21] Art. 27 (2) of the ACHPR provides that;

"The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest"

[22] The question to be answered therefore is; *whether URSB's ground for the impugned action was justified and falls within the ambit of Art. 43 (1) of the Constitution?*

[23] It is not disputed that *URSB* took *the impugned action*. Since that was established, the burden of proof shifted to *URSB* to prove, on a balance of probabilities, that the ground upon which it took *the impugned action* was justified and falls within the ambit of *Art. 43 of the Constitution*.

*Charles Onyango Obbo & Anor vs. Attorney General (supra) and Major General Tinyefuza vs. Attorney General*¹³, followed.

[24] *Learned Counsel for Mugisha and Ors* argued that the limitation under *Art. 43* does not apply to the present case, while *learned*

¹³ Constitutional Petition No. 1 of 1997 and S/C Constitutional Appeal No. 1 of 1997

Counsel for URSB argued that the limitation applies to the present case and *the impugned action* was taken in public interest.

[25] The test to determine whether *the impugned action* falls within the ambit of Art. 43 is that, *URSB's* ground for taking the impugned action must demonstrate, that *the proposed Company* would either prejudice the fundamental or other human rights and freedoms of others or of the public interest.

[26] "Public interest" is defined as the general welfare of the public that warrant recognition and protection, something in which the public as a whole has a stake. (See Black's law Dictionary¹⁴).

[27] The public has a stake, a common interest, in the ideals or actions of an individual or group of persons to the extent that they may affect *the morality* of others. See the definition of public morality in the same dictionary (supra)¹⁵.

Masrur Rahman 14/6.

¹⁴ 9th ed. at page 1350

¹⁵ At page 1100

[28] *URSB's* case is that the objectives of *the proposed company* were to promote behavior not in line with the Laws of Uganda, particularly *Sec. 145 of the PCA*. Their *Counsel* argued that promotion of morals is widely recognized as a legitimate aspect of public interest which can justify restrictions and that criminal law by its nature is concerned with public interest and aims at safeguarding it.

[29] On the other hand, the case of *Mugisha & Ors* is that it was unconstitutional for *URSB* to have taken the impugned action and therefore not registering the LGBTI organization, on the basis of the provisions of *Sec. 145 of the PCA*. Their *Counsel* argued that one cannot speculate on the commission of an offence. That the decision in *Jackueline Kasha Nabagesera & 3 Ors vs. Attorney General & Rev. Fr. Lokodo*¹⁶ was wrong, the objectives of *the proposed Company* do not violate *sec. 145 of the PCA*.

¹⁶ HCMC. No. 033 of 2012

[30] I carefully considered the arguments for and against *the impugned action* by *URSB* and the authorities relied on by each party.

First, it is essential to look at the provisions of Article 31 (2) (a) of the Constitution as amended by Sec. 10 of the Constitution (Amendment) Act, 2005 and sec. 145 of the PCA.

Art. 31 (2) (a) of the Constitution provides that;

"Marriage between persons of the same sex is prohibited"

Sec. 145 of the PCA provides that;

"Any person who

(a) has carnal knowledge of any person against the order of nature

(b) has carnal...

(c) permits a male person to have carnal knowledge of him or her against the order of nature

commits an offence and is liable to imprisonment for life"

[31] I agree with the arguments of *Learned Counsel* for *URSB* that the objectives of *the proposed company* were to promote behavior that

M. S. Mahan

14/6

contravene not only Sec. 145 of the PCA, but also Art. 31 (2) (a) of the Constitution.

[32] The *proposed company* would be an organization formed to protect and promote an assembly or association of persons; LGBTIs and homosexuals, whose practices, ideals, beliefs and objectives contravene the stated law.

[33] In the same vein, I am entirely in agreement with the decision of Musota, J in the *Jackueline Kasha Nabagesera & 3 Ors vs. Attorney General & Rev. Fr. Lokodo case (supra)*.

Musota, J held that *in addition to the substantive offence under sec. 145 of the PCA, it is also prohibited to directly or indirectly encourage or assist the commission of an offence or to conspire, to do so with others to commit it regardless of whether the offence is actually committed or not. To wit, to incite, and to promote an illegality is prohibited. He made reference to secs. 21, 390, 391 and 392 (f) of the PCA.*

The Learned Judge further held that *by the closure of a workshop on the ground that the organizers were using the workshop to promote and encourage homosexual practices, the Minister acted lawfully.*

[34] That position in *Jackueline Kasha Nabagesera & 3 Ors vs. Attorney General & Rev. Fr. Lokodo case (supra)* conflicts with the decision relied on by *learned Counsel* for Mugisha & Ors in the *Jackueline Kasha Nabagesera & 2 Ors vs. Rolling Stone Ltd & Anor case, (supra)*. In the latter case, Musoke- Kibuuka, J, held *that the scope of sec. 145 of the PCA is narrower than "gayism" and that one has to commit an act prohibited under that section in order to be regarded as a criminal.*

[35] As I stated, I entirely agree with the decision of Musota, J, in the *Jackueline Kasha Nabagesera & 3 Ors vs. Attorney General & Rev. Fr. Lokodo case (supra)* and not with the decision in the *Jackueline Kasha Nabagesera & 2 Ors vs. Rolling Stone Ltd & Anor case (supra)*.

Musa Wambani 4/6

[36] *Learned Counsel for Mugisha & Ors* argued that in *the Eric Gitari (supra)* and *the Botswana case of Thuto Ramogge (supra)*, it was held that the persons who had identified themselves as LGBTI were entitled to freedom of expression and association and that likewise *Mugisha and Ors* enjoyed the same freedom.

[37] I don't agree with that argument. In my view, cases decided in other jurisdictions can only be relevant to our own jurisdiction if the laws and societal values are the same. *Learned Counsel for Mugisha & Ors* has not demonstrated that the values and laws in those jurisdictions pertaining at that time, were the same as those in our own Jurisdiction. It is also trite that decisions made in other jurisdictions may only be persuasive and are not binding.

[38] In addition, I also don't agree with the reasoning in *the Eric Gitari case*. In that case it was held that the only qualification was whether the persons associating were human, and that if they were, they had freedom of expression and association. I have already

stated the general principle that fundamental and other human rights and freedoms are not absolute.

[39] I subscribe to the approach taken in *Schalk and Kopf vs. Austria* in the European Court of Human Rights (ECHR), (First section)¹⁷.

In that case, the Applicants' complaint before the ECHR was that being a same-sex couple, they did not have access to marriage which remained a reserve for different-sex couples.

The ECHR noted that there was no European consensus regarding same-sex marriage and that out of the 47 Convention States, no more than 6 allow same-sex marriage. Making reference to Art. 9 of the Charter on Fundamental Rights of the European Union (the Charter), the ECHR found no violation of Art. 14 of the Charter on the enjoyment of rights and freedoms¹⁸. The Court observed that *the reference to national laws in the Charter, leaves the decision whether or not to allow same-sex marriage to the States, it is left*

Assessment 14/6

¹⁷ In Applic. No. 30141/04 dated 22nd November, 2010

¹⁸ Art. 14 is couched in similar words as Art. 21 (2) of the Constitution of Uganda

to regulation by the National State. The ECHR further observed that marriage has deep – rooted social and cultural connotations which may differ largely from one society to another

[40] Using that approach in the *Schalk and Kopf case (supra)*, in our domestic laws in Uganda, the association for unlawful purposes and practices by LGBTI's are prohibited. What happens or is allowed in other jurisdictions cited by *learned Counsel for Mugisha and Ors*, does not apply here and indeed in most African States, and cannot therefore be a point of reference.

[41] *Courts of law in Uganda are enjoined to exercise judicial power in conformity with the law, the values, norms and aspirations of the people of Uganda (Art. 126 (1) of the Constitution). The proposed Company name and objects go against the values and norms of the Ugandan people and are prejudicial to the public interest.*

[42] In *The King vs. Registrar of Joint Stock Companies*¹⁹, the Registrar refused to register the company on the ground that its object was

¹⁹ [1931] 2 KB at page 197-203

illegal. In an appeal from the Divisional Bench, the Court of Appeal affirmed their decision and *stated that a company cannot be formed whose proposed constitution necessarily involves an offence against the general law.*

[43] Much as *The King vs. the Registrar case (supra)* is an old case, the principle is still valid and squarely applicable to this case.

[44] *I hold therefore, that URSB has justified its impugned action, taken in public interest within the ambit of Art. 43 of the Constitution. This issue is in the result, answered in the negative.*

[45] On the question of the delay complained about by *Mugisha & Ors*, I find their complaint legitimate. A response by *URSB* given in a period of eighteen (18) months, to wit, between the time *URSB* received the clarification it requested for, and the time it took *the impugned action*, was inordinate.

[46] *URSB* argued that the delay was attributable to the failure by *Mugisha & Ors* to provide timely clarity, but failed to substantiate that assertion. *Mugisha & Ors* showed that they sent the

Mugisha & Ors v. URSB

clarification by May 2013 and that it was not until they sent several subsequent reminders that *URSB* eventually responded.

[47] Be that as it may, much as I have found that *URSB's* delay in responding was inordinate, I am hesitant to draw any conclusions that such delay was attributed to the nature and objects of *the proposed company*.

There is no basis for this court to rule out other causes for the delay. These could have included sheer inefficiencies in the administrative systems of *URSB*.

Mugisha & Ors ought to have shown that such delay was peculiar to them or that other individuals or groups made similar applications and were treated differently by *URSB*. This was not done. It cannot therefore be said that they were treated unequally or unjustly within the meaning of *Art. 42 of the Constitution*.

In any event, I am unable to see any adverse effect of such delay on the outcome of the verification process by *URSB* or on the Applicants.

Orders of this Court:

[48] Having found issue No. 1 as I have, this application is dismissed with costs to the Respondent (*URSB*) against the Applicants (*Mugisha, Wamala and Ssenfuka*).

I so Order,

Mugisha 14/6.

P. BASAZA - WASSWA
JUDGE

14/06/2018

This Ruling shall be delivered on my behalf by the D/Registrar Civil Division.

Ruling is delivered on *27th* day of *June* 2018 at *9:30am* in the presence of;

1.... Mr. Ronald Lutwenda fl resp

Counsel flapp abs

Parties abs

By D. Clerk

ct: Ruling read & delivered in open

the bench & R/S explained

[Signature]

27/6/18