THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 482 OF 2020
(Arising From Miscellaneous Cause No. 81 of 2020)

1. **ATTORNEY GENERAL**
2. **THE COMMISSIONER GENERAL OF PRISONS** **::::::::::::::::::::::** **APPLICANTS**

VERSUS

HUMAN RIGHTS AWARENESS AND PROMOTION FORUM **::::::::::::::::::::::** **RESPONDENT**

BEFORE: HON. JUSTICE MICHAEL ELUBU
RULING

This is an Application brought under Section 33 of the **Judicature Act Cap 13**; Section 98 of **the Civil Procedure Act Cap 71;** and Order 9 Rule 27 of the **Civil Procedure Rules SI 71-1**.

The Applicants are the **Attorney General** and **Commissioner General of Prisons** while the Respondent is the **Human Rights Awareness and Promotion Forum.**

This matter was filed seeking Orders that:

1. The Ex parte Judgement in Miscellaneous Cause No. 81 of 2020 be set aside and the Applicants be allowed to appear and defend the suit;

2. The Costs of this Application be provided for.

The grounds on which the application is based are stated in the Notice of Motion and particularized in the supporting affidavit of Mr Hillary Nathan Ebila**.** The respondent opposes the application. One Dr. Adrian Jjuuko deposed the affidavits on its behalf.

Background

On the 24th of April 2020 the Respondent filed Miscellaneous Cause No. 81 of 2020 against the Applicants named here. That application was for orders declaring that the fundamental rights of the respondent's 19 clients, who were detained at Kitalya Government Prison, had been infringed. The Respondent also sought orders that their clients be released from Prison and compensation to atone for the wrongs.

Both applicants in this application did not file affidavits in reply in Miscellaneous Cause No. 81 of 2020. Before the main cause was fixed for hearing, the respondents prayed for an order to meet their clients. The order was granted by this court.

The main cause was fixed for hearing and the applicants here served with a hearing notice. An affidavit of service to that effect was duly filed.

When the matter was called for hearing on the 27th of May 2020, there was no Representative or Counsel for the applicants present. This court directed that the matter proceed *Ex Parte* and on the 5th of June 2020 the ruling was delivered.

The prayers sought were granted and it was directed that compensation of 5,000,000/- be paid to each of the detained persons.

On the 25th day of August 2020, the Applicants filed this Application seeking to set aside the *Ex Parte* Judgment issued in Miscellaneous Application No. 81 of 2020. The application is premised on the reason that Counsel for the applicant could not be in Court on time owing to the country wide lockdown in place at the time. Farther still, that it was impossible to get information from the Uganda Prison Service which the applicant needed to conduct the defence of the case. As a result no affidavits in reply were filed. For that reason the applicant has shown sufficient cause for this application to be granted.

The respondent opposes the application. That when the applicant was served, Counsel in personal conduct of the matter, one Mugisha Moses, contacted them and they asked him to file a reply. That he, in turn, proposed a monetary settlement which was rejected. No reply was filed nor did Counsel appear for the hearing. It is averred that at the time of the hearing there had been a relaxation of the travel restrictions and it cannot validly be given as reason for absence of Counsel

Issues

The main issues for determination in this matter are,

1. Whether there is sufficient cause to set aside the *Ex Parte* Judgment

2. Whether the *Ex Parte* Judgment passed in Miscellaneous Cause No. 81 of 2020 is irregular

3. Whether the Applicants have a good Defence with a High probability of success

4. What remedies are available?

There were other, mainly procedural questions, framed as preliminary points.

a. Whether the affidavit in reply should be struck out

b. Whether the Contents of Hilary Nathan Ebila's affidavit in support of the Application are inadmissible as hearsay

c. Whether the Application has been overtaken by events and is therefore moot

Submissions

The parties were granted leave to file written submissions which are on the Court record.

Resolution

Both sides have pointed out several procedural shortcomings in the matter.

Issue 1

Whether the affidavit in reply should be struck out

Counsel for the Applicants raised an objection against the Respondent's affidavit in reply and supplementary affidavit saying they were filed out of time. That this contravenes **Order 12 Rule 3 (2)** of the **Civil Procedure Rules SI 71-1** which requires that an affidavit in reply shall be filed within 15 days from the date of service of the Application.

It was stated farther that the affidavit of service on the court record shows that the Respondent was served on the 23rd day of September 2020 and acknowledged receipt. That a reply was not filed until the 27th October 2020. A supplementary affidavit in reply was filed on the 28th October 2020. These replies were lodged more than a month after service of the Application on them. That the respondent did so without first seeking leave of the Court to file out of time. In support of these arguments, Counsel for the Applicants relied on the case of **Stop and See (U) Ltd vs Tropical Africa Ltd HCMA No. 333 of 2010.**

The Respondent's reply was that **Order 12** of the **Civil Procedure Rules SI 71-1** does not apply to the present Application but only to interlocutory matters. That this Application arises from a Cause that has already been substantively determined by this Honourable Court.

It was further submitted that this Court is vested with Jurisdiction and discretion to enlarge time in the interests of justice. The Respondent cited **Section 6(5)** of **the Human Rights Enforcement Act 2019.**

Determination

It is true that the respondent filed a reply out of time. That it did so without seeking the leave of this Court. This however is an application that emanates from a Cause filed to enforce the fundamental rights of persons represented by the respondent. This Court has the inherent jurisdiction to ensure that the ends of justice are met. On this procedural matter therefore the Court will rely on **Section 6 (5)** of the **Human Rights Enforcement Act 2019** which states:

> No suit instituted under this Act shall be rejected or otherwise dismissed by the competent court merely for failure to comply with any procedure, form or on any technicality

The Court therefore validates the respondent's late affidavits in reply

Issue 2

Whether the Contents of Hilary Nathan Ebila's affidavit in support of the Application are inadmissible as hearsay

This issue was raised by Counsel for the Respondent. It was his contention that **Paragraphs 5, 6, 7, 8** and **9** of Hilary Nathan Ebila's affidavit in support of the Application contain matters which are hearsay and they offend **Order 19** of the **Civil Procedure Rules SI 71-1.**

The argument in reply for the Applicants was that the Attorney General's Chambers is a firm of lawyers just like any other. It was further submitted that the information deposed by Mr. Nathan Ebila is information that is ordinarily within his knowledge obtained in the ordinary course of his practice in the Attorney General's Chambers.

Determination

Affidavit evidence in civil matters is regulated by **Order 19** of the **Civil Procedure Rules.** The rules in this Order give the parameters within which affidavit evidence is acceptable. It states,

> (1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.
>
> (2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit.

It was stated that the testimony in Mr Ebila's affidavit is information that is within his knowledge as an in officer in the Attorney General Chambers. In **Lakony Vs Gulu District Service Commission HCCA No. 110 of 2018** the High Court held that:

> affidavits based on information must disclose the source of information. An affidavit in which the deponent's source of information is unknown is unreliable and can have no evidential value

It should be stated that an affidavit is a sworn written statement used mainly to support certain applications or as evidence in court proceedings (see **Oxford Dictionary of Law** *5th Edition* ***Oxford University Press***)

Therefore the rules of evidence apply with full force to affidavits that a party wishes to rely on in Court. A court will not rely on hearsay evidence as it has little or no probative value.

Hearsay evidence is testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness (see **Black's law dictionary 8th Edition West Publishing Company).**

In **Col (Rtd) Dr. Kizza Besigye Vs Yoweri Kaguta Museveni & another Election Petition No. 1 of 2001** the Supreme Court held that:

> Court can reject offending parts of an affidavit while accepting the rest of it the same way it rejects inadmissible oral evidence.

The following paragraphs of Mr Ebila affidavit are reproduced:

5. *That I know the Attorney General as legal representative of Government endeavored to obtain information from Uganda Prisons Services who are alleged to have denied the Respondents access to their clients*

6. *That I know that the Attorney in personal conduct of this matter could not obtain the necessary information from the Uganda Prison Service and prepare affidavits in reply to the Application because of restriction of movements in the country*

7. *That I know that the Applicants could not procure the necessary witnesses to depose affidavits in reply to the Application because they were unable to move from their work stations due to restrictions in movement*

8. *That I know that the day the matter came up for hearing, Counsel in personal conduct arrived late at Court due to lack of transport as a result of the government directives restricting public transport*

9. *That I know that Counsel in personal conduct of the matter arrived at Court to find that the matter had proceeded Ex parte and hence could not address Court on the challenges that had prevented the Applicants from filing a reply to* the suit.

In his Affidavit in reply, Dr Adrian Jjuuko states that he met one Moses Mugisha who introduced himself as Counsel from the Attorney General's Chambers in personal conduct of the matter. That on the 27th of May 2020 he met the same gentleman who expressed regret for coming late. These averments were not rebutted by the applicants.

It is clear therefore that it was one Mr Mugisha Moses, and not Mr Nathan Ebila, who was Counsel in personal conduct of MC No 81 of 2020. Mr Ebila did not depose to the source of all the information he gave regarding the details of the applicants' case. Since Mr Ebila does not state the source of that information and knowledge, it is rendered hearsay. For that reason it offends **Order 19 Rule 3** of **the Civil Procedure Rules** for not disclosing the source of information.

In the circumstances **Paragraphs 5, 6, 7, 8** and **9** of Nathan Ebila's affidavit in support are hereby struck out.

Issue 3

Whether there is sufficient cause to set aside the Ex parte Judgment

It was submitted for the Applicant, that Mr Nathan Ebila had deposed under **paragraphs 4, 5, 6 and 7** of his affidavit in support of the Application, that at the time Miscellaneous Cause No. 81 of 2020 was filed in court and served on the Applicant, there was a nationwide lock down. That there were strict restrictions on movement of persons and that as a result, the Applicant was unable to obtain information from officials of the Uganda Prisons Service.

For the Respondent the argument was that the Applicants have not established sufficient cause to set aside the Judgment in Miscellaneous Cause No. 81 of 2020. That the reason that has been furnished by the Applicants for not attending the Hearing in Miscellaneous Cause No. 81 of 2020 cannot be sustained. That at the time of the hearing the Government had eased travel restrictions. To support of this argument, Counsel for the Respondent referred this Court to paragraphs 20, 21, 22 and 23 of Dr Adrian Jjuuko's affidavit in reply and **the Public Health (Control of Covid -19) (No. 2) (Amendment No. 2) Rules, 2020.**

Determination

The provisions of the law relating to setting aside a default judgement stipulate as follows:

> In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also (see **Order 9 Rule 27** of the **Civil Procedure Rules)** .

In **Departed Asians Property Custodian Board v Issa Bukenya** ***Supreme Court Civil Appeal No. 18 of 1991*** the Supreme Court held that:

> an application to set aside an ex parte judgment cannot succeed if no good or substantial reasons are given to justify setting it aside.

The Applicants relied on **paragraphs 4, 5, 6 and 7** of Mr Nathan Ebila's affidavit in support to show that there is sufficient reason to justify the setting aside of the Ex parte Judgement in Miscellaneous Cause No. 81 of 2020. Those paragraphs were found offensive and struck out.

Dr. Adrian Jjuko's deposes in Paragraph 13 of the affidavit in reply, that on the 26th of May 2020 he personally went to the 1st Applicant's chambers to meet Counsel Mugisha who was in personal conduct to verify whether he had filed an affidavit in reply. He also stated that at the time the lock down had been eased. That in fact the respondent was provided with three motor vehicle stickers marked 'Legal Services' for purposes of enabling it to pursue MC No 81 of 2020. That in light of this application being filed almost three months after the ruling was delivered, is a mark of indolence and contempt on the part of the applicant.

It is also important to note that the Applicants did not file a reply in the Main Cause No 81 of 2020. And that is on top of not appearing for the hearing of the matter despite proper service on them.

The applicant did not respond to the respondent's averments above. The principle on this was stated in **Massa vs Achen 1978 H.C.B. 197** when the Court stated that where certain facts are sworn to in an affidavit, the burden to deny them is on the other party, and if he does not they are presumed to have been accepted.

Additionally, this Court takes judicial notice of the fact that throughout the lock down period, State Attorneys from the office of the Attorney General appeared before the Court and prosecuted or defended several applications with full instructions from several Ministries, Departments and Agencies.

It is also pertinent that the ruling in M.C. No 81 of 2020 was delivered on the 5th of June 2020. The applicant did not file this application to set aside until the 25th of August 2020. While there is no time set within which the application should be brought, if indeed the applicant was as vigilant and interested as depicted, the Court would have expected a prompt response by expeditiously filing an application to set aside the default judgment.

As it stands there has been no explanation furnished for the 80 day delay before the filing of this application. In other words the current action appears to be an afterthought.

It is therefore disingenuous to state that it was because of the lockdown that the applicant was prevented from appearing. It is evident that the applicant has not furnished sufficient cause for this Court to set aside the *Ex Parte* Judgement entered in Miscellaneous Cause No. 81 of 2020.

Issue 4

Whether the Exparte Judgment passed in Miscellaneous Cause No. 81 of 2020 is irregular

It was submitted for the Applicants that the *Ex parte* Judgment entered in Miscellaneous Cause No. 81 of 2020 is irregular owing to the Respondent's failure to seek for and obtain leave in accordance with **the Government Proceedings Act Cap 77**. In support of these arguments, the following sections were cited: **Sections 10** and **26 (2) (c)** of **the Government Proceedings Act Cap 77** and **Rule 6** of **the Government Proceedings (Civil Procedure) Rules**.

In reply the Respondent argued that the Courts have already pronounced themselves on **the Government Proceedings Act Cap. 77**. It was further submitted that the Civil Procedure Rules apply to the Government. As a result the judgment was validly entered. It was further submitted for the Respondent that **Article 21** of the Constitution protects the equality of persons and therefore the Government has to be treated equally with the Respondent.

It was the contention of the Applicant in rejoinder that the Respondent should seek leave of Court to refer this question to the Constitution Court for interpretation.

Determination

The challenge by the respondent is that Rule 6 of **the Government Proceedings (Civil Procedure) Rules** which the applicant relies on is discriminatory. It states,

> Judgment shall not be entered, and no order shall be made, against the Government in default of appearance or pleading under any provision of the principal Rules without leave of the court, and any application for such leave shall be made by summons served not less than seven days before the return day.

It is stated by the applicant that any challenge to this rule requires an interpretation of the Constitution. That the respondent should have invoked Article 137 (5) of **the Constitution** which stipulates that where any question as to the interpretation of this Constitution arises in any proceedings in a court of law, the court may, if it is of the opinion that the question involves a substantial question of law; refer the question to the constitutional court for decision in accordance with clause (1).

Clause 1 stipulates that any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

In my view the legal status of Government as a party in view of **the Government Proceedings Act Cap 77 and the Rules** made there under has been litigated and clarified by the Constitutional Court. Particular reference is made to the decisions in **Dr. James Rwanyarare versus Attorney General *(2003) 2 EA 664*; Attorney General versus Osotraco Ltd *Court of Appeal Civil Appeal No. 32 of 2002*; Kabandize and 20 Others Vs Kampala Capital City Authority *Court of Appeal Civil Appeal No. 28 of 2011*.**

In Kabandize (supra), for example, the Court considered ***Section 2*** of **The Civil Procedure and Limitations (Miscellaneous Provisions Act)** and held,

> This law was enacted in 1969. It therefore falls under the category of all laws that must be construed in conformity with the 1995 Constitution under Article 274.
>
> That Article states as follows:
>
> > ***"Existing law.***
> >
> > ***274 (1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be effected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring into conformity with this Constitution.***
> >
> > ***(2) For the purposes of this article, the expression "existing law" means the written and un written law of Uganda or any part of it as existed***

> ***immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after the date"***

While construing ***Section 2*** of **The Civil Procedure and Limitations (Miscellaneous Provisions Act)** already set out above, Courts of law must therefore take into account the provisions of Articles 274 and Article 20 of the Constitution of Uganda.

Article 20(1) of the Constitution provides as follows;-

> ***"All persons are equal before and under the law in all spheres of political, economic, social and culture life and in every other respect and shall enjoy equal protection of the law."***

This article in our view requires that parties appearing before Courts of law must be treated equally and must enjoy equal protection of the law.

The Court went to state that,

> We find that in view of Article 20 (1) of the Constitution a law cannot impose a condition on one party to the suit and exempt the other from the same condition and still be in conformity with Article 20 (1) of the Constitution.
>
> … the Constitution must be complied with by according parties to an intended suit equal treatment and protection of the law.

While the law under review in this case was ***Section 2*** of **The Civil Procedure and Limitations (Miscellaneous Provisions Act)** the holding applies with full force to the instant case where the Respondent challenges Rule 6 of the **the Government Proceedings (Civil Procedure) Rules**.

In another case, Section 15 (2) of **the Government Proceedings Act** which barred the grant of injunctions against government came up for challenge in **Dr. James Rwanyarare versus Attorney General (2003) 2 EA 664.**

The Constitutional Court after reviewing several decisions held that,

> There is no sound reason under the Constitution why government should be given preferential treatment at the expense of an ordinary citizen. That provision of the Government Proceedings Act is an existing law, which under article 273(1) should be construed with such modifications, adaptations as may be necessary to bring it into conformity with the Constitution.

The Court went on to hold that an injunction against government, Section 15 (2) of the Government Proceedings Act notwithstanding, could issue.

In view of the above findings, it is the holding of this Court that the question regarding the nature of treatment to be accorded to the Government under laws that give it preferential status has been settled.

In the circumstances, there is no reason for this court to refer a question where there is an abundance of precedent on the matter.

In this instant case, the applicant seeks to evoke Rule 6 of **the Government Proceedings (Civil Procedure) Rules** which requires leave of Court and an application served before default judgment can be entered against the government.

In view of the decisions in the Constitutional cases cited above, I find that that leave and notice is not mandatory before a default judgment can be entered against Government. Under Order 9 of **the Civil Procedure Rules**, no such leave or notice are required for ordinary parties. The same should hold true for the Government.

In the same way the applicant cannot use it as a shield against the default judgement issued in MC No 81 of 2020.

In the result this Court holds that the *Ex Parte* Judgement in MC No 81 of 2020 was not irregular.

The rest of the issues have rendered redundant.

In the Circumstances, this Application is dismissed with Costs to the Respondent.

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Michael Elubu

Judge

21.12.2020