THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATIONS NOS. 279 OF 2019 & 287 OF 2019

(ARISING FROM MISC. CAUSES NOS. 118 OF 2019 & 124 OF 2019)

1. **UGANDA JOURNALIST ASSOCIATION**
2. **BWIRE RONALD**
3. **BYANSI HENRY ::: APPLICANTS**

VERSUS

UGANDA COMMUNICATIONS COMMISSION:::::::::::::::::::::: RESPONDENT

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

1. This is the ruling in consolidated applications Nos. 279 and 287 of 2019. The Applicants sought temporary injunctions orders;
    i. restraining the Respondent, its agents, workmen, representatives or any other person, from enforcing the directives contained in the letter dated 30th April, 2019, referenced OED/181, addressed to thirteen media houses and directing the immediate suspension of producers, editors and heads of programs at the said media houses pending the disposal of the main applications.

ii. restraining the Respondent, its agents, workmen, representatives or any other person, from enforcing the directive contained in the letter referenced in (i) above requiring the media houses to submit the names, particulars and qualifications of the producers, heads of news and programs to the Respondent.

iii. restraining the Respondent, its agents, workmen, representatives or any other person, from enforcing the directive contained in the letter referenced in (i) above requiring the media houses to submit to the Respondent, recordings of all live programs and news bulletins aired on 29th April 2019.

iv. restraining the Respondent, its agents, workmen, representatives or any other person, from issuing any regulatory sanctions against the media houses and their employees and/or revoking their operating licenses basing on the directive mentioned above.

v. The Applicants finally want an order that the Respondent pays them costs.

2. The first Applicant was represented by Mr. Eron Kiiza of M/s. Kizza & Mugisha Advocates and the second and third Applicants represented themselves. The Respondent was represented by Mr. Waiswa Abdu Salim and Ms. Martha Kamukama from the Legal Department of the Respondent and Mr. Joseph Matsiko of M/s. KAA Advocates.

3. The applications which are substantially the same, were supported by the affidavits of Mr. Mukose Arnold - the secretary for media safety and human rights at the first Applicant, Ms. Josephine Karungi - the head of news at NTV and the second Applicant. The grounds of the applications were that on 30th April 2019, the Respondent through its Executive Director wrote to the Managing Director and/or owners of thirteen media houses to wit, Akaboozi FM, BBS TV, Beat FM, Bukedde TV, Capital FM, CBS FM, Kingdom TV, NBS TV, NTV, Pearl FM, Salt TV, Sapientia FM and Simba FM a letter referenced OED/181 with directives that; (i) these media houses immediately suspend their producer, head of news and head of programs pending conclusion of investigations; (ii) the media houses submit to the Respondent the names, particulars and qualifications of the subject office holders within

three days and (iii) the media houses submit to the Respondent recordings of all live programs and news bulletins aired on 29th April 2019 within three days.

4. The Applicants contended that through the impugned directives the Respondent threatens and intends to unfairly, unconstitutionally and arbitrarily exercise statutory powers, violate media freedom, freedom of speech and expression, human rights of media workers and right to information of Ugandans. Further, that the directives interfere with editorial freedom and independence of the media by purporting to set arbitrary and unconstitutional standards which are not enshrined in the Constitution or other laws of Uganda.

5. The Applicants also contended that there is status quo to be maintained since the directives had not been implemented at the time of filing their applications and the denial of these applications will render their judicial review applications nugatory. In addition they argued that if an injunction is not issued, the Respondent will arbitrarily gag the media, curtail freedom of expression and impose unconstitutional limitations. They also contended that under section 10(1) of the Press and Journalistic Act Cap 105, the function of regulating the journalists lies with the Media Council and not the Respondent. The balance of convenience is in favour of the Applicants, the media houses, and the general public whose constitutionally guaranteed rights will be grossly affected by the Respondent's actions.

6. The Respondent opposed the applications through affidavits in reply and supplementary affidavits of Mr. Meddy Sebagala Kaggwa - the head multimedia at the Respondent, Ms. Victoria Sekandi - the manager legal affairs at the Respondent and Mr. Mugwisagye Richard - acting Commissioner of Police attached to electoral and political crimes division at the Criminal Investigations Directorate. Mr. Sebagala averred that the Respondent is established under section 4 of the Uganda Communications Act 2013 as a regulator of the communications sector in Uganda with powers to license, regulate, control, set standards, monitor and enforce compliance relating to content and to receive, investigate and arbitrate complaints relating to communications services and take any necessary actions. Sometime in April 2019, the Respondent received complaints from security agencies that some broadcasters were broadcasting programs and content that was contrary to the minimum broadcasting standards in so far as the programs were likely to create public insecurity.

7. After a preliminary review of the content, the Respondent found that some content which was broadcast by some media houses was likely to create violence contrary to section 31 and schedule 4(a)(iv) of the Act, clause 14(i) of the license agreement and broadcasting standards. Before this incident, the Respondent had reminded all media houses to comply with minimum broadcasting standards at all times. The directive to suspend the office bearers from their positions was a necessary and measured intervention by the Respondent to avoid further breach during investigations. Many of the media houses have complied with this directive, the media houses are broadcasting normally and the implementation of the said directive has not in any way compromised the Applicants or the general public's right to information. The directives were issued solely within the statutory mandate of the Respondent and the same are not arbitrary, unconstitutional or unfair and they do not impose a ban on the media. Granting these applications would directly impinge the Respondent's regulatory powers over broadcasters in Uganda, the status quo has already changed and these applications are overtaken by events.

8. In a meeting on 7th May 2019 with the National Association of broadcasters, it was agreed that the directives did not require the media houses to dismiss their employees but rather that they step aside from those roles and be assigned other responsibilities in order to facilitate proper investigations. The main applications do not raise any *prima facie* case with chances of success, granting these applications will pre-empt the main applications, the Applicants have not demonstrated that not granting these applications will expose them to damage that cannot be atoned in monetary terms. In matters of national and public security, the balance of convenience lies with maintenance of security and peace and the applications are legally incompetent, an abuse of court process and should be dismissed with costs.

9. Ms. Sekandi averred that the Respondent has not at all purported to regulate journalists and the directives were issued in implementation of its mandate under the Uganda Communications Act. Mr. Mugwisagye deponed that Uganda police obtained classified intelligence information that opposition leaders planned to use elements within the media to propagate their agenda by relaying news and live coverage of all clashes between the police and rowdy supporters of the opposition to incite violence. If the Respondent had not

intervened there could have been a real risk that the peace, security and stability of the country could have been compromised. The Respondent's directives were therefore lawful, reasonable and necessary to preserve national security and public order.

10. In rejoinder Mr. Mukose averred that this matter is properly before court and there is a likelihood of success. Except for BBS, KTV, Simba and CBS, the rest of the concerned media houses have not complied with the directives. The Respondent will not be impeded in its regulatory work, the Respondent has not produced any evidence to prove that the matter touches national security, the directives issued infringe the rights guaranteed under the Constitution, the harm to be visited on media freedom, the right to be heard, right to practice their profession, occupation and trade of journalism by the directives is profound and irreparable.

11. Mr. Bwire deponed that the affidavits of Mr. Sebagala and Mr. Mugwisagye contain hearsay, misleading and unsubstantiated statements from undisclosed sources which makes them unreliable. The applications are legally tenable and properly before court and there is no evidence that the employees were given a fair hearing before the directive to suspend them. The Respondent will not be prejudiced in any way if the applications are granted.

12. Ms. Karungi in rejoinder averred that the Respondent does not have any legal mandate to direct a media house to suspend a journalist, she has not been suspended and as such there is status quo to preserve. It is just, expedient and equitable that the orders sought be granted.

13. The standard for grant of a temporary injunction is now well established in our jurisdiction. The applicant must prove that;

   a) he/she has a prima facie case with high chances of success and that
   b) if the injunction is denied, he/she stands to suffer irreparable loss.
   c) If the court is in doubt of these two tests, it makes a determination of the application based on a balance of convenience.

14. The Respondent counsel raised two preliminary issues i) that there is no status quo to maintain since the one in the directive has already changed as demonstrated by annexure G and ii) that the second and third Applicants have no locus to bring this application.

15. I have considered all the pleadings and submissions of the parties. I take the view that in today's era of public interest litigation, it is difficult to bar someone bringing an action for violation of rights. Moreover, nothing in the Judicature (Judicial Review) Rules of 2009 bars the second and third Respondents from bringing their application. Above all, as claimants that their constitutional rights including the right to information are affected by the Respondent directive, the two Applicants can safely bring their action for judicial review. For clarity, the jurisprudence has established that anyone aggrieved by an administrative decision can bring an action for judicial review.

Status quo

16. Respondent counsel submitted that the status claimed in the application has since changed, the concerned persons have stepped aside from their roles in issue, they have not been suspended or dismissed, the investigation is going on smoothly and there's no need in the exercise of court's discretion to fetter the Respondent's statutory regulatory role.

17. In response, the Applicants insist that the status quo they desire maintained is that of the concerned remaining in their positions of work as before the directive of 30th April 2019. Mr. Mukose explained that of the 13 media houses concerned, only BBS, KTV, Simba and CBS complied with the directive.

18. For the purpose of deciding whether an interlocutory injunction should be granted to preserve status quo, the status quo is the state of affairs existing during the period immediately preceding the issue of the writ/summons and in respect of a motion for an interlocutory injunction, the period immediately preceding the motion.

19. Lord Diplock stated that "the duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the

parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo." See Garden Cottage Foods Ltd v. Milk Marketing board [1984] AC 130; Thompson v. park [1944]1 KB 408; Followes v. Fisher [1975]3 WLR 184 at 199.

20. In Re NEWTON, 146 S.W 3d 648, 651 (Tex.2004) the term 'status quo' is defined as the last, actual, peaceable and non contested status that preceded the pending controversy. In the case of Clovergem Fish & Foods Ltd v. International Finance Corp. & 7 Ors [2002-2004] UCLR 132 at page 137, Arach Amoko J, (as she then was) stated that: " indeed the court needs to know the 'status quo' intended to be preserved by the application before applying the three conditions laid down… if the 'status quo' has changed before the application, then the application would be rendered useless since there will be no 'status quo' to preserve."

21. In this case, the Applicants filed their applications on 2nd and 7th May 2019. The Respondent held a meeting with the National Association of Broadcasters on 7th May at UCC House at which it clarified that it meant that the concerned persons were not to be suspended but step aside from their roles while investigations go on. With all due respect, taking the context of this application into account, the material status quo to be sustained is that which was prevailing before the 30th April directive from UCC and 2nd May when the first application was filed. In the circumstances of this case, the meeting between UCC and the Association of broadcasters on 7th May can be seen as an attempt to defeat justice for the Applicants in court. In all events, maintaining the status quo in issue is actionable and not an exercise in futility.

22. I find that there is a status quo to be maintained. It is sustaining the persons concerned in the 13 media houses in their work positions before the 30th April 2019 directive from UCC.

Prima facie case and irreparable loss

23. For a *prima facie* case, the court must be satisfied that the claim is not frivolous or vexatious, that there is a serious question to be tried. See American Cynard v. Ethicon [1075] ALL ER 504.

24. For the condition of irreparable damage, Yorokamu Bamwine J held in Katusiime Elias v. Arncy Holdings Ltd HCMA 272 of 2005 that the law requires that "irreparable injury" must be substantial or a material one that cannot be adequately compensated for in damages.

25. After carefully considering all the submissions and pleadings, I cannot, at this stage, determine whether or not the applicants have a *prima facie* case with high chances of success. I also cannot safely determine if the applicants would suffer irreparable loss that the Respondent cannot atone in damages if the injunctions were denied. I will therefore determine the injunction application on a balance of convenience.

Balance of convenience

26. The term balance of convenience literally means that if the risk of doing an injustice is going to make the Applicant suffer then probably the balance of convenience is favorable to him/her. It also points to weighing whether the injunction would or would not in fact impose a significant burden on a party as compared to the other. The ' balance of harms' as it is termed in the American civil procedural laws refers to the threatened injury to the party seeking the preliminary injunction as compared to the harm that the other party may suffer from the injunction. In arriving at the balance of convenience, the court has to weigh the mischief likely to be caused to the Applicant, if the injunction is refused. At the same time, court has also to compare the prejudice likely to be caused to the other side if the injunction is granted. See Uganda National Students Association & ors v. Nkumba University HCMA 35 of 2015.

27. On the one hand, the Respondent contends that the injunction would undermine its regulatory mandate in the industry which, in this case, it was exercising in response to complaints from security agencies, of possible incitement of violence which stood to threaten national security. On the other hand, the Applicants are vehement that the directive has the effect of violating their constitutional and other rights like to information, to be heard, practice a profession, freedom of speech and expression and human rights of media workers. These rights are enshrined in Articles 41, 42, 40 (2) and 29(1)(a) of the 1995 Constitution.

28. It is not clear why a complaint of possible incitement to violence, which is substantially criminal in nature, was reported to the UCC instead of the police or Directorate of Public Prosecutions. Even UCC in choosing to act on it, should have reported to the police.

29. I am mindful of the of the Respondent's regulatory mandate in the communications sector. I am also alive to the importance of national security for any democratic country. However regulatory action cannot be an excuse to trample constitutional rights of citizens.

30. National security is a very serious issue for which some rights may be waived temporarily in exceptional circumstances. However, it too cannot just be waved like a magic wand to stifle the rights of citizens. It's threat must be specifically and satisfactorily demonstrated. Unfortunately, I am not satisfied that whatever the situation that may have occurred, rose to the exceptional level, to warrant the directive in issue which had the effect of stifling constitutional rights.

31. On a balance of convenience, I find that it is safer to injunct the Respondent directive since it has the far reaching effect of unfairly violating the applicants' constitutional rights and freedoms. Accordingly, the application is allowed, an injunction is issued restraining the Respondent, its agents, assignees and any person acting under the Respondent's authority or instructions from implementing the Respondent's directive of 30th April 2019 till final determination of the judicial review applications or until otherwise directed by this court.

32. To avoid acrimony between the parties, each party shall bear its own costs.

I so order.

Lydia Mugambe
Judge
23rd May 2019