THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

[CORAM: KATUREEBE CJ; ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; TIBATEMWA-EKIRIKUBINZA; MUGAMBA; JJSC; TUMWESIGYE; AG.JSC]

MISC. APPLICATION NO.7 OF 2018

(ARISING OUT OF CONSTITUTIONAL APPEAL NO.2 OF 2018)

MALE .H.MABIRIZI K KIWANUKA ::::::::::::::::::::::::::APPLICANT

VERSUS

THE ATTORNEY GENERAL:::::::::::::::::::::::::::::::::: RESPONDENT

RULING OF THE COURT

Background

The applicant filed Constitutional Petition No. 49 of 2017 against the Attorney General at the Constitutional Court challenging the Constitution (Amendment) Act of 2017 that had been passed by Parliament and later on assented to by the President. The Constitutional Court consolidated the applicant's Petition with Constitutional Petitions No. 03 of 2018 of Uganda Law Society vs Attorney General, No. 05 of 2018 of Hon Gerald Kafureeka Karuhanga and 5 Others vs Attorney General, No. 10 of 2018 of Prosper Businge and 3 Others vs Attorney General and No. 13 of 2018 of Abaine Jonathan Buregyeya vs Attorney General.

At the commencement of the hearing of the consolidated Petition, the applicant made an application under **Order 16 Rule 1 of the Civil Procedure Rules** to have the Speaker of Parliament the Rt.Hon. Rebbecca Kadaga summoned by Court for examination on grounds that she holds a Constitutional office under Article 82 of the Constitution under which she is supposed to be accountable to the people and that she had chaired all proceedings which led to the passing of the impugned Act. The applicant's application was opposed by the Attorney General on the ground that the Speaker was immune to Court proceedings and should therefore not be summoned by Court to be examined.

The Constitutional Court declined to grant the order sought on the ground that they found no reason to do so. They stated that they would give the detailed reasons in the final judgment(s). The Constitutional Court did not give their detailed reasons in the final judgment.

The applicant was dissatisfied with the above ruling and part of the majority judgment and orders of the Constitutional Court and filed Constitutional Appeal No.2 of 2018 in this Court as well as the instant application.

The Application:

This application is by Notice of Motion made under Articles 28(1),44(c), 79(1) & (3), 82(1), (2) & (10), 126(1), (2)(a) & (e), 128(1), 132(2), 259(1), 263(1) & (2)(a) of the Constitution, Section 7 of the Judicature Act, Rule 23(2) of the Constitutional Court (Petitions and

Reference) Rules 2005, Rule 2(2) & (3), 30(2)(a), 42(1) of the Judicature (Supreme Court Rules) Directions, Paragraphs 2-5 of the Code of Conduct for Members of Parliament and Appendix F to the Rules of Procedure of Parliament seeking for orders that;

1. **The applicant be allowed to adduce additional evidence by way of oral examination of the Rt.Hon. Rebecca Kadaga, the current Speaker of Parliament.**

2. **The Rt.Hon. Rebecca Kadaga, the current Speaker of Parliament be summoned to appear before this Court, on an appropriate date and time, for examination by the applicant.**

3. **The costs of this application be provided to the applicant as against the respondent.**

The affidavits in support:

The application is supported by the affidavit of Male H. Mabirizi. K. Kiwanuka dated 19th November, 2018 and a supplementary affidavit dated 3rd December, 2018.

Affidavit in reply:

On 7th December, 2018, the Attorney General filed an affidavit in reply that was sworn by the Clerk to Parliament Jane L. Kibirige. That affidavit was not dated.

Affidavit in rejoinder:

The applicant filed an affidavit in rejoinder on 10th December, 2018.

The application was set down for hearing on 12th December, 2018. When it was called for hearing Mr. Francis Atoke, the Solicitor General sought the indulgence of the Court to allow for substitution of Ms. Jane Kibirige's affidavit which had been dated and filed on the 11th December, 2018 with the one that had not been dated. He submitted that the content of the affidavit filed on 7th December, 2018 was exactly the same as the one filed on the 11th December, 2018 and that the applicant who had filed a rejoinder to the one of 7th December, 2018 would not be prejudiced in any way.

Mr. Mabirizi objected to the application because according to him it was intended to circumvent the requirement of the law and that the affidavit which he described as incurably defective could not be substituted.

Before Court could deliver a ruling on the Solicitor General's application, the parties were asked to address Court on the contents of the affidavits which appeared to offend **Order 19 Rule 3 of the Civil Procedure Rules** for being argumentative, containing hearsay, narrative and conjectures. They were also asked to address Court on the propriety of the application which appears to pre-empt the determination of the grounds of appeal related to failure of the Constitutional Court to summon the Speaker from which an issue was framed by this Court as will be shown in this

ruling. Related to that is the question as to what law an application to elucidate evidence is made in this Court.

On the contents of the affidavit, the applicant submitted that all his affidavits were compliant with the requirement of the law in that the affidavits are confined to facts within his knowledge as a lawyer who had studied the Court judgments and had come up with the depositions in the affidavits which inform the content.

He submitted that there were no matters of conjecture in his affidavits where he merely faults the Constitutional Court which erred by not summoning the Speaker and instead engaged in conjecture without hearing from the Speaker.

On the issue of pre-empting the determination of the issues framed in the appeal, Mr. Mabirizi submitted that the question goes to the merit of the application and he would address it when submitting on the application.

On his part Mr.Atoke submitted that the respondent concurred with the observations of the Court that all the affidavits of the applicant went beyond the parameters on which affidavits are supposed to be deponed. He contended that the affidavit in reply was premised on the ground that the affidavits of the applicant were based on conjecture and the respondent intended to raise it as a preliminary point of law. He defended the affidavit of Ms. Kibirige which according to him was not argumentative because it was a direct response to the matters raised in the affidavits of the applicant.

Consideration of Court

On the issue whether the Court can substitute an undated affidavit, reference is made to the case of **Saggu vs Roadmaster Cycles (U) Ltd (2002) 1 EA 258** where Court held that:

> ***"a defect in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (2) (e) of the Constitution and that a Judge has power to order that an undated affidavit be dated in Court or that the affidavit be re sworn, and may penalize the offending party in costs."***

Despite the fact that this case is a Court of Appeal case, we find its decision persuasive and is good law.

Both the applicant and the Solicitor General relied on the case of **Kasaala Growers Co- operative Society vs Kakooza Jonathan & Another, Supreme Court Civil Application No.19 of 2010** which draws a clear distinction between an affidavit which is defective and one which does not comply with the requirements of the law. The one which is defective is curable and the one which does not comply with the law is incurable. An affidavit which is undated is defective but is one that can be cured. One of the ways of curing such an affidavit is by way of allowing the affidavit to be dated as was held in the case of **Saggu vs Roadmaster Cycles (U) Ltd (2002)1 EA 258**.

In this case the respondent realized the defect before the case was called for hearing and cured the defect by filing one bearing a date. Although the applicant had rejoined to one that did not bear a date, we do not find any prejudice to him because he rejoined to the contents of an affidavit that is the substance of the case for the respondent.

In dealing with a defective affidavit, the case of **Hon. Theodore Ssekikubo & 3 Others vs The Attorney General & 4 Ors Constitutional Application No. 6/2013** followed the case of **Banco Arabe Espanol vs Bank of Uganda Civil Application No. 08 of 1998** where it was held that:

> ***".....a general trend is toward taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in Article 126 (2)(e) of the Constitution..... Rules of procedure should be used as handmaidens of justice but not defeat it. "***

In conclusion on this point our view is that, while the affidavit in reply filed by the respondent on the 7th December, 2018 was defective in that it did not bear a date, it was curable and the filing of the subsequent affidavit that was dated and sworn by the same deponent on the 11th December, 2018 cured the defect.

On the issue of whether the affidavits of the applicant are argumentative, narrative and contain hearsay and conjectures, **Order 19 Rule 3 of the Civil Procedure Rules** provides that:

"**3. Matters to which affidavits shall be confined.**

(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.(underlining for emphasis)

In the instant application, the affidavit in support contains 94 paragraphs and the supplementary affidavit contains 67 paragraphs. The affidavit in rejoinder contains 103 paragraphs. This makes a total of 264 paragraphs. The length of the affidavits by itself is not the issue but we find that the contents are argumentative and prolix. An affidavit as we understand it is meant to adduce evidence and not to argue the application. We find that the affidavits of the applicant fall short of meeting this standard. They argue the case instead of laying down the evidence to be relied on in deciding the application.

We also observe that the affidavit in reply suffers from the same defect.

Prolixity is defined in the **Black's Law Dictionary, Ninth Edition at page 1331** as "**The unnecessary and superfluous stating of facts and legal arguments in pleading or evidence**."

In the case of **Re: Bukeni Gyabi Fred HCMA 63/99, [1999] KALR, 918** the Court in interpreting this rule held that the order is very clear. An affidavit should contain facts and not arguments or matters of law.

In **Rohini Sidipra vs Freny Sidipra & Ors HCCS 591/90, [1995] KALR 724** Mpagi Bahigeine J as she then was held:

> ***" I think I first desire to make an observation about the applicant's supplementary affidavit. It appears not to have been skillfully drawn. It is prolix in the extreme. It contains 11 rather lengthy paragraphs covered on 7 pages. Much of this is argumentative narrative, not strictly relevant to the application before me."***

The learned Judge quoted Order 17 rule 3(1) of the Civil Procedure Rules which is now Order 19 rule 3(1). She said:

> ***"In this regard, the court has power to take an affidavit off the file for prolixity or to order scandalous matter to be struck out of an affidavit. The Registrar should not have allowed it on record. I proceed to strike it out."***

We cite that reasoning with approval.

It is further noted that under **Order 19 Rule 3 of the Civil Procedure Rules,** the deponent who makes the argumentative

affidavit which is incurable can be penalized by paying costs of the application.

While we do not find anything scandalous in the affidavits of the applicant, we find that they are prolix and non-compliant with Order 19 Rule 3 of the Civil Procedure Rules and we strike them out.

The consequence of striking out the affidavits is that there is no competent application before this Court since it is a requirement under Rule 43 of the Supreme Court Rules which reads that:

> " **43. Supporting Documents.**
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> **(1)Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts."**

Regarding the issue that the application is pre-emptive of the issue framed for determination by this Court in the appeal, we observe that the applicant raises grounds relating to the failure of the Constitutional Court to summon the Speaker. Issue No.7 framed for trial by this Court covers those grounds of appeal and this application is indeed pre-emptive of the issues which should not be allowed. We consider this to be an abuse of Court process because submissions have already been made on these grounds and Court is required to pronounce itself on them.

In the result this application is dismissed and we make no orders as to costs.

Dated at Kampala this 14th day of December 2018

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HON. JUSTICE KATUREEBE
CHIEF JUSTICE

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HON. JUSTICE ARACH-AMOKO
JUSTICE OF THE SUPREME COURT

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HON.JUSTICE MWANGUSYA
JUSTICE OF THE SUPREME COURT

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HON. JUSTICE OPIO-AWERI
JUSTICE OF THE SUPREME COURT

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HON.JUSTICE TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT

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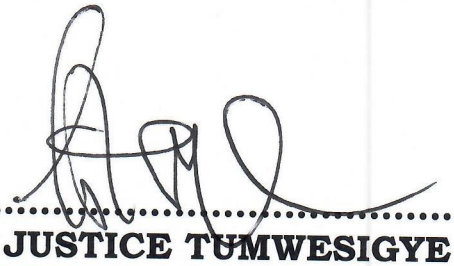
HON. JUSTICE MUGAMBA
JUSTICE OF THE SUPREME COURT



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HON. JUSTICE TUMWESIGYE
AG. JUSTICE OF THE SUPREME COURT