**THE REPUBLIC OF UGANDA**
**IN THE HIGH COURT OF UGANDA**
**(CIVIL DIVISION)**
**MISCELLANEOUS CAUSE NO. 252 OF 2021**

**ANDREW OLUKA::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

1. **PETROLEUM AUTHORITY OF UGANDA**
2. **TOTAL E&P UGANDA**
3. **CNOOC UGANDA LIMITED:::::::::::::::::::::::::::::::::RESPONDENTS**

***BEFORE: HON. JUSTICE SSEKAANA MUSA***

# RULING

The applicant brought this application under Article 50 of the Constitution, The Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules SI 31 of 2019 and Section 98 Civil Procedure Act seeking declarations and orders that:

1. A Declaration that the ongoing procurement processes undertaken by the respondent in respect of;
   (a) The East Africa Crude Oil Pipeline (EACOP) Project,

   (b) The Tilenga Upstream Project,

   (c) The Kingfisher Development Area Project,

are being done in contravention of Articles 2, 26, 40 and 244 of the Constitution and all enabling laws providing for national content in the petroleum sector.

2. An Order directing the respondents to conduct a legal Audit of all the oil petroleum procurement activities in (1) above to ensure compliance with the national content provisions of the law.

3. An Order of injunction restraining the Respondents from continuing to conduct any further procurements in the petroleum sector which does not comply with the national content provisions of the law.

4. A Declaration that all business income derived from procurement under the projects in (1) above is taxable in Uganda.

5. Costs of this application be provided for.

The grounds upon which these applications are based are set out in the affidavit of Andrew Oluka which briefly are;

1. That applicant is an Advocate and Legal Practitioner in the oil and gas sector in Uganda who is interested in the proper development of the petroleum sector and application of the relevant laws.

2. The Applicant brings this action in public interest to enforce and stop the infringement of the constitutional and economic rights of Ugandans who are entitled to be given priority in the provision of goods and services in the petroleum sector as provided under Articles 2, 26, 40 and 244 of the Constitution and the enabling laws providing for the national content.

3. The applicant is aggrieved that the respondents are engaged in procurements under the East Africa Crude Oil Pipeline (EACOP), Tilenga Upstream and Kingfisher Development Area Projects which procurement processes are giving preference or priority to foreign companies/entities over Ugandans or Uganda owned companies in contravention of the law.

4. That the 2nd and 3rd respondents are principle sector players in the three projects presently ongoing in Uganda's Oil and Gas industry under the supervision of the 1st respondent and these are;
   i) *The East African Crude Oil Pipeline (EACOP) project estimated at a value of US$ 5,000,000,000.*
   ii) *The Tilenga Upstream Project estimated a value of US$ 5,000,000,000*
   iii) *The Kingfisher Development Area Mainstream Project estimated at a value of US$ 2,500,000,000*

5. That according to the shareholders' agreement for EACOP, the interest of the participants is broken down as follows;
   ***(i) TOTAL E&P UGANDA 62%***
   ***(ii) CNOOC (U) LTD 08%***
   ***(iii) GOVERNMENT OF UGANDA 15%***
   ***(iv) GOVERNMENT OF TANZANIA 15%***

6. That the applicant is further interested in a proper legal audit of the procurement processes currently undertaken by the respondents and an injunction restraining any present or future procurement which do not comply with the national content provisions of the law.

7. This application raises matters of broad public concern that affect all citizens of Uganda and it is a legal matter that requires addressing *pro bono publico.*

8. That the application is of an urgent nature because the impugned processes complained of are illegal and yet they continue to go on and are undermining the economic rights of Ugandans.

9. That impugned procurements if allowed to continue, shall occasion loss of public revenue and property unless restrained.

The respondents filed affidavits in reply and opposed the application: *James Musherure Rujoki*-(Senior National Content Officer) swore an affidavit on behalf of the 1st respondent (Petroleum Authority of Uganda): *Mariam Nampeera Mbowa*-(Deputy General Manager) deponed on behalf of the 2nd respondent; While *Alex Tumwesigye*-(Procurement Manager) deposed on behalf of the 3rd respondent.

They all opposed the application and contended that the application is not a legitimate public law and public interest action and is filed in bad faith and with improper motive. It is intended to delay the implementation of the oil projects which are supposed to be beneficial to the overall Uganda population

The application does not demonstrate any violation of a fundamental right in the Constitution and the applicant has no right or capacity [*locus standi*] to bring the application.

That all the procurements relating to the projects are being undertaken are executed in accordance with laws of Uganda and the National content requirements. The National Suppliers Data base has over 1600 Ugandan companies and over 600 foreign companies that have registered to participate in oil and gas activities and is used to assess the available capacity in the country.

There are some contracts and activities which have been advertised in newspapers like EPSCC and no local or Ugandan company expressed interest to participate in the procurement due to the complexity of the work to be undertaken and financial capital expenditure required. The law allows a licensee with approval of 1st respondent to procure and contract any other company to provide goods and services that cannot be provided by a Ugandan company or registered entity.

In summary, the Applicant alleges that the procurement activities being undertaken in connection with the upstream oilfield development of the

Tilenga license area in Buliisa and Nwoya Districts, the Kingfisher license area in Kikuube District and the construction of the East African crude oil pipeline are non-compliant with the local content requirements set out in the Petroleum (Exploration, Development and Production) Act 2013, the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act 2013, the Petroleum (Exploration, Development and Production) (National Content) Regulations 2016 and the Petroleum (Refining, Conversion, Transmission and Midstream Storage) (National Content) Regulations 2016.

The respondents raised preliminary objections as to the competency of the application by way of preliminary objections.***Whether the Application is competently before the court?***

The applicant was represented by *Mathew Kiwunda* holding brief for *Fred Muwema*, while *Daniel Kasuti* represented the 1st respondent, *James Mukasa Ssebugenyi (SC)* & *Nicholas Ecimu* represented the 2nd respondent and the 3rd respondent was represented by *David Mpanga, Daniel Gatungo & Yusuf Mawanda* represented the 3rd respondent.

***<u>Whether the Application is competently before the court?</u>***

The respondents have raised several preliminary objections to the application which can be summarized as follows;

***(i)*** ***That the application does not disclose a reasonable cause of action against the respondents jointly and it does not demonstrate any violation of a fundamental human right.***

***(ii)*** ***The application is untenable under Article 50 of the Constitution and has been brought under a wrong procedure and it is frivolous and vexatious as well as an abuse of court process.***

***(iii)*** ***That the applicant does not have sufficient interest (locus standi) in this matter to institute and maintain the application.***

*(iv)* ***That the application does not qualify as a legitimate public interest action as it allegedly seeks to promote the private interests of a narrow group of persons and, if successful, will result into private commercial benefit.***

*(v)* ***That the applicant's affidavit in support is incurably defective for being prolix, argumentative and containing hearsay.***

*(vi)* ***The application is non-justiciable and moot.***

*(vii)* ***The applicant has not exhausted existing remedies.***

*(viii)* ***The application affects rights of 3rd parties who will be grossly affected by the orders sought, if granted, without being afforded a right to be heard***

The respondents submitted that this is not an appropriate application for enforcement of fundamental rights as it discloses no fundamental rights breaches that have to be enforced. The applicant does not disclose what right is threatened or infringed and the right indicated in the application as having been infringed or threatened is not related to the allegations in the applications as such its misconceived and ought to be struck out for disclosing no cause of action.

The applicant has not indicated which citizen has been disqualified from which specific procurement process to warrant an infringement and or threatened fundamental human right violation enforcement claim. The applicant has not shown how the Articles cited have been breached, infringed and or threatened apart from just a mere assertion of the rights.

The respondent further submitted that the failure by the applicant to point to any specific or particular procurement process which contravened the provisions of the constitution and laws providing for national content points to a frivolous and vexatious application. The request for a legal

audit is a clear indication that the applicant does not have any evidence of breach of procurement process or contravention of laws and this shows the applicant is on a fishing expedition by making general allegations without supporting evidence.

The application seeks a declaration in Clause 4 of the orders that "all business income derived from the procurements under the projects in (1) above is taxable in Uganda" without substantiating or supporting the prayer. There are already tax laws providing for how business income is taxed, this imputes something sinister in the application.

The applicants counsel in reply submitted that the respondents' preliminary objections are incompetent because they are based on out-dated technicalities which are not in consonance with existing law. The same are devoid of any legal standing because they delve into the merit and mature arguments which are reserved for the main cause.

It was counsel's submission that the Human Rights (Enforcement) Act 2019 has expressly barred technicalities based on procedure and form or otherwise which intend to inhibit or limit the direction of pleadings, proceedings and decisions on court matters raised under Article 50.

The applicant's counsel contended that bringing an action under Article 50, the applicant was required to show on his pleadings that he has an arguable claim of the violation of his or other person's constitutional rights.

The applicant's Notice of Motion and accompanying affidavit clearly presents an arguable claim of violation of his constitutional rights and those of the Ugandan public, in respect of the regulation and management of the oil sector.

***Analysis***

It is not clear whether it is an application for constitutional interpretation or for enforcement of rights or enforcement of the law on national content

which may be judicial review. The applicant generally alleges that this is an action in public interest to enforce and stop the infringement of the constitutional and economic rights of Ugandans who are entitled to be given priority in the provision of goods and services in the petroleum sector as provided under Articles 2, 26, 40 and 244 of the Constitution.

Court will only entertain a public law action where there is a widespread and gross violation of fundamental rights set out in the Constitution, or where basic human rights are invaded. As a preliminary matter, in order to proceed or bring an action under Article 50 of the Constitution, the matter must relate directly to fundamental rights and freedoms guaranteed under the Constitution. ***See High Court Miscellaneous Cause No. 23 of 2017: Kimpi Isabirye v Attorney General and Dr. Medard Bitekyekerezo.***

It seems the applicant's counsel wants to impute some rights that would be affected by implication without necessarily setting out any such specific rights that are being infringed. In the Application, the Applicant sets out four provisions of the Constitution as having been allegedly violated by the 2nd Respondent. These are Article 2 (*which provides for the supremacy of the Constitution*), Article 26 (*which protects the right to property*), Article 40 (*which provides for the right to carry on a lawful occupation, trade or business*) and Article 244 (*which provides for the regulation of minerals*).

In the case of ***Pastor Martin Sempa vs Attorney general High Court Miscellaneous Application No. 71 of 2002***, an action was brought to object to new electricity tariffs that had been imposed without giving the members of the public a hearing and accordingly the applicant's right to fair treatment under Article 42 of the Constitution had been infringed. The learned trial judge struck out the action on ground that it does not disclose violation of a constitutional right. He rules

> *"It is not enough to assert the existence of a right. The facts set out in the pleadings must bear out the existence of such a right and its breach would give rise to relief."*

Similarly, in another case of ***Ogago Brian Abangi vs Uganda Communications Commission High Court Miscellaneous Application No. 267 of 2013***; The Court held that the applicant did not cite any Articles of the Constitution which had been violated to assist the court come to a conclusion that the applicant seeks enforcement of constitutional rights. See also ***Human Rights Network for Journalists & Another vs Uganda Communications Commission Miscellaneous cause No. 219 of 2013***

The applicant in this matter has not cited any infringement of any right or freedom guaranteed under the Constitution as the basis of filing this application. The applicant in his paragraph 37 of his affidavit generally states that 1st respondent has allowed unauthorized taking of the property in and control of the petroleum resource of Uganda by non-citizens in contravention of Article 2, 26, 40 and 244 of the constitution.

Articles 2 and 244 of the Constitution are statement Articles in the sense that they are non-operative. A private procurement process administered by the 2nd Respondent would not violate these Articles provided that the procurement process is compliant with the applicable domestic law. With regard to Articles 26 and 40, which are operative clauses, the Applicant has not demonstrated the manner in which any specific individual's economic rights have been violated by the 2nd Respondent's procurement process in a manner that would call for enforcement intervention under Article 50.

The applicant seems to be challenging the procurement process of the service providers in the oil and gas sector by way of enforcement or rights and this may seem quite untenable. The applicant ought to have filed an application for judicial review challenging that decision of the 1st respondent setting a criterion for securing service providers or challenging the application of the relevant laws illegally or with material irregularity to the detriment of the Ugandan Citizens and companies. There is no single right that has been expounded in the affidavit how it was violated and there is no iota of evidence to support the contention in the application that this is an application for enforcement of rights.

The allegations contained in the Application in totality are complaints about performance of statutory functions by a public body in the regulation of the upstream oil and gas sector. Such complaints (if they are meritorious) can only be entertained in a judicial review action and not public interest litigation against the 2nd & 3rd Respondents which are private companies. Accordingly, the Applicant has not exhausted available public law administrative remedies established by law. The Upstream Act and Regulations make provision for dealing with complaints relating to breach of the provisions of the Upstream Act and Regulations.

This court will not allow such a litigant to devise alternative procedure in order to circumvent the set procedure. He is only trying to access court through the 'window' instead of the 'door' which has been prescribed by the Constitution. It is not enough to label an application as an 'Enforcement of rights Cause' without supporting the application with cogent evidence of violation or threat to violation of constitutional rights as the applicant has tried to do.

Justice is to be rendered in accordance with the law and set principles and procedure. If the Constitution is silent as to the procedure to be followed or how to access courts to seek redress outside constitutional interpretation and enforcement of human rights, then the necessary procedure must be followed from the existing legislation like the Judicature Act or Civil Procedure Act and not to invent any procedure the applicant finds convenient or comes to his imagination.

It is an abuse of court process to use another remedy under the Constitution to avoid a set procedure. In the case of ***Harrikisson v Att-Gen (Trinidad and Tobago)[1980] AC 265 at 268*** *Lord Diplock* underscored the importance of limitation to the constitution right of access to courts:

> *"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The*

*right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms: but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action….the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate remedy…."*

The nature of the orders being sought clearly show that this is not an application for enforcement of rights as it has been 'baptised' in the title;

- A Declaration that the ongoing procurement processes undertaken by the respondent in respect of;
    - The East Africa Crude Oil Pipeline (EACOP) Project,
    - The Tilenga Upstream Project,
    - The Kingfisher Development Area Project,

are being done in contravention of Articles 2, 26, 40 and 244 of the Constitution and all enabling laws providing for national content in the petroleum sector.

- An Order directing the respondents to conduct a legal Audit of all the oil petroleum procurement activities in (1) above to ensure compliance with the national content provisions of the law.

- An Order of injunction restraining the Respondents from continuing to conduct any further procurement in the petroleum sector which does not comply with the national content provisions of the law.

- A Declaration that all business income derived from procurement under the projects in (1) above is taxable in Uganda.

The remedies sought by the Applicant are also entirely out of scope of the jurisdictional limits of an Article 50 claim and demonstrate that the Applicant does not have a sufficient interest in law *[Locus standi]*. The Applicant does not demonstrate how a procurement process violates the Constitution. The Applicant's assertion that *"income derived from the procurement process is taxable"* is abstract, ambiguous and outside the first-instance jurisdiction of the court in this Application as this would be a matter for the Uganda Revenue Authority and, where an appeal or review is lodged, the Tax Appeals Tribunal.

The Applicant's prayer for an injunction to stop sector-wide procurement activities is not supported by any credible evidence as to irreparable loss, while the Courts have underlined that an injunction will not be granted to one spirited individual at the expense of a broader economic activity that benefits the country as a whole.

The nature of the remedies sought point to something sinister beyond the application which motive was intended for a specific purpose outside the application. The application is indeed frivolous and vexatious to the extent that it is an abuse of court process.

It cannot be argued that the Constitution intended to disregard all procedural rules in relation to access to justice or grant of reliefs and allow applications filed in all form of manner. Constitutional provisions are not intended to supersede the available modes of obtaining relief before a civil court or deny the defences legitimately open in such actions.

The applicant like all other litigants should not be encouraged to circumvent the provisions made by a Statute providing a mechanism and procedure to challenge administrative action. Every potential litigant

would rush to the court in any manner they deem fit and thus rendering the statutory provisions meaningless and non-existing.

Constitutional provisions on human rights or Enforcement of Human Rights Act are not intended to short circuit or circumvent established procedures and statutory provisions for accessing courts. See Article 126(2)(e) of the Constitution.

Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

The court must come with a very heavy hand on a litigant who seeks to abuse the process of the court; as the Supreme Court of India has observed; *"No litigant has a right to unlimited drought on the court time and public money in order to get his affairs settled in the manner he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions"*. ***Budhi Kota Subbarao v K. Parasarab, AIR 1996 SC 2687;(1996) 5 SCC 530.***

This application is frivolous and vexatious since it is intended to drag the 2nd and 3rd respondent in 'mind games' and or influence their operations, therefore such an application under public interest litigation with oblique motive does not have an approval of this court.

It is the responsibility of the High Court as custodian of justice and the Constitution and rule of law to maintain the social balance by interfering where necessary for the sake of justice and refusing to interfere where it is against the social interest and public good.

Limitations in other legislations are intended to restrict access to courts for seeking some other remedy apart from that provided by a statutory provision enacted specifically to deal with particular situations. Matters of procedure are just as important as matters of substance. Procedural matters are part of the due process and cannot be lightly treated.

This court declines to entertain the application and the same is dismissed with costs.

**I so Order**

*Obiter dictum*

*" Of late, such an important jurisdiction as public interest litigation has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing applications with oblique motives. Time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous and vexatious litigation should be totally discouraged. The court has to protect and preserve this important jurisdiction in the larger interest of the people of Uganda but effective steps have to be taken to prevent and cure its abuse on the basis of monetary and non-monetary directions by the courts. It is the duty of the court to ensure that unscrupulous and undesirable public interest litigation be not instituted in the courts of law so as to waste the valuable time of the courts as well as preserve the faith of the public in the justice delivery system."*

***Ssekaana Musa***
***Judge***
***11th April 2022.***