

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISC. CAUSE NO. 314 OF 2021

LEGAL BRAIN TRUST (LBT) LTD ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

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

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This applicant bought this application under Article 50 of the Constitution, section 4 of the Human Rights (Enforcement) Act, 2019 and Rule 7 (1) of the Judicature (Fundamental & Other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019 seeking orders/ declarations that:

- 1) A declaration that any presidential directive, cabinet resolution, advice/ approval by the Attorney General, memorandum of understanding, agreement, contract, license, consent, letter of no- objection and such other document by whatever name called, through which the Government of Uganda and its organs or organs or agencies purportedly authorized an Indian company “Mahathi Infra Services Private Limited” and its Ugandan subsidiary “Mahathi Infra (Uganda) Limited” or any other person affiliated with the aforesaid entities, to operate as a monopoly for the business of transporting petroleum products by barges over Lake Victoria to and from Uganda, violate or threaten to violate a bundle of

fundamental rights protected by Articles 21 (1), 28 (1), 38, 40 (2), 42, 43, 44 (c) and 45 of the Constitution and are thus illegal, null and void;

- 2) An injunction restraining the respondent and its servants or agents or any other person or authority from implementing or enforcing the impugned presidential directive, cabinet resolution, advice/ approval by the Attorney General, memorandum of understanding, agreement, contract, license, consent, letter of no objection and other documents at issue by whatever name called; and
- 3) Costs.

This application was supported by the grounds contained in the affidavit sworn on behalf of the Applicant by Jjumba Anthony, the head of Investigations which briefly are that;

1. The purpose and effect of the impugned presidential directive, cabinet resolution, advice/ approval by the Attorney General, memorandum of understanding, agreement, contract, license, consent, letter of no objection and other documents at issue by whatever name called, are blatantly in violation of the respondent's obligations to respect, uphold and promote fundamental rights to good governance, fairness and equality of economic opportunity.
2. The impugned conduct of the respondent goes beyond the permissible exercise of state power in regulating business, and is blatantly discriminatory, plainly, unlawful and unacceptable and demonstrably unjustifiable in a free and democratic society.

3. Unless restrained by this Honourable Court, the conduct of the respondent and other persons or authorities interested in the impugned monopoly to transport petroleum products by barges over Lake Victoria to and from Uganda will impair respect for the rule of law (including the rules of fair play), and exacerbate corruption and abuse or misuse of power by those holding political and other public offices, and is thus detrimental to public good or welfare of good governance.
4. In order to foster Uganda's effort to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices, it is just and convenient for this court to allow this application and grant the reliefs hereby sought.

The respondent opposed the application by way of an affidavit deposed by Rev. Justas Frank Tukwasibwe who stated that this application is bad in law, speculative, moot, misconceived and should be dismissed with costs. The respondent also stated that the agreement executed by the parties to permit Mahati Infra Services Private Ltd to operate a business of transporting of petroleum products by barges over Lake Victoria from Kisumu- Kenya to port Bell and Jinja does not threaten the rights of Ugandan protected under Articles 21 (1), 28 (1), 38, 40 (2), 42, 43, 44 © and 45 of the constitution of the Republic of Uganda.

The applicant did not file any submissions or appear in court with counsel whereas the respondent by Ms. Maureen Ijang.

The matter was set down for hearing and one issue was raised for determination by this court being;

Whether the application is competently before the court in light of the Judicature (Fundamental & Other human Rights and Freedoms) (Enforcement Procedure) Rules, 2019?

The parties were directed to file written submissions and the respondent accordingly filed the same. The applicant did not file its submissions. Nonetheless, this court determined the issue raised in consideration of the pleadings, evidence and submissions on the court record.

Determination

Counsel for the respondent submitted that this application is not competently before this Honourable court. She stated that Article 50 of the Constitution provides for the enforcement of human rights and Rule 3 of the Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedures) Rules, 2019 provides for its objective to promote the right of any person to institute court action where he or she believes that a fundamental right or other human right or freedom under Chapter Four of the Constitution has been violated or that there is a threat that is likely to be violated.

The respondent submitted that it can be discerned from the application that the applicant has brought this action in public interest since his application and affidavit do not state that is his individual rights that have been infringed upon by the impugned action but rather that it is detrimental to public good and welfare.

Counsel further defined public interest litigation as per the Black's Law Dictionary (8th Edition) as the general welfare of the public that warrants recognition and protection. It was submitted that Rule 5 of the Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedures) Rules, allows for public interest litigation and states the actions to be brought thereunder. Counsel further noted that the Rule 7 (2) provides for the proper court with jurisdiction to hear actions that are brought in public interest this being the Constitutional court under Article of the Constitution.

The respondent therefore submitted that the application before the court is incompetent and prayed that it should be dismissed with costs.

Analysis

According to the notice of motion, this application was brought under Article 50 of the Constitution, section 4 of the Human Rights (Enforcement) Act, 2019 and Rule 7 (1) of the Judicature (Fundamental & Other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019.

The application sets out in the blanket form articles that are allegedly being violated as Articles 21(1), 28(1), 38, 40(2), 43, 44(c) and 45 of the Constitution. The affidavit does not show how any of those articles of the Constitution are being violated. This application was not for enforcement of rights as contended but rather a public interest litigation or a judicial review matter challenging the actions and decision of government.

This court will not allow such the applicant to devise alternative procedure in order to circumvent the set procedure. The applicant is only trying to access court through the 'window' instead of the door that has been prescribed by the Constitution.

Justice is to be rendered in accordance with the law and set principles and procedure. 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.

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.

The applicant is trying to convert any alleged transgressions into a human rights issue for enforcement of rights. This is unacceptable and courts will guard jealously their constitutional mandate from being abused by busy bodies or meddling intermeddlers like the applicant.

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.

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.

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...."

This application did not involve any violation of rights and it had no basis to be 'baptized' as an enforcement of rights application. For this reason it would be dismissed accordingly.

The respondent's counsel has submitted that this action is therefore deemed to be one which falls in category of Public Interest Litigation and thereby incompetently before this court. The *Black's Law Dictionary 8th Edition* defines Public Interest Litigation as "*the general welfare of the public that warrants recognition and protection*". It is also defined as something in which the public as a whole has a stake. Campbell C.J in *R v Bedfordshire* 24 L.J.G.B 84 said a matter of Public or General Interest;

"...does not mean that which is interesting as gratifying curiosity or love of information or amusement; but that in which a class of community have a pecuniary interest, or some interest by which their rights or liabilities are affected."

In light of the above, the respondent submitted that the applicant's application is improperly before this court since it seeks to enforce public interest rights and not personal/ individual rights for which this court has jurisdiction.

For context, *Article 50 of the Constitution* provides that;

(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

(2) Any person or organization may bring an action against the violation of another person's or group's human rights.

Section 4 of the Human Rights (Enforcement) Act, 2019 provides that;

The High Court shall hear and determine any application relating to the enforcement or violation of;

a) non derogable rights and freedoms guaranteed in article 44 of the Constitution;

- b) other rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms envisaged in article 45 of the Constitution;*
 - c) rights and freedoms restricted under a law made for purposes of a state of emergency; and*
 - d) rights and freedoms which are preserved by this Act to be determined by a magistrate court, where the remedy sought by the applicant is beyond the pecuniary jurisdiction of that court.*
- (2) Applications under subsection (1) shall be in the form prescribed by regulations and may, unless the high court determines otherwise, be heard in open court.*

Rule 7 (2) of the Judicature (Fundamental & Other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019 provides that a public interest action under rule 5(1)(d) shall be filed in the Constitutional Court under Article 137 of the Constitution.

From the applicant's pleadings, it is very clear that the applicant seems to seek to enforce public interest actions on behalf of the people of Uganda. This court does not therefore have jurisdiction to handle it and as the right forum under Rule 7 (2) for the orders and reliefs sought is the Constitutional Court as stated above.

The nature of litigation which falls in the category of public interest litigation must also be scrutinized in order to limit abuse of the court process. Litigation does not become public interest litigation merely because questions of law of general public importance arise in that case. Such important questions are often decided in private litigation and those help the public in general but public interest litigation is different. Public Interest Litigation is where the interest, which the court pronounces upon, is itself in a representative capacity a public interest.

Litigation in public interest is directed towards ensuring governance in accordance with the constitutional and statutory mandate. Public Interest

Litigation cannot provide an avenue for substituted governance nor can the Court, in a democratic set up governed by separation of powers assume to itself the task of governance which the Constitution leaves to elected representatives or to Executive members through expert bodies who are accountable to collective wisdom of the Legislature or Executive.

The role of the Court is directed towards ensuring that the process of governance accords with the parameters which are laid down with the Constitution and by governing statutory requirements. Once the Court is satisfied that this has been so, there must be an element of deference particularly in matters involving technical expertise or policy making functions, upon which there is a conferment of power to constitutional or statutory authorities.

This application would still have failed to satisfy the test of substantial public interest and there is no genuine public harm or public injury. This application was for a private motive or oblique motive or ulterior motive.

For the reasons above, this application fails and is dismissed with costs.

I so order.

SSEKAANA MUSA
JUDGE
14th December 2022