IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Audace Ngiye; Charles O. Nyawello & Charles Nyachae, JJ)

CONSOLIDATED APPLICATIONS NO.4 & 6 OF 2019
(Arising from Reference No.6 of 2019)

MALE H. MABIRIZI KIWANUKA ..... APPLICANT/RESPONDENT

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA ..... RESPONDENT/ APPLICANT

6TH FEBRUARY, 2020

REASONED RULING OF THE COURT

A. Background

1. On 3rd May 2019, Mr. Male H. Mabirizi Kiwanuka did file before this Court **Reference No. 6 of 2019. Male H. Mabirizi Kiwanuka vs. The Attorney General of the Republic of Uganda**, challenging the validity of Uganda's *Constitutional (Amendment) Act No. 1 of 2018*. He served the Reference upon the office of the Attorney General of Uganda on 6th May 2019. On 20th June 2019, the Attorney General's office filed its 'Answer to the Reference' and subsequently filed an 'Affidavit in Reply' in respect of the same Reference on 21st June 2019. Both pleadings were served upon the Mr. Mabirizi on 24th June 2019, whereupon he filed **Application No.4 of 2019** that is before us presently.

2. **Application No.4 of 2019** was instituted under Article 30 of the Treaty for the Establishment of the East African Community ('the Treaty'), as well as Rules 21(1), 30(1), 43 and 47 of the East African Court of Justice Rules of Procedure ('the Rules'). It *inter alia* sought to have the Answer to the Reference and Affidavit in Reply referred to above struck off the court record, and judgment on admission entered in favour of the Applicant therein, Mr. Mabirizi. It was premised on the following grounds:

    i. The Respondent therein (the Attorney General of Uganda) had not filed and served the impugned Answer to the Reference and Affidavit in Reply within forty five (45) days as by law prescribed.
    ii. The impugned 'Answer to the Reference' and 'Affidavit in Reply' are alien to the Rules of this Court.

iii. The documents in support of the impugned Answer to the Reference were not filed together with it.

iv. The said Answer to the Reference and Affidavit in Reply contain general and evasive denials; are frivolous and vexatious, and the Affidavit in Reply particularly contains irrelevant and scandalous material.

3. The Application was supported by the Affidavit of Mr. Male Mabirizi that, while regurgitating the foregoing grounds, literally critiques the form and content of the Respondent's Answer to the Reference and faults the impugned Affidavit in Reply for not making specific responses to his Affidavit in support of the Reference.

4. In turn, the Attorney General filed an Affidavit in Reply to **Application No.4 of 2019**, as well as **Application No.6 of 2019** that essentially moves this Court to enlarge the time within which the Answer/ Response to the Reference may be served upon Mr. Mabirizi or, in the alternative, the Answer/ Response to the Reference that had been previously served upon him be validated. The Application is premised on the alleged inability of the Attorney General's Office to serve the said pleading upon Mr. Mabirizi within the prescribed time on account of reasons beyond that party's control, to wit, the indisposition of one Moses Opio, a Records Assistant who was responsible for the process service function in the Attorney General's Chambers.

5. At the hearing of the above Applications, the Parties did concede to their consolidation. Consequently, the hearing of the consolidated Application commenced with submissions from Mr. Mabirizi in **Application No.4 of 2019**, followed by the Attorney General's

submissions in response to the same Application, as well as Submissions highlighting his case in **Application No.6 of 2019**. Mr. Mabirizi did then address us in Submissions in Reply in respect of **Application No.4 of 2019**, as well as his Submissions with regard to **Application No.6 of 2019**. Finally, the Attorney General addressed us in Submissions in Reply with regard to **Application No.6 of 2019**.

6. Mr. Mabirizi was self-represented, while the office of the Attorney General was represented by a team of State Attorneys led by the Hon. Attorney General, Mr. William Byaruhanga; Hon. Deputy Attorney General, Mr. Rukutana Mwesigwa; Learned Solicitor General, Mr. Francis Atoke; Director of Civil Litigation, Ms. Christine Kaahwa and a team of State Attorneys – Mssrs. Martin Mwambusya, Phillip Mwaka, George Karemera, Richard Adrole, Geoffrey Madete, Imelda Adongo, Susan Akello Apira, Johnson Natuhwera, Allan Mukama and Sam Tusubira.

B. **Mr. Mabirizi's Submissions in** *Application No. 4 of 2019*

7. Mr. Mabirizi did not dispute the fact that the Answer to the Reference had been filed within the 45 day period prescribed by Rule 30(1). What he did contest was its late service upon him, as well as its designation as an 'Answer' to the Reference rather than 'Response' to the Reference. He does also fault the Attorney General's office for filing an Affidavit in Reply after the filing of the Answer to the Reference, which he argued contravened Rule 39(1) of the Court's Rules of Procedure. He appeared to consider the Affidavit in Reply to have been a document accompanying the Answer to the Reference, which Affidavit he contested for having been filed out of time. He relied on the cases of **Madhivani International vs. Attorney**

General of Uganda, Civil Appeal No. 23 of 2010 *(Uganda Supreme Court)* and **Mwesekezi vs. Kajubi, Civil Application No. 261 of 2013** *(Uganda Court of Appeal)* to assert that issues of time limitation were not mere technicalities but, rather, matters that went to the substance of a case and should be enforced strictly.

C. Mr. Mabirizi referred us to paragraphs 14 – 21 of his Affidavit in support of **Application No.6 of 2019** to supposedly illustrate the general and evasive denials that had been made by the Respondent therein (Attorney General of Uganda) to express averments in the Reference. In his view, the nature of the Respondent's denials violated Rule 43(1) of this Court's Rules of Procedure, as well as case law from Kenya and Uganda that frowned upon evasive denials in pleadings. In that regard, he cited **Nile Bank & Another vs. Thomas Kato & Others, Miscellaneous Application No. 1190 of 1999**, **Obit Chemical Industries vs. Attorney General of Kenya, Civil Case No. 876 of 2014** and **Kenya Commercial Bank vs. Suntra Investment Bank, Civil Suit No. 380 of 2013**. Finally, with regard to the allegation of scandalous and unnecessary material, Mr. Mabirizi relied upon the definition of 'scandalous matter' in ***Black's Law Dictionary 8th Edition, p.4187*** to urge the Court to strike out the scandalous material cited in paragraphs 22 and 23 of his Affidavit in support of the Application. In conclusion, it was his contention that since the Answer to the Reference had been shown to contain evasive denials and scandalous material, Rule 43(1) of the Court's Rules should be evoked such that the purportedly uncontroverted allegations of fact made in the Reference be deemed to have been admitted by opposite party.

D. **Attorney General's Submissions in *Consolidated Application No. 4 & 6 of 2019***

8. Mr. Geoffrey Madete argued that the Answer to the Response was duly filed on 20th June 2019 in accordance with Rule 30(1) of the Court's Rules but conceded that it was served upon the Applicant therein on 24th June 2019, beyond the prescribed time frame. It was his contention that the filing of an 'Affidavit in Reply' in respect of the Reference on 21st June 2019 did not offend any procedural rule in so far as the documents attendant thereto (Annexes A and B) were appended to the said Affidavit and not to the Reference. He further argued that, contrary to Mr. Mabirizi's assertions, the Answer to the Reference did address all the allegations of fact made in the Reference and its supporting Affidavit, without offending Rule 37 of the Court's Rules of Procedure, which enjoins all pleadings to contain concise statement of facts and not evidence. He thus maintained that the Answer to the Reference was in compliance with Rule 43(1) of the Court's Rules. With regard to the question of time limitation, Mr. Madete contended that Rule 4 of the Rules explicitly empowers the Court to consider applications for extension of time therefore it could not be suggested that prescribed time frames were not open to extension. He urged the Court to consider the substance of the Answer to the Reference and not the nomenclature surrounding its title, and exercise its discretion to dismiss **Application No.4 of 2019**.

9. On her part, Ms. Christine Kaahwa advanced the argument that the Application before us was the wrong procedure for a determination as to whether matters in a pleading were either frivolous or vexatious, or in any way admitted by a party. In her view, Rule 53(1) of the Court's

Rules provides an avenue by which points of agreement and disagreement between parties may be distilled in a Scheduling Conference. She sought to counter Mr. Mabirizi's contention in respect of the allegedly general denials in the Attorney General's pleadings, by reference to Rule 43(2) of the Rules, which allows for specific denials, as well as by a statement of non-admission, either expressly or by necessary implication. Ms. Kaahwa urged us to deduce some denials by necessary implication, arguing that the Respondent had not deemed it necessary to answer each and every allegation set out in the convoluted Reference.

10. On the other hand, arguing **Application No. 6 of 2019** on behalf of the Attorney General, Mr. Richard Adrole contended that the Applicant in that case had demonstrated sufficient reason for his inability to file the Affidavit in Reply to the Reference within time. He argued that the Answer to the Reference having been filed within time, the Attorney General only sought to have the time within which it could be served upon Mr. Mabirizi enlarged or, in the alternative, the late service be validated by this Court. In his view, Mr. Mabirizi stood to suffer no prejudice by the grant of the Application therefore it was just and equitable that it be granted. Mr. Adrole grounded his arguments in cases where this Court had deduced what constituted sufficient reason for the grant of an application for extension of time to be a matter of unfettered court discretion and considered matters of public importance to sufficiently warrant the exercise of its discretion to grant such applications. *See* ***Prof. Anyang' Nyong'o & 10 Others vs. the Attorney General of the Republic of Kenya, EACJ Application No. 1 of 2010*** *and* ***Anthony Calist Komu vs. the Attorney General of the United Republic of Tanzania, EACJ***

Reference No. 7 of 2012. He argued that **Reference No.6 of 2019** raised matters to do with eligibility to contest the Presidency in an EAC Partner State, that Partner State's electoral calendar for national elections, as well as the mandate of this Court to interrogate the decision of a Partner State's apex court; all of which, he portended, were matters of grave public interest and importance.

E. **Mr. Mabirizi's Submissions in *Consolidated Application No. 4 & 6 of 2019***

11. Mr. Mabirizi addressed us in Submissions in Reply in respect of **Application No.4 of 2019**, as well as substantive Submissions in **Application No.6 of 2019**. With regard to the former Application, he maintained that the filing of the Answer to the Reference within time was not in dispute; rather, it was the late filing and service of the attachments and annexures thereto that was in contention. He maintained that the Court's Rules of Procedure enjoined parties to respond to all allegations presented in opposite parties' pleadings therefore it was not up to any party to determine what to respond to in that regard. Further, in his view, where the Rules explicitly designated a pleading as a 'Response' to the Reference, parties were bound by the Rules and did not have the prerogative to either re-designate the pleading as an 'Answer' to the Reference or additionally file an Affidavit in Reply. He contested Ms. Kaahwa's assertion that a Scheduling Conference was the right forum for the points of law raised in his Application, arguing that scheduling conferences did not deal with the striking out of unnecessary material in pleadings.

12. In terms of **Application No.6 of 2019**, Mr. Mabirizi relied upon the case of **Attorney General of Uganda vs. Media Legal Defence Initiative & 19 Others, EACJ Appeal No.3 of 2016**, where it was *inter alia* held that 'a party could not be permitted to defeat a preliminary objection. Once a notice of any objection is given or lodged, the time to remedy the deficiency complained of lapses.' He argued that **Application No.6 of 2019** was incompetent in so far as it sought to remedy the deficiency of time limitation after he raised the issue, and thus defeat his Application. He also questioned the cogency of the reasons advanced by opposite party for the grant of an extension of time given that the process server's alleged ill health was not supported by medical evidence. It was his contention that the purported gravity of the matters raised in the Reference would have been more reason for the Applicant therein to ensure compliance with the procedural rules.

F. **Attorney General's Submissions in Reply to *Application No. 6 of 2019***

13. In a brief reply, it was re-asserted for the Attorney General that **Application No.6 of 2019** was not intended to defeat the purpose of **Application No.4 of 2019** but simply sought to redress a procedural lapse. Mr. Adrole reiterated his earlier submission that this Court did have powers to enlarge time in a matter as grave as the Reference underlying the present consolidated Application.

G. **Court's Determination**

14. Upon hearing both Parties herein, the Court did render its decision in the consolidated application. We reproduce the decision below:

i. *We decline to strike out the Answer to the Reference.*

ii. *We decline to strike down the Affidavit in Reply in its entirety but do hereby expunge paragraph 17 thereof.*

iii. *We disallow the prayer sought in* **Application No.4 of 2019** *for judgment on admission in* **Reference No.6 of 2019**.

iv. *We do exercise our discretion under Rule 4 of the Court's Rules of Procedure to enlarge the time within which the Answer to the Reference may be served, and do hereby deem the said Answer to the Reference as previously served upon the Applicant/ Respondent – Mr. Mabinzi, to have been validly served.*

15. The foregoing decision was rendered in accordance with Article 68(3) of the Court's Rules of Procedure, which provides for the reservation of reasons that underpin a decision. We do forthwith proceed to deliver the reasons that informed the foregoing decision.

16. In a nutshell, the present Consolidated Application poses the issue of the applicability of the Court's procedural rules. It brings to the fore the need for clarity on the application of the rules pertaining to time limitation, pleadings and court's discretionary mandate to extend time fixed by the Rules. We note from the outset that it was a conceded fact that the impugned Answer to the Reference had been filed within time but was served late upon opposite party. Thus, whereas on the one hand, the Applicant in **Application No.4 of 2019** severely admonishes the Respondent therein for service of a pleading that he portends is illegally designated as an 'Answer to the Petition' beyond the time prescribed in Rule 30(1) of the Court's Rules, the said Respondent (vide **Application No.6 of 2019**) reverts to Rule 4 of the

same Rules to remedy the acknowledged late service. For clarity, we reproduce Rules 4 and 30(1) below:

> Rule 30(1)
>
> **The respondent shall within forty-five (45) days after being served with a notification of the reference file and serve upon the applicant a response stating the:-**
>
> **(a)Name and address of the respondent;**
> **(b)Concise statement of facts and law relied on;**
> **(c)Nature of evidence in support where appropriate, and**
> (d)**Relief sought** by the **respondent**.
>
> Rule 4
>
> **A Division of the Court may, for sufficient reason, extend the time limited by these Rules or by any decision of itself for the doing of any act authorized or required by these Rules, whether before or after expiration of such time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed a reference to such time as so extended.**

17. Rule 30(1) addresses the allegations of late service of the Answer to the Respondent; non-recognition of any such document in the Rules, as well as the late filing of the 'Affidavit in Reply' to the Reference and the documents appended thereto. It seems quite clear that the time frame stipulated in Rule 30(1) pertains to the dual function of filing and service of a 'response' to a Reference. To that extent, we do agree with Mr. Mabinzi that late service of the Answer to the Reference did contravene that Rule. However, it is also abundantly

clear that a party that is caught up by the time limitation prescribed in that Rule does have recourse to Rule 4 for redress. That is what the Attorney General sought to do by filing **Application No. 6 of 2019**. Mr. Mabirizi contested this course of action by the Attorney General on the premise that it was intended to defeat his **Application No. 4 of 2019** that had been filed earlier seeking to have the impugned Answer to the Reference struck off the Court record.

18. First and foremost in the case of **Attorney General of Uganda vs. Media Legal Defence Initiative & 19 Others** (supra) to which we were referred by Mr. Mabirizi, it was a *preliminary objection*, and not an application, that was in issue. Rule 41 of the Court's Rules addresses preliminary objections before this Court as follows:

> (1) **A party may by pleading raise any preliminary objection.**
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> (2) **Where a respondent intends to raise a preliminary objection he shall, before the scheduling conference under Rule 53 of these Rules, give not less than seven (7) days written notice of the preliminary objection to the Court and to the other parties of the grounds of the objection.**

19. In oral submissions, Mr. Mabirizi argued that Rule 41(2) was inapplicable to him because he was an applicant in the Reference and not a respondent as delineated in that Rule. He thus appears to have interpreted Rule 41 in such a manner as to suggest that, there being no duty upon an applicant under Rule 41(2) to notify opposite party of a preliminary objection, a preliminary objection may be raised by pleading it in an application and the opposite party would stand duly notified. Though not entirely untenable, we find this a rather disingenuous and untidy procedure for raising preliminary points of

law before this Court in so far as it defies the notion of judicial economy. Simply stated, judicial economy denotes **efficiency in the operation of courts and the judicial system, especially the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources.**[1] Indeed, the function of judicial economy in court procedures was aptly articulated in the Article, Pieras, J., '*Judicial Economy and Efficiency through the Initial Scheduling Conference: The Method*', Catholic University Law Review, Vol.35, 1986, p.934, as follows.

> **In reality, there are three participants** in every case: **the plaintiff, the defendant and the court. All of them have their particular interest. The plaintiff's and defendant's interests are of an economic nature, the court's interest is in the administration of justice in accordance with the law and in the speedy resolution of disputes. Speedy resolution translates into economy of time, effort and money, and consequently the reduction of costs to all participants.** *(Our emphasis)*

20. Against that background, the usual practice before this Court is for an applicant that wishes to raise a preliminary point of law to do so at the scheduling conference delineated under Rule 53: the Court would then make a determination as to whether it is the sort of point of law that would conclusively dispose of the case, in which case it would be heard as a preliminary point of law; otherwise, it would be framed as an issue for determination in the Reference. The circumstances of this case are that Mr. Mabirizi opted to file an application that raised

[1] Black's Law Dictionary, 10th Edition, p.975

preliminary points of law. He thus placed himself out of the ambit of typical preliminary objections and into the realm of interlocutory applications. He cannot then be seen to benefit from the law on preliminary objections when he has opted to submit to the purview of interlocutory applications. We therefore find the decision in **Attorney General of Uganda vs. Media Legal Defence Initiative & 19 Others** (supra) inapplicable to the Consolidated Application before us presently.

21. In the consolidated Application before us it was argued for the Attorney General that the Answer to the Reference having been filed within time, he only sought to have the time which it could be served upon Mr. Mabirizi enlarged or, in the alternative, the late service be validated by this Court. Mr. Adrole argued that Mr. Mabirizi stood to suffer no prejudice by the grant of the prayers sought, which in his view were just and equitable given that **Reference No. 6 of 2019** raised matters of public interest and importance, to wit, eligibility to contest the Presidency in an EAC Partner State, that Partner State's electoral calendar for national elections, as well as the mandate of this Court to interrogate the decision of a Partner State's apex court. On his part, Mr. Mabirizi disputed the cogency of the reasons advanced for the grant of an extension of time, questioning a process server's averment of ill health in the absence of supportive medical evidence.

22. In the case of **Prof. Anyang' Nyong'o & 10 Others vs. the Attorney General of the Republic of Kenya** (supra), navigating the import of Rule 4 of the Court's Rules, it was held:

This Court appreciates the reference to the Court's 'unfettered discretion' indicated in the Katatumba case above. Nonetheless, as a matter of practical application and good jurisprudence, the Court's 'unfettered discretion arises only after 'sufficient reason' for extension of time, has been established. Therefore, to that extent, the Court's discretion in an application to extend time is not unfettered

23. On the other hand, in the latter case of Godfrey Magezi vs. National Medical Stores, EACJ Appeal No. 2 of 2016 it was held:

> In determining whether 'sufficient reason' for the extension of time under Rule 4 exists, the court seized of the matter should take into account not only the considerations relevant to the applicant's inability or failure to take the essential procedural step in time, but also any other considerations that might impel a Court of Justice to excuse a procedural lapse and incline to a hearing on the merits. In our considered opinion, such other considerations will depend on the circumstances of individual cases and include, but are not limited to, such matters as the promptitude with which the remedial application is brought, ... the public importance of the said matter, and of course, the prejudice that may be occasioned to either party by the grant or refusal of the application for extension of time.

24. Needless to state, the foregoing decisions have binding authority upon us. In the instant case, the Reference raises matters of grave public importance to the governance of the Republic of Uganda, derived from the amendment of no less than the Grundnorm or that

Partner State. We deduce no prejudice to the Respondent, Mr. Mabirizi, should the prayer for extension of time be granted, neither were we satisfactorily addressed on any such prejudice. In any event, the grant of the Application would merely formalise the service upon him of a document that is already on Court record.

25. Mr. Mabirizi did also challenge the veracity of the reasons advanced for the Attorney General's inability to serve the Answer to the Reference in time. These were encapsulated in the Affidavit of one Moses Opio that was lodged in this Court on 31st July 2019. However, a related issue was conclusively addressed by the Appellate Division of the EACJ in **Godfrey Magezi vs. National Medical Stores** (supra) in the following terms:

> **A statement or statements made on oath in an affidavit are evidence and it was improper to treat them as mere statements or allegations which required evidential proof (as would undoubtedly have been the case if they had been made in a pleading). To cast doubt on the veracity of such statements, as the Trial Court did at the urging of Counsel for the Respondent, without there being any rebutting evidence from the Respondent was also a misdirection of the law.**

26. In this case, as in that case, no evidence in rebuttal was presented by the Respondent (Mr. Mabirizi) such as would provide a basis for the veracity of the Applicant's evidence to be impeached. In the absence of such contrary evidence, Mr. Opio's affidavit evidence remained uncontroverted. Consequently, we are satisfied that the Attorney General has established sufficient reason for that office's inability to serve the Answer to the Petition within the prescribed time.

We would therefore exercise our discretion under Rule 4 of the Court's Rules to grant the application for enlargement of time within which the Answer to the Petition may be served upon Mr. Mabirizi.

27. Be that as it may, Mr. Mabirizi did further contend that there is no provision for such a pleading as an 'Answer to the Reference' in the Rules. With utmost respect, this argument appears to us to be a classic case of applying rules of procedure as handmaidens of *injustice* rather than *justice*. Whereas we do acknowledge the use of the term 'response' in Rule 30(1) with regard to the pleading that responds to a Reference, and it indeed might have been more prudent to use the same term in the attendant pleading; we are hard pressed to appreciate how the designation of such pleading as an Answer to the Reference would so discredit it as to warrant its being struck off the record, as has been proposed. In our view, the more pertinent issue would be whether it conforms in substance to the requirement of a response to a reference as envisaged in Rules 30(1) and 43, a matter to which we revert later in this Ruling. For present purposes, therefore, although it might have been more elegant to refer to the pleading in question as a Response and not 'Answer to the Reference, such a procedural lapse would, in our considered view, not render it fatally defective.

28. With regard to the allegation of late filing of the 'Affidavit in Reply', we are constrained to observe that we find no provision in the Court's Rules for an Affidavit in support of a Reference or Response to a Reference. It does follow that, there being no provision for an affidavit in support of either pleadings, there would be no prescribed time frame in the Rules within which an affidavit in support of a Response

to a Reference may be filed. Meanwhile, whereas Rule 24(3) enjoins an applicant seeking to annul an Act, as is the case herein, to accompany the Statement of Reference with **'documentary evidence of the same'** there is no such corresponding obligation upon a respondent to a reference under Rule 30. Nonetheless, Rule 39(1) mandates any party that wishes to append documents to its pleadings to do so provided, obviously, that it would be required to formally adduce them in evidence at trial should it wish to have them formally on Court record. Indeed, in the case of **Union Trade Centre (UTC) vs. Attorney General of Rwanda, EACJ Appeal no. 1 of 2015**, it was held that **any annexures to a document unless the document is an affidavit and they are annexed thereto, or the same are produced at the trial as exhibits, are not evidence.** The import of that decision is that documents that a party intends to rely upon in support of its case may be adduced either by appending them to an affidavit or by their production in oral evidence at trial as exhibits. Thus, subject to the Scheduling Conference delineated in Rule 53(1), an affidavit such as the Affidavit in Reply in this case would be treated as affidavit evidence within the confines of Rule 53(1)(c), and any documents appended thereto would be adduced as documentary evidence under cover of that affidavit. We do accordingly agree with Mr. Mabirizi that an 'affidavit in reply' with regard to the Answer to the Reference is indeed alien to the Rules, but disallow his claim that the said affidavit was not filed within the time frame by law prescribed. There is no such time frame in the Rules. We therefore find this objection to be misconceived and untenable.

29. Mr. Mabirizi also sought to have the Answer to the Reference and Affidavit in Reply struck off the record on account of their purportedly containing general and evasive denials; being frivolous and vexatious, and the Affidavit in Reply particularly containing irrelevant and scandalous material. In what appeared to be an alternative argument, he did in oral submissions contend that the general and evasive denials should be deemed to be admissions within the precincts of Rule 43(1). Conversely, it was argued for the Attorney General that the Answer to the Reference had addressed all the allegations of fact made in the Reference and its supporting Affidavit without offending Rule 37, which enjoins all pleadings to contain concise statement of facts and not evidence. It is not lost upon us that the decisions cited by Mr. Mabirizi on this issue were from Kenyan and Ugandan courts. We are alive to the fact that decisions from EAC Partner States (apex courts inclusive) have only persuasive authority before this Court.[2] They would not supersede the express provisions of the Court's procedural rules. The Rules themselves are quite categorical on this issue. We reproduce Rules 37(1) and 43 for ease of reference.

<u>Rule 37(1)</u>

Subject to the provisions of this Rule and Rules 40, 41 and 42, every pleading shall contain a concise statement of material facts upon which the party's claim or defence is based not the evidence by which those facts are to be proved

[2] This observation equally applies to the cases of [illegible] Attorney General of Uganda, Civil Appeal No. 23 of 2010 (Uganda Supreme Court) & Mwesekezi vs. Kajubi, Civil Application No. 261 of 2013 (Uganda Court of Appeal) that were cited in support of the proposition that issues of time limitation must be strictly enforced

Rule 43

(1)Any allegation of fact made by a party in a pleading shall be deemed to be admitted by the opposite party unless it is denied by the opposing party in the pleading.

(2)A denial may be made either by specific denial or by a statement of non-admission and either expressly or by necessary implication.

(3)Every allegation of fact made in a pleading which is not admitted by the opposite party shall be specifically denied by that party; and a general denial or a general statement of non-admission of such allegation shall not be sufficient denial.

30. Rule 37(1) explicitly enjoins parties to a reference to be *concise* in their pleadings, restricting them to '**material facts upon which the party's claim or defence is based.**' On the other hand, Rule 43 specifically addresses denials and admissions. We construe Rule 43(1) to encapsulate the general rule that a factual allegation, if not denied by opposite party would be deemed to be admitted. That general rule is then qualified by Rule 43(2) that outlines what the denial envisaged in Rule 43(1) would entail, to wit, a specific denial or a statement of non-admission, both of which may be deduced from their express terms or by necessary implication. The first aspect of 43(3) appears to be synonymous with the import of Rule 43(1) in so far as it advocates the specific denial of any allegation that is not admitted. The second aspect of that sub-rule however, expressly negates the effect of *general* denials and statements of non-admission. It thus renders redundant blanket, sweeping statements of

denial in the nature of omnibus denials that purport to restrict a party's liability to only matters expressly admitted by it in a pleading.

31. In the matter before us Mr. Mabirizi did not take issue with any omnibus clause either in his pleadings or in submissions. He did, however, fault the Attorney General for not responding to aspects of his Statement of Reference. We have carefully considered paragraphs 14 – 21 of his affidavit in support of Application No. 4 of 2019, to which we were referred. It is abundantly clear that those paragraphs do acknowledge that responses were made to all Mr. Mabirizi's allegations in the Reference albeit not in the detail and with the specificity that he might have preferred. This, in our view, is not quite the same thing as there being no denial whatsoever as envisaged under Rule 43(1). On the contrary as quite rightly argued by Ms. Kaahwa, Rule 43(2) does make provision for either specific denials or statements of non-admission. Perhaps more importantly, in any event, the Rules do not prescribe the degree of specificity that parties would be expected to subscribe to. Ultimately, it is the respective parties call to decide how much specificity would support their case. It certainly is not for opposite party to dictate this detail to them. That would probably explain the Rules deference in Rule 37(1) to pleadings containing **'a concise statement of material facts.'** Consequently, we are satisfied that the Answer to the Reference did not offend the Court's Rules of procedure in that regard.

32. Given the definition of a 'pleading' in Rule 2 which encompasses **'any document lodged by or on behalf of a party relating to a matter before the Court'**; the application of the Rules in the foregoing discourse would also pertain to Mr. Mabirizi's allegation that

the Affidavit in Reply contained general and evasive denials. In any event, there would be nothing to stop opposite party from filing additional affidavits to provide more specific affidavit evidence in support of its case. We would therefore disallow Mr. Mabirizi's contestations as to the generality of the affidavit evidence on record.

33. We now turn to the question as to whether or not the Answer to the Reference and Affidavit in Reply were frivolous and vexatious, the latter document allegedly containing scandalous material too. Having carefully scanned the entire Court record we find no substantiation by Mr. Mabirizi either in his Application or in submissions on the issue of frivolous and vexatious pleadings. We shall therefore not belabor the point. He did nonetheless, address us on the question of the Affidavit in Reply containing what he considered to be scandalous material on the basis of the following definition of *scandalous matter* in *Black's Law Dictionary 8th Edition, p.4187*:

> **A matter that is both grossly disgraceful (or defamatory) and irrelevant to the action or defense. A federal court – upon a party's motion or on its own – can order a scandalous matter struck from a pleading.**

34. We reproduce the impugned paragraphs of the Affidavit in Reply below.

> Paragraph 15
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> ***That I know that the Applicant is habitually known to abuse court process and has previously challenged the competence of Lady Justice Elizabeth Musoke and Justice Cheborion Barishaki to hear his petition when it was filed in the***

Constitutional Court on the alleged grounds that they were bound to be biased in favour of the Respondent due to their kinship connections with members of the Executive, and at the beginning of the hearing abandoned his application.

Paragraph 17

That I know that the Applicant has continuously exhibited vexatious and frivolous behavior in the conduct of his petitions challenging the legality of the Constitution (Amendment) Act No. 1 of 2018 in the Courts of Law of Uganda.

35. We would respectfully decline to make a finding on paragraph 15 above given that it denotes issues that are similar to those raised in the substantive Reference from which this Application is derived. We would not wish to pre-empt our decision on the merits of the Reference without hearing the parties extensively on the issues inherent therein. With regard to paragraph 17, however, it appears to be an attack on the person of Mr. Mabirizi in terms of his personal conduct of legal disputes attendant to *Constitution (Amendment) Act No. 1 of 2018*. It does in our considered view run afoul of the professional courtesy that is expected from members of the Bar, including self-represented litigants and is, to that extent, scandalous. We do reiterate that court decorum dictates that the dignity of a court is to be respected and maintained at all times, including in speech, pleadings, attire and presentations made before it. Quite obviously that would extend to minimum standards of courtesy to all court users; judicial officers, advocates and litigants alike. This Court does treat court decorum with the seriousness that should be accorded to

it, and would not condone any inclinations to the contrary. On that premise, we do hereby strike out paragraph 17 of the Affidavit in Reply.

H. Conclusion

36. In the result, as we did state in our Summary Ruling of 29th October 2019, we decline the invitation extended to us to strike off the Court record either the Answer to the Reference or Affidavit in Reply in its entirety. We do, however, expunge paragraph 17 from the Affidavit in Reply; disallow the prayer sought in **Application No.4 of 2019** for judgment on admission in **Reference No.6 of 2019**, and exercise our discretion under Rule 4 of the Court's Rules of Procedure to enlarge the time within which the Answer to the Reference may be served, and do deem the said Answer to the Reference as previously served upon the Applicant/Respondent – Mr. Mabinzi, to have been validly served.

37. We do reiterate our Orders in our Ruling of 29th October 2019 that **Application No.6 of 2019** is allowed and **Application No.4 of 2019** is dismissed, save as decided in paragraph 6(ii) thereof that paragraph 17 of the Affidavit of Reply is expunged.

38. Finally, as we did state therein, we make no order as to costs
It is so ordered.

Dated, signed and delivered at Arusha this 6th day of February, 2020.

Hon. Lady Justice Monica K. Mugenyi

PRINCIPAL JUDGE

Hon. Dr. Justice Faustin Ntezilyayo

DEPUTY PRINCIPAL JUDGE

Hon. Justice Audace Ngiye

JUDGE

Hon. Dr. Justice Charles O. Nyawello

JUDGE

Hon. Justice Charles Nyachae

JUDGE