IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT ARUSHA

(Coram: Dr. E.Ugirashebuja, P.; L. Nkurunziza, V.P; E. Rutakangwa, J.A.; A. Ringera, J.A.; G. Kiryabwire, J.A.)

APPEAL NO. 3 OF 2016

BETWEEN

THE ATTORNEY GENERAL OF UGANDA .....APPELLANT

AND

MEDIA LEGAL DEFENCE INITIATIVE (MLDI)
AND 19 OTHERS ..... RESPONDENT

[Appeal from the Ruling of the First Instance Division at ARUSHA (Monica K. Mugenyi, P.J.; Isaac Lenaola, D.P.J.; Faustin Ntezilyayo, J.; Fakihi A. Jundu, J.; and Audace Ngiye,J.) dated 28th June, 2016 in Application No. 4 of 2015]

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JUDGMENT OF THE COURT

INTRODUCTION

1. It is axiomatic that in administering justice, procedural formalities and rules are not empty ones, that is, not without any intended salutary purpose. Procedure, as was aptly observed, is a legal requirement designed to facilitate the attainment of justice and further its ends: **Sangram Singh v. Election Tribunal,** AIR 1955 sc 425. The overriding objective of all procedural rules, is to enable justice to be fairly done between the parties in a dispute, consistent with public interest: **Dy.CIT v. Central Concrete and Allied Products Ltd**. [1999] 236 ITR 595 (Cal). The pertinent holding of Frankfurter, J. in **McNobb v. U.S.** (318) US 332 at page 347 is a further illumination of this. He said:

> *"The history of liberty has largely been the history of observance of procedural safeguards."*

2. Alive to these truths, the framers of the Treaty for the Establishment of the East African Community ("the Treaty"), through Article 42 (1), found it wise to vest the East African Court of Justice ("the Court") with powers to make rules of the Court which, subject to the provisions of the Treaty, shall *"regulate the detailed conduct of the business of the Court"*. The promulgated rules are the East African Court of Justice Rules of Procedure 2013 ("the Rules").

3. One of the important rules in the conduct of the Court business is Rule 21 of the Rules. This Rule provides as follows in sub-rule (1):

> *"Subject to sub-rule (4) of this Rule, all applications to the First Instance Division shall be by motion, which shall state the grounds of the application."*

Sub-rule (4) simply directs that a notice of Motion shall be substantially in the Fourth Schedule.

It is notably further prescribed in sub-rule (5) that:

> *"Every formal application to the First Instance Division shall be supported by one or more affidavits of the applicant or some other person or persons having knowledge of the facts, in accordance with Form 3 of the Second Schedule."*

4. The perceived failure of the Respondent to comply with the obviously mandatory provisions of sub-rule (5) of the Rules while instituting Application No. 4 of 2015 ("the Application") in the First Instance Division ("the Trial Court"), is at the bottom of this Appeal, as we shall presently demonstrate.

BACKGROUND

5. It is common ground that this Appeal ("the Appeal") emanates from the Ruling of the Trial Court dated 28th June, 2016 in Application No. 4 of 2015 alluded to above.

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6. The Application was lodged by the Respondents basically under Rules 21, 36 and 53 of the Rules. In the Application, the Respondents are seeking leave to act as *amici curiae* in Reference No. 16 of 2014 ("the Reference") which is still pending hearing in the Trial Court. The Applicant in the Reference is one Ronald Ssembuusi (deceased).

7. The main grievance of the Applicant in the Reference is that the Ugandan criminal defamation law contained in Sections 179 and 180 of the Penal Code, Cap 120 is an affront to the Fundamental and Operational Principles of the East African Community ("the Community") as enshrined in Articles 6, 7 and 8 of the Treaty. He is, accordingly, seeking the Court's declaration to that effect.

8. During the pendency of the Reference, the Respondents in the Appeal, who are priding themselves on *"possessing a strong and genuine commitment to promoting respect for and observance of the right of freedom of expression, including freedom of the press...,"* accessed the Trial Court seeking leave to make submissions in the Reference and subsequently appear as *amici curiae*. The Application was by Notice of Motion as required by Rule 21 (1) of the Rules. It is stated in the said Notice of Motion that it is supported by the affidavit of one *"Yakoré-Oulé Jansen sworn on or about the 23rd of April 2015"*.

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This assertion notwithstanding, the only affidavit of the said Yakoré-Oulé Jansen in support of the Notice of Motion found at pages 64-70 of the Record of Appeal, shows that it was sworn on "4th June, 2015".

9. The Appellant, who is the Respondent in the Application, resisted the merits of the Application and challenged its competence. The competence of the Application is challenged *vide* paragraph 3 of the Affidavit in Reply thus:

> *"That the affidavit accompanying the application is incompetent, based on hearsay and does not disclose the source of information contained therein."*

10. The Respondents, then Applicants, through the Affidavit in Rejoinder of one Annet Namugasa, resisted the preliminary objection asserting that the impugned Affidavit was competent and valid in law.

11. Procedurally, the raised point of preliminary objection ought to have been argued and disposed of before the hearing on the merits of the Application. This was not done. Instead, oral hearing on the merits of the Application was conducted on 12th November, 2015.

12. Mr. Francis Gimara, learned advocate, argued in favour of the Application and pressed the Trial Court to grant the sought orders. He

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had the full support of Mr. Nicholas Opiyo, learned advocate for the 1st Respondent.

13. For the 2nd Respondent, now Appellant, Mr. Geoffrey Atwine, learned Senior State Attorney, first of all, submitted in support of the point of preliminary objection, urging the Trial Court to strike out what they believed was an incompetent Application. In the alternative, he prayed for the dismissal of the Application for want of merit, were the Trial Court to overrule the point of preliminary objection.

14. It was in his rejoinder that Mr. Gimara "briefly" argued that the impugned Affidavit "*conformed with the rules and the format provided for in the Third Schedule of the Rules*". Thereafter, the Trial Court reserved its ruling.

15. In its Ruling, the Trial Court, in our respectful opinion, made a fleeting reference to the challenge on the competence of the Application, at the stage of summarising the 2nd Respondent's case. However, in its determination of the Application, it never addressed itself to the submissions of the Parties on the issue. It only addressed itself to the merits of the Application and finding it not wanting in merit, granted the orders sought therein, hence this Appeal.

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THE APPEAL

16. The Appellant had lodged a Memorandum of Appeal containing seven (7) grounds of complaint. As we found these grounds to be interwoven, at the Scheduling Conference, they were condensed into three (3) substantive issues ("the Issues") for our determination. These are:

i) Whether the Trial Court erred in law and procedurally by failing to hold that the Respondent's Affidavit in support of the Application was incurably defective.

ii) Whether the Trial Court erred in law in holding that the Respondents had sufficiently demonstrated their interests in the outcome of the case as well as their neutrality, impartiality and independence in the dispute to justify their joinder as *amici curiae* in the Reference, and

iii) To what reliefs are the Parties entitled?

Counsel for the Parties opted to lodge written submissions and make brief oral highlights, a commitment they carried out to the best of their abilities.

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LEGAL REPRESENTATION

17. At the hearing of the Appeal, the Parties' representation was as follows: Ms. Harriet Nalukenge and Ms. Charity Nabasa, learned Senior State Attorney and State Attorney respectively, appeared for the Appellant. Mr. Francis Gimara, learned advocate, appeared for the Respondents.

SUBMISSIONS OF COUNSEL

18. Ms. Nalukenge addressed the three issues squarely in her submission. It was her contention that they had timeously challenged the competence of the Application in their Pleadings and had given the requisite details. The challenge, she stressed, was premised on the obvious defects in the Affidavit in support of the Notice of Motion which rendered the Affidavit incompetent to support the Notice of Motion. That being the case, she argued, that Affidavit ought to have been struck out, thereby rendering the Application incompetent and unmaintainable. However, she continued, the learned Justices in the Trial Court, ignored the issue on the competence or otherwise of the Application. Their failure to determine this crucial issue, in her view, amounted to a procedural irregularity leading "*to a miscarriage of justice*". She accordingly urged us to answer the first issue in the affirmative and on that basis alone, allow the Appeal with costs.

19. On his part, Mr. Gimara was least impressed by Ms. Nalukenge's submission. It was his startling submission, in our respectful opinion, that that submission does not hold water because "*the Appellant did not specify which affidavit it is referring to*".

20. It was Mr. Gimara's further contention that the Application "*was supported by 17 affidavits of representatives of the respondents*", each containing "*information on the mandate and work of the relevant non-governmental organisations as well as their interest in the outcome of the Reference*".

21. In his oral highlights, he devoted himself exhorting us to accept as competent the 17 affidavits which were lodged much later following a Court Order, but after the preliminary objection had been raised. It was only at the prompting of the Court, that he casually referred to the first issue saying the Trial Court did not commit a procedural error in failing to determine the issue on the competence or otherwise of the Application.

22. As if he was taken unawares, he confidently asserted thus:

> "*My Lord, if I may go back to the record, this issue first of all was not raised as an issue for this position (sic). It came in the Submissions of the Respondent...If you look at the record, it was raised as a submission on the part of the Appellant; and it wasn't*

an issue that required the Court to make a determination on it. It was a submission and I think that the Court is enjoined not to take every submission and respond to it. They will take what is relevant and make a response on that... Otherwise you would have a judgment that is 150 pages if you decided to respond to every submission."

23. On the basis of these sentiments, he pressed us to answer the first Issue in the negative.

THE COURT'S DETERMINATION ON ISSUE NO.1

24. The first Issue is whether the Trial Court erred in law and procedurally by failing to hold that the Respondent's Affidavit in support of the Notice of Motion was incurably defective.

25. Before venturing our opinion on this crucial issue, we have found it constructive, first, to repair the apparent misleading flaws in Mr. Gimara's argument.

26. First of all, it is not true to assert, as did Mr. Gimara, that the Appellant did not specify the challenged Affidavit. The undeniable truth is that from the outset, the Appellant had been challenging one piece of Affidavit. This was the one of Yakaré - Oulé Jansen.

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27. Secondly, it is equally not true to claim that the issue relating to the alleged invalidity of Jansen's affidavit was belatedly raised for the first time by the Appellant in his submissions. On this Mr. Gimara is belied by the averments in paragraph 3 of Ms. Annet Namugasa's Affidavit in Rejoinder sworn and lodged on 30th July, 2015, challenging the validity of the pleaded point of preliminary objection. All the same, even if we were inclined to uphold Mr. Gimara on this, we would have found his arguments untenable in law, because: **One**, on points of law, it is settled by the courts that illegality of an issue is a question of law which can be raised at any time or at any stage of the proceedings with or without prior knowledge of the parties See, **Uganda Railway Corporation v. Ekwaro D.G. & 5104 Others** (UCA) U.L.R. [2008] 319. **Two,** a court of law cannot sanction what is illegal; an illegality once brought to the attention of the court, overrides all questions of pleading including any admissions made between the parties (**Uganda Railway Corporation v. Ekwaro** (supra)). It must be resolved by the court even at the risk of making the judgement frighteningly long.

29. Reverting to the issue under scrutiny, we have to quickly point out that its determination will rest on the following pertinent irrefutable established legal principles and/or requirements:-

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(i) A party cannot be permitted to defeat a preliminary objection notice of which has already been given; once a notice of preliminary objection is given or lodged, the time to remedy the deficiency complained of lapses: See, for instance, **Juma Ibrahim Mtale v. K. G. Karmali** (CAT) [1983] TLR 50, **Damas Ndaweka v. Ally Saidi Mtera** (CAT) Civil Appeal No. 5 of 1995 (unreported).

(ii) An issue of jurisdiction on a preliminary objection has always to be determined first by the court: See, for example, **Shahida Abdul Hassenari v. Mahed M. G. Kanji** (CAT) Civil Application No. 42 of 1999 (unreported).

(iii) A court seized with a preliminary objection is, first of all enjoined by law to determine that objection before going into the merits or substance of the case or application before it. Failure to do so amounts to an incurable procedural irregularity: See, for instance, **Bank of Tanzania v. Devran P. Valambia** (CAT) Civil Application No. 15 of 2002, **Thabit R. Maziku and Kisuku S. Kaptula v. Amina K. Tyela and Mrajis wa Nyaraka Zanzibar** (CAT) Civil Application No. 98 OF 2011 (both unreported).

(iv) If a party desires to have any point of law disposed of before the trial, he should raise it in his pleading by an objection on a point of law, especially where the point may dispose of the suit. A point

of law, however, may be argued whether raised in the pleadings or not: See, for instance, **Saggu v Roadmaster Cycles (U) Ltd** [2002] 1EA (UCA).

(v) A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued successfully as a preliminary point may dispose of the suit : See, **Garden Square Ltd v. Kogo and Another** [2002] LL.R. 1695 (KCC), **Attorney General of Kenya v. Independent Medical Legal Unit,** EACJ Appeal No. 10 of 2011 or EACJ LR 2005-2011, p. 377, and **The Secretary General of the East African Community v. Rt. Hon. Margaret Zziwa,** EACJ Appeal No. 7 of 2015(unreported).

(vi) One of the most commonly pleaded ground of preliminary objection is failure of a pleading to conform to the requirements of law or rules of court.

(vii) A court commits an error of law or a procedural error when, for instance, it acts irregularly in the conduct of the proceedings or hearing, resulting or leading to a denial or failure of due process (i.e. fairness), irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party's pleadings, etc: See, **The Hon. Attorney General of Tanzania v. ANAW**, Appeal No. 3 of 2011 (EACJ LR 2005-2011, p. 395), **Angella Amudo v. The**

Secretary General of the EAC, Appeal No. 4 of 2014 (EACJ LR 2012-2015 p. 592).

29. As already shown in paragraph 8 above, the Application was instituted by a Notice of Motion in terms of Rule 21(1) of the Rules. It is evident from the Notice of Motion itself that it is supported by the Affidavit of one Yakoré-Oulé Jansen sworn on or about the 23rd of April, 2015. It goes without saying, therefore, that the requirements of Rule 21 were, **on the face of it,** complied with by the Respondents.

30. The immediately above observation notwithstanding, it is the Appellant's contention that the Respondent's Pleadings violated the dictates of the Rules. In elaboration, he contends that the said Notice of Motion was supported by an incurably defective affidavit, thereby rendering the Application incompetent and unmaintainable in law. It deserved no hearing on the merits but ought to have been struck out, the Appellant is protesting. As this was not done by the Trial Court, argues the Appellant, it committed an irreversible procedural error and its impugned Ruling should be nullified by this Division of the Court.

31. There is no gainsaying here that the Appellant had properly pleaded in his Pleading, a point of preliminary objection on a pure point of law, challenging the competence of the Application. The Trial Court took cognizance of it in its Ruling but, admittedly, did not determine that

objection. Instead, it proceeded to determine the Application on the merits as if its competence was not an issue, and much to the chagrin of the Appellant granted the orders sought therein.

32. We have already demonstrated (see para 28 (iii), above) that it is settled law that a court seized with a preliminary objection, is first of all enjoined by law to determine it before going into the merits or substance of the case before it and failure to do so amounts to an incurable irregularity.

33. It was thus succinctly stated by the Court of Appeal of Tanzania in **Bank of Tanzania v. Devram P. Valambia** (supra):

> *"The aim of a preliminary objection is to save the time of the court and the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily".*

34. We may as well add without any fear of being contradicted that if a raised point of preliminary objection which otherwise would have disposed of the proceedings summarily is left undetermined and the party raising it is forced to defend an incompetent proceeding, he or she is greatly prejudiced. The prejudice arises through loss of his/her precious resources, such as time, money, etc. But more tellingly, he or

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she is denied his/her vested right to have the matter disposed of at the threshold, thereby, occasioning a failure of justice.

35. In the case of **Thabit R. Maziku** (supra), following settled law and practice, it was stated with sufficient lucidity that failure by the trial court

> *"to deliver the ruling on the point of preliminary objection...constituted a colossal procedural flaw that went to the root of the matter."*

It was further aptly held that:

> *"It matters not, whether it was inadvertent or not. The Trial Court was duty bound to dispose of it fully, by pronouncement of the Ruling (on it) before dealing with the merits of the suit. This it did not do. The result is to render all the subsequent proceedings a nullity."*

36. In that case, the trial court had in fact properly heard the parties on the preliminary objection and had reserved its ruling to be delivered on 16/9/2009. The ruling was never delivered at all but the suit was heard and determined on its merits, hence forcing the Court of Appeal to nullify the proceedings. We subscribe wholly to the reasoning and holdings in the **Thabit R. Maziku** case, and having found it very

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persuasive, we shall adopt and apply it in our determination of the first Issue in this Appeal.

37. Coming back to the issue under discussion, we have found it as an established fact that the Notice of Motion which instituted the Application in the Trial Court was supported by only one affidavit. This has been the stance of the Appellant who is borne out on this by the Notice of Motion and Mr. Gimara himself.

38. Mr. Gimara is on record on the day of hearing the Application (12/11/2015) confidently asserting thus:

> *"My Lord (sic), the Applicants rely entirely on their Notice of Motion filed on the 10th June, 2015, the supporting Affidavit of Yakoré-Oulé Jansen filed on (sic) the Notice of Motion, the EAC Treaty and the Rules of Procedure under the jurisprudence of this Court on those matters."*

This, to us, tells it all.

39. It is the Affidavit of Y.O. Jansen which was the subject of the preliminary objection. If this Affidavit was incurably defective as the Appellant is maintaining, then it could not validly support the Notice of Motion. Without a valid supporting affidavit, the Application, by any stretch of imagination, could not be said or held to have been

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competently before the Trial Court. In that eventuality, the Trial Court could not have been properly seized with jurisdiction to entertain and determine the Application on its merits. Viewed from this perspective, it has occurred to us that it was even more imperative for the preliminary objection to be both heard first, and disposed of by the Trial Court before proceeding to hear the Parties on the merits or otherwise of the Application. Failure to do so by the Trial Court was, in our settled minds, "a colossal" incurable "procedural irregularity" envisaged by Article 35A(c) of the Treaty.

40. In view of the above exposition, under normal circumstances, we would have proceeded forthwith to nullify and set aside the Proceedings in the Trial Court as from 12th November, 2015 including the Ruling appealed from. However, after perusing the only oral submissions of Counsel for the Parties in the Trial Court, we are of the settled view that this course of action will not serve the interests of justice both in the Application and the Reference which has been pending since 2014.

41. We are saying so advisedly because Counsel for both sides had the opportunity to address the Trial Court on the pleaded preliminary objection at the time the Application was heard on the merits. We have found nothing objectionable on this, as this is usually done in order to

Court to determine it first. Once a decision thereon is rendered, then any aggrieved party, can, under the permissive provisions of Article 35A of the Treaty, access this Division on appeal.

43. We, all the same, have found ourselves constrained to make this pertinent observation as we conclude our canvassing of this Issue. We are not oblivious of the fact that the unfettered right of appeal against any "judgment or order" of the First Instance Division carries with it the potential for causing delays in the disposal of cases in both Divisions of the Court, thereby rendering the Court's vision a poetic dream. This is particularly true where the appealed from decision or order, like this one, does not have the effect of finally disposing of the Reference, Application or Claim. We therefore hope and pray that well intentioned parties will sparingly resort to this right of appeal against interlocutory rulings or orders which are not likely in the long run to lead to a miscarriage of justice if no immediate redress is sought and obtained.

44. That said, we answer the first Issue in the affirmative. Since we have nullified the impugned Ruling, the dictates of justice compel us to say nothing on the second Issue.

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CONCLUSION

45. The crucial issue in the Appeal was whether or not the Trial Court erred in law and procedurally by failing to determine the point of preliminary objection challenging the competence of the Application. From our discussion on this Issue we have arrived at one conclusive finding. This is that the Trial Court actually so erred in law and procedurally. The error was incurable and vitiated the impugned Ruling which we have quashed and set aside.

46. As a way forward, since the Parties were heard in full on the undetermined point of preliminary objection, we direct the Trial Court to re-constitute itself in order to compose a fresh ruling which should contain a clear determination of the pleaded point of preliminary objection, before considering the merits or otherwise of the Application, if that need will arise. It is also our considered finding and holding that since the Parties are not to blame for this incurable procedural irregularity, they should bear their own costs here and below.

It is so ordered.

DELIVERED, Dated and Signed at Arusha, this 26th day of May, 2017.

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Dr. Emmanuel Ugirashebuja

PRESIDENT

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Liboire Nkurunziza

VICE PRESIDENT

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Edward Rutakangwa

JUSTICE OF APPEAL

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Aaron Ringera

JUSTICE OF APPEAL

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Geoffrey Kiryabwire

JUSTICE OF APPEAL