

ADMINISTERING JUSTICE WITHOUT UNDUE REGARD TO THE TECHNICALITIES¹

Background

The Court system in Uganda to day has become a subject of increasing scrutiny not only by the users of the courts but also by the media. This new scrutiny makes it more apparent that the courts be worthy of the public confidence that is the ultimate basis for society's willingness to accept their decisions.

This is particularly so at a time when the 1995 Constitution has placed the Courts of Judicature at the centre of many controversies which in the former days used to be the sole preserve of the Executive and sometimes the Legislature if there was one. At the same time new and proliferating legislations in such areas as human rights, environmental law, class actions, and tax and corporate-commercial law to name just a few, are placing the civil justice system in the public eye on a daily basis. It is therefore important for the Judiciary to keep its officers well focused on this new and many others that are held from time to time to discuss some of these controversial issues must be commended.

With those introductory remarks, I shall turn my attention to the topic you assigned to me. I take it that you chose this topic as the organisers of this conference are currently engaged in court battles to make our environment safer for the generations and us to come. Before the coming into force of the 1995 Constitution, there were legislations that are still in use today, which enjoined the courts to administer substantive justice. I am sure many of us take them for granted most of the time.

The **Civil Procedure Act** and the rules that were made under it contain specific provisions that are supposed to promote the concept of administering substantive justice. I shall try to highlight some of them.

Enlargement of time. This is provided under section 99 and rule 47. The power given is discretionary. It is given to enable the court to enlarge time in favour of a party who fails to meet the deadline set by the Act and the rules.

This is intended to avoid a situation where a litigant can easily be driven from the judgement seat before his or her complaint is investigated.

Amendment of Pleadings- order 6 rule 18 - this is also another discretionary power

¹ A paper written by Hon. Lady Justice Constance K. Byamugisha, Justice of the Court of Appeal of Uganda.

given to any court to allow a party to amend his/her/its pleadings in order to cure any defects so that the court is in a position to determine the **real** issues in controversy.

Misjoinder and non-joinder of parties- order 1 rule 9. This rule provides that no suit shall be defeated for the misjoinder or non-joinder of parties and the court is enjoined to deal with the matter in dispute and determine the issues in controversy between the parties before it. This rule is intended to promote substantive justice.

Section 100 govern the payment of deficiency fees so that a case is not thrown out of court in the event of enough fees not been paid.

Even where a court has already determined a dispute either way, it is still permitted to review its decision under **section 83 and order 42**. It can also amend its judgement or orders to correct mistakes. There are also the inherent powers of court provided under **section 101** that many legal practitioners invoke quite often to persuade court in order to have substantive justice done. In many cases courts have readily resorted to this section in order to administer substantive justice.

The above statutory provisions notwithstanding, the rules of procedure in all the courts have specific provisions that are technical in nature. A few examples will illustrate this. **Order 6 rule 5** provides that the plaintiff or defendant must raise by his/her/its pleadings all matters, which show that the action is unmaintainable or it is barred by law. Applications for enlargement of time or setting aside an *ex-parte* judgement must show *sufficient cause* why the necessary steps were not taken in time. Rejection of a plaint under **order 7 rule 11** is a technical tool, which militate against the administration of substantive justice. Striking out pleadings under **order 6 rule 29** has been used quite often to hamper the administration of substantive justice.

1995 Constitution

The framers of the 1995 Constitution placed a burden on the Courts of Judicature that was not there before. In Article 126 they said that:

"(1) Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the law and values, norms and aspirations of the people.

(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principle-

(a) justice shall be done to all irrespective of their social or economic status;

(b) justice shall not be delayed;

(c) adequate compensation shall be awarded to victims of wrongs;

(d) reconciliation between parties shall be promoted ;and

(e) substantive justice shall be administered without undue regard to technicalities. "

As you can see for your selves the Constitution puts emphasis on matters that we used to take for granted. In particular administration of justice without undue regard to technicalities was understood to mean that rules of procedure were handmaidens of justice. What this meant in practical terms was that the courts were charged with resolving disputes without being unduly hindered by legal technicalities. In other words rules of procedure are supposed to help the courts expedite court business but are not supposed to be ironclad obstacles to all causes of action in all circumstances. Apart from this Article, the Constitution has other provisions of great significance in my view. **Article 41** gives the citizens of this country the right of access to information in the hands of the State except if its release will,

"prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person."

Article 50 gives the right to anybody who claims that a fundamental other right or freedom guaranteed under the Constitution has been infringed to go to court for redress. The reason for this article is that it the duty of every citizen to defend the Constitution regardless of whether he is personally aggrieved or not to go to court. The rationale here is that even if one's personal rights are not threatened, you go to court to seek redress for public good. The concept of *locus standi* in my view demystified. This is what is popularly known as class action litigation. The last article, which I should mention, is **Article 273, which saved** all laws **that** were in existence at the promulgation of the 1995 Constitution. The article charged the Courts to construe these laws,

"with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."

The new constitutional order presented to the Judiciary for the first time in its history a big challenge especially in new areas of human rights and fundamental freedoms, environmental law etc. It is now my duty to examine how the Courts have faced this challenge. I shall start with some of the cases that have caused disquiet among the court users and the public in general.

Utex Industries Ltd. Vs Attorney General (Civil Application No.52/95).

The application before the Supreme Court was the usual one seeking to enlarge time for failure to take the right step at the right time under certain provisions of the Supreme Court rules of procedure. The applicant sought to rely on Article 126(2)(e) in support of its case. In rejecting the application the Court said:

"Regarding Article 126(2)(and the Mabosi case we are not persuaded that the Constituent Assembly Delegates intended to wipe out the rules of procedure of our courts by enacting Article 126(2)(e). Paragraph (e) contains a causation against undue regard to technicalities. We think that the article appears to be a reflection of the saying that rules of procedure are handmaids to justice meaning that they should be applied with due regard to the circumstances of each case. We cannot see how in this case article 126(2)(e) or Mabosi case can assist the respondent who sat on its rights since 18/8/1999 without seeking leave to appeal out of time. It is perhaps pertinent here

to quote paragraph (b) of the same clause (2) of Article 126. It states; "justice shall not be delayed". Thus to avoid delays, rules of Court provide a timetable within which certain steps ought to be taken. For any delay to be excused, it must be explained satisfactorily. "

The next case of **Kasirye Byaruhanga & Co Advocates Vs Uganda Development Bank** (Civil Application No.2/97) came before the same court on an application for enlargement of time. The applicant also sought to rely on Article 126(2)(e) in support of its application. In rejecting the application, the Court relied on the *Utex* case and stated:

" a litigant who relies on the provisions of Article 126(2)(e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to pay undue regard to a relevant technicality. Article 126(2)(e) is not a magic wand in the hands of defaulting litigants."

It should be borne in mind that the court was being asked to exercise its discretion in favour of the applicants. In exercising its discretion, the circumstances of each case are very important. However, the right to be heard should always be a relevant consideration and therefore should be considered before such applications are rejected on technical grounds. In some instances there may be no injustices that would be caused to the opposite party. In any case, our judicial system should never permit a party to be driven from the judgement seat without the court considering his/her/its/ right to be heard except in cases where the cause of action is obviously and almost incontestably bad.

Constitutional Petitions.

Constitutional Petitions are a special category of civil litigation. This is reflected in the creation of a court that is charged with the responsibility of determining constitutional petitions although it also doubles as an appellate court. Article 137 of the Constitution governs the jurisdiction of the Constitutional Court. This court can hear what causes? The answer is found in sub-article (3) and the decided cases on the subject such as **Attorney General Vs Major General David Tinyefuza - C.A 1/97** and **Ismail Serugo Vs Kampala City Council & Another -C.A.2/98**. Both are decisions of the Supreme Court.

I will now examine some decisions which have judiciary considered Article **126(2)(e)**. The first case that addressed this article in the Constitutional Court was **Major General David Tinyefuza Vs Attorney General** (supra).

The facts leading to the institution of the case are well known. What is of interest to this conference is the manner of how both the Constitutional Court and the Supreme Court handled the technical objections that were raised by the Attorney General. The objections raised related to affidavits sworn in support of the petition. The learned Solicitor General considered the affidavit defective and in normal circumstances, they would have been rejected leading to the striking out of the petition. The Constitutional Court rejected the preliminary objections. Manyindo DCJ (as he then was) said:

"The case before us relates to the fundamental rights and freedoms of the individual like the petitioner which are enshrined in and protected by the Constitution. In my opinion it would be highly improper to deny him a hearing on technical or procedural grounds. I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on merit unless it does not disclose a cause of action. This Court should readily apply the provisions of Article 126(2)(e) of the Constitution in a case like this one and Administer justice without undue regard to technicalities. It is for the above reason that I cannot uphold Mr. Kabatsi's objections."

The other members of the Court wholly embraced this position and on appeal, the highest court in the land could not fault the Constitutional Court.

I am told the legal fraternity was jubilant at this land mark decision and hoped to utilise it to the maximum. However many petitions have been dismissed on technical grounds. I shall briefly try to refer to some of them.

The first was **The Uganda Journalist Safety Committee & Kanabi Vs Attorney General-Constitutional Petition No 6/97**. This petition was filed seeking declarations that certain provisions of the Penal Code Act were inconsistent with the Constitution and a violation of the petitioner's rights contained in certain provisions of the Constitution. When the matter came before the court it was dismissed on technical grounds raised by the Attorney General. The court contended that it was not the proper court for a party who is seeking redress under Article 50 of the Constitution. Journalist challenging the constitutionality of certain provisions of the Press and Journalist Statute filed the second case * This petition suffered the same fate. It was dismissed on a similar technicality. What is interesting about these two petitions is that they cited Articles 50 and 137 of the Constitution.

One of them could have been irrelevant and it is not unusual for litigants to cite a number of provisions that may or may not be applicable to all the issues at hand. The court is in a better position to sort out what is relevant and administer substantive justice. The Court also found that the petition did not disclose a cause of action. I do not know why counsel for the petitioners did not apply to amend his pleadings and strike out the offending rules and the articles. What is at stake is that the parties were driven from the judgement seat without the court considering their rights to be heard. The court also did not address the provisions of Article 126(2)(e) and determine whether the technicalities that were being raised by the Attorney General could hinder the administration of substantive justice as the same court in Tinyefuza case.

Election Petitions

As we all know all evidence at the trial of election petitions both presidential and parliamentary is required by the rules governing the presentation of those petitions to be adduced by way of affidavits. Rules 22 and 26 of the Presidential and Parliamentary Election Petition Rules specifically

guard against technicalities. They state that: "No proceedings upon a petition shall be defeated by any formal objection or by the miscarriage of any notice or any other document sent by the Registrar to any party to the petition."

During the trial of the petition filed by Dr Kiiza- Besigye against the current President - **Election Petition No.1/2001** the Supreme Court had to deal with a number of objections that were raised by both sides. One of them concerned the affidavit evidence. In particular the affidavits that were sworn under Order 17 rule 3 of the Civil Procedure Rules, which provide that:

"(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except in interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated.

(2) The costs of every affidavits which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of extracts from documents shall unless the court otherwise directs, be paid by the party filing them."

Odoki C.J in dealing with the objections raised stated that:

"From the authorities I have cited there is a general trend towards taking a liberal approach in dealing with defective affidavits. This is in line with the constitutional directive enacted in article 126 of the Constitution that the courts should administer substantive justice without undue regard to technicalities. Rules of procedure should be used as handmaidens of justice but not to defeat it. "

The other members of the court expressed almost similar views. I should perhaps mention that the filing of affidavits went on throughout the trial including one affidavit from the Registrar who had commissioned the affidavit of the President. The nature of the petition itself and the allegations that were made by the petitioner were such those technicalities had to take a back seat and the law to take its course.

The Civil Procedure (Amendment) Rules. S.I. No. 26/98

In 1998 the Chief Justice issued the above rules as part of the process to reduce on technicalities. The most important innovations introduced by the rules are full disclosure, summary of the facts to be relied on, the witnesses to be called, the documents, the authorities scheduling conference and alternative dispute resolution. The rules also made provisions for specific timetable within which to carry out the scheduling conference etc. This is found under **order 10 B**. I am reliably told the Commercial Court Division has taken advantage of these rules not only to reduce on the backlog of cases but also to administer substantive justice expeditiously.

Family Law

Most of our statutes on family law were modeled on common law and have remained so even after the 1995 Constitution. The Divorce Act in particular has specific provision, which if applied can deny women who are seeking divorce substantive justice. I am glad that this fact was timely recognised by the High Court in the case of **Annette Nakalema Kironde V s Apollo Kaddu Mukasa Kironde & Another - D.C. No6/01**. The petitioner was a woman and under section 5(2) of the Divorce Act she could only petition for divorce on the ground that only her husband had committed adultery but also that he had been cruel etc. In dealing with the problem at hand **Kagaba J.** after referring to various articles of the Constitution said:

"The effect of all these provisions is to show that sections 5 and 6 of the Divorce Act are inconsistent with the Constitution in that they create different sets of rights, opportunities and treatment for men and women to the same institution of marriage."

The Judge in the same case found **section 23** of the same Act void for being discriminatory because it provides for payment of costs by the co-respondent to the husband if it is the husband petitioning and not vice versa. Substantive justice was done in this case and technicalities were ignored.

Environmental Law.

I must confess, I am not a disciple of environmental law although I support the efforts of all those who are involved in the struggle to make Uganda a clean country to live in. The cases that have been filed in court such as **M/s Environmental Action Network Ltd. Vs B.AT.U. (Miscellaneous Application No. 70/02)** and **Greenwatch Vs A. G (M.A.No.140/02)** have managed to survive the initial technicalities that were raised by the respondents so that substantive justice is done.

The recent amendment of the Advocates Act to protect the work an advocate does on behalf of his client when he practices without a practicing certificate was long overdue. I hope the amendment will serve its purpose.

Costs

In civil proceedings costs follow the event. The court is given wide discretion to award costs to the party who has been successful unless for good reason connected with the case. Of late however, the courts have relaxed this rule of winner takes it all. In many cases that are perceived to be of great public importance the courts have ordered each party to bear its own costs. I will mention just a few. The costs in these cases would have been exorbitant- **Prince D.C Mpuga Rukidi Vs Prince Solomon Iguru & Others - C.A No.18/94; Attorney General Vs Major Gen. David Tinyefuza (supra) and Col.**

(RTD) Dr Kiiza- Besigye Vs Museveni Yoweri Kaguta (supra). There are other authorities where costs are apportioned depending on the circumstances of the case.

I would like to end my remarks by stating that not all technicalities are bad. For instance service of summons is mandatory and not a mere technicality which cannot be dispensed with. It is vital to the process of civil litigation.

Some other technicalities do assist court to expedite court proceedings although this should not be at the expense of administering substantive justice. In some other instances they can cause delay in the disposal of cases.

I have one case in mind that was recently concluded in the Supreme Court.

The lead judgement summed up the position thus:

"Before leaving this appeal, I am constrained to comment upon the length of time and the voluminous materials including many cases produced photocopied and presented in courts by counsel for the Government and Bank of Uganda in their ingenious defences against the respondent's claim. The facts and circumstances of this case have always been simple, clear and admitted. Uganda, a sovereign state and its Central Bank, freely and willingly sent emissaries to Spain looking for a loan which they got from the respondent, a respectable banking institution, and they accepted the terms and conditions of the loan which the Government received. In subsequent correspondence, the Government, finding it economically and financially difficult to meet its obligations under the loan agreement, the parties agreed to reschedule the repayment terms. Thereafter, the Government and the Bank of Uganda suddenly turned round and disclaimed liability. In pursuit of technical points and questionable arguments and authorities, the borrower and guarantor hired the services of advocates to delay the repayment on sheer technicalities. It is now more than ten years and after some seven volumes of records of proceedings and submissions in this court and in courts below that this case has been disposed of in favour of the respondent. The state will now have to finally pay more than double in repayments of the loan, interest and costs, the sum of money it had borrowed all at the expense of the Ugandan taxpayer."

Such is the price that litigants can pay for relying solely on technicalities to win cases.

With that, I beg to rest my case.

Lady Justice C.K.Byamugisha
02/12/03