IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Application No. 031 of 2019

In the matter between

NWOYA DISTRICT LOCAL GOVERNMENT COUNCIL **APPLICANT**

And

JOHN PAUL ONYEE **RESPONDENT**

Heard: 4 March 2019

Delivered: 11 April 2019

Summary: Application to set aside an order of costs in *ex-parte* proceedings.

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] The applicant seeks an order setting aside an order awarding costs to the respondent in an ex-parte proceedings and an order dismissing an application for judicial review on grounds of being time barred. The application is made under Order 9 rule 27 and Order 52 rule 1 of *The Civil Procedure Rules,* section 98 of *The Civil Procedure Act*. The grounds of the application are that the decision sought to be set aside was made ex-parte in circumstances where the proceedings should have been inter-parties, and that the substantive application for judicial review was filed out of time without an order for extension or enlargement of the time.

[2] In the respondent's affidavit in reply, he avers that it is not a legal requirement that applications for leave to apply for judicial review should be heard inter-parties. In any event, the trial judge had a wide discretion to award costs in ex-parte proceedings and exercised that discretion correctly. The trial Judge granted an extension of time within which to apply for judicial review. The substantive application for judicial review is meritous in so far as the respondent seeks to challenge an illegal administrative decision, which application ought to be determined on merit.

The parties' arguments;

[3] In her submissions, Ms. Elinah Areebwe, the State Attorney representing the applicant argued that the application for leave to apply for judicial review was misconceived and counsel proceeded under revoke rules; it was erroneous for the court to have proceeded ex-parte and to have awarded costs against the applicant who was never notified of those proceedings. The interdiction the respondent seeks to challenge in the main application occurred on 2nd September, 2016 yet the application for leave was made on 25th March, 2017 and the actual application was made in January this year. All the applications were made out of time the latter of which should be struck out.

[4] In response, counsel for the respondent Mr. Otto Gulamali submitted that it is not a legal requirement that applications for leave to apply for judicial review should be heard inter-parties. The trial judge had a wide discretion to award costs and exercised that discretion correctly. There is no apparent error that necessitates setting aside the decision. The substantive application for judicial ought to be determined on merit. He prayed that the application be dismissed with costs to the respondent.

Ex-parte proceedings are the exception;

[5] The right to a fair trial guaranteed by article 28 (1) of *The Constitution of the Republic of Uganda, 1995* subsists until final execution of the decree. It guarantees the right of participation by both parties and to be heard at all stages of the proceedings, except where the parties prevent themselves from exercising that right. Implicit in that guarantee is the fact that nothing should get onto the court record in violation of any of the party's right to be heard. Decisions taken on basis of material that goes to the merit of the case placed before court without giving an opportunity to the opposite party to be heard, or in violation of the principles of natural justice, once brought to the attention of court, will be set aside.

[6] It is a cardinal principle of fairness that both parties should be given an opportunity to be heard before court pronounces itself on the matters in controversy between the parties. It follows therefore as a rule of thumb that all judicial proceedings should be conducted inter-parties save where the law expressly states otherwise or where the other party after having been duly notified, prevents himself or herself from exercising that right. An ex-parte judicial proceeding is one where the opposing party has not received notice nor is present. Ex parte judicial proceeding are an exception to the usual rule of court procedure and the right to a fair trial that both parties must be present at any argument before a judicial officer. It is for that reason that an ex-parte judgment will be set aside if there is no proper service (see *Okello v. Mudukanya [1993] I K.A.L.R. 110*).

[7] In all judicial proceedings where the law does not expressly permit ex-parte proceedings, parties are entitled to notice and the opportunity to be heard. This is the basic concept behind the right to a fair trial. The exception to this rule is in emergency situations in which the safety of life is endangered or substantial loss of property is threatened and in situations where ex-parte proceedings are

expressly permitted by statute or the rules of procedure. Even in such situations, the rule of practice requires at least a good faith effort to notify the opposing party of the time and place of any ex-parte hearing.

[8] An affidavit of service must be on record before ex-parte proceedings are allowed in the non-exempted proceedings (see *Kitumba v. Kiryabwire [1981] H.C.B. 71*). Effective service of court process requires the person serving to provide the recipient a copy of the process and immediately thereafter to return to the issuing court the original process duly endorsed with what he or she has done concerning it. Such service is proved by an affidavit of the person effecting service in which he or she identifies himself or herself, states that he or she is authorized under the law to serve process or documents therein, and that the process or document in question has been served as required by the law, and sets forth the manner and the date of such service. The procedures of service are so exacting to the extent that the requirement that a duplicate be delivered or tendered is mandatory and if not complied with, the service is bad (see *Erukana Kavuma v. Metha [1960] E.A. 305*). It is for that reason that courts have time and again emphasized the need to file an affidavit of service after effecting service (see *Tindarwesire v. Kabale Municipal Council [1980] H.C.B. 33; Edison Kanyabwera v. Pastori Tumwebaze SCCA No. 2 of 2004 (unreported*); *Kanji Naran v. Velji Ramji (1954) 21 E.A.C.A. 20*).

[9] In the instant case, the ex-parte application was purportedly for leave to apply for judicial review, made under the revoked *Civil Procedure (Judicial Review) Rules, 2003*. Counsel for the respondent, even at the time of making submissions in the current application, was under the mistaken view that leave to apply for judicial review is still a legal, procedural requirement. Whereas such a process was provided for by the revoked rules and was prescribed as an ex-parte procedure, at the time the impugned application was made in 2017 those rules had been revoked and with them, the requirement of an ex-parte application for leave to

apply. The ex-parte proceedings therefore sprung from a mutual misconception of the law by both counsel and court.

[10] Whereas counsel for the respondent argued that that application having been made under a revoked law was a mere technicality, this court respectfully disagrees. The entire conceptual basis upon which it was premised evinces an erroneous adoption of a defunct process of seeking leave prior to presenting an application for judicial review. The court therefore erred in that regard and the entire ex-parte proceedings denied the applicant an opportunity to be heard. The applicant was never served and under Order 9 rule 27 of *The Civil Procedure Rules,* where court is satisfied that the court process was not duly served, or that the applicant was prevented by sufficient cause from appearing when the suit was called on for hearing, the court may make an order setting aside the decree as against the applicant. This is a proper case for setting aside the ex-parte orders made against the applicant i those proceedings.

Award of costs inappropriate in ex-parte proceedings;

[11] The applicant further challenges the award of costs against it in those ex-parte proceedings. It is trite that the award of costs is an exercise of discretion and may not be interfered with save where it was on basis of wrong principles. An important consideration for the court when awarding costs is whether it was reasonable for the applicant to commence the proceedings and whether it was reasonable for the respondent to defend them. It envisages a situation of a successful and losing party, hence inter-party proceedings in an adversarial contest. Since costs are the ultimate expression of essential liabilities attendant on the litigation, it is unjust to award costs against a person who has not been given the opportunity to engage in that adversarial contest.

[12] Although section 27 (2) of *The Civil Procedure Act* provides that the costs in any matter, action or cause shall follow the event" unless the Court or Judge shall for

good reason, otherwise order," costs relating to interlocutory relief usually are awarded "in the cause." This is because the words “the event” mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action. It means that only if the party in whose favour the order is made is later awarded the costs of the action will that party be entitled to recover the costs of the interlocutory application.

[13] It is well recognised that the principle "costs follow the event" is not to be used to penalise the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case. If an order for costs is made on an interlocutory application, the party in whose favour the order is made must not enforce the costs order (by taxing the costs) until the proceeding in which the order is made is finished, except where the court otherwise orders that costs be taxed immediately.

[14] In the instant case, the proceedings in which costs were awarded against the applicant were of an interlocutory nature, i.e. leave to apply for judicial review. The granting of interlocutory relief does not go to the ultimate merits of the case but it does show only that the court has accepted that there is a serious question to be tried and that the balance of convenience favours the applicant. Counsel for the respondent argued that this was a proper exercise of discretion by the trial judge in that application in so far as that discretion is unfettered by any law.

[15] Indeed exercise of the power to award costs is always subject to the discretion of the presiding judicial officer, but there is no such thing as absolute discretion. Even where the discretion appears to be unlimited, it will be limited by a range of implied factors including but not limited to;- the need to exercise the power reasonably; the need to take relevant factors into account when reaching a decision, and not take into account irrelevant factors; the obligation to exercise

the power in conformity with the Constitution and applicable statutes; the need to exercise the power for the purpose for which it was provided. The purpose of the power may be expressly set out in legislation, or it may be implied from its objectives.

[16] In addition to indemnifying a successful litigant, the purposes of awarding costs in judicial proceedings have been described as follows: deterring frivolous actions or defences; to encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect; encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; and to have a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation, and by discouraging the continuance of doubtful cases or defences (see *British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, 2003 SCC 71*).

[17] The court may and should intervene by way of review of its decisions under Order 46 rule 1 of *The Civil Procedure Rules* on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, for example where it finds that it misdirected itself as to the applicable law or made a palpable error in its assessment of the facts. No doubt, the ordinary rule is that, where a plaintiff has been successful, he or she ought not to be deprived of his or her costs, or, at any rate, made to pay the costs of the other side, unless he or she has been guilty of some sort of misconduct (see *Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd, [1951] 1 All ER 873*). It is generally the case that the primary factor in deciding the question of the award of costs is the outcome of the litigation. That is, the unsuccessful party will usually be required to pay the successful party's costs of the proceedings and the courts will only depart from this rule if special circumstances are shown to exist.

[18] By judicial practice, litigation costs are awarded after the ultimate trial or appellate decision and almost always to the successful party. Costs for interlocutory proceedings are ordinarily determined to abide the final result. The reason for such restrictive award of costs in interlocutory proceedings is apparent since awarding costs in advance could be seen as prejudging the merits and the objectivity of the court making such an order will almost automatically be questioned. A case must be exceptional in order to attract interlocutory costs.

[18] The discretionary, extraordinary award of interlocutory costs is guided by the following principles: the party seeking the interlocutory costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case; there is a special relationship between the parties such that an award of interlocutory costs or support would be particularly appropriate; and it is presumed that the party seeking interlocutory costs will win some award from the other party. I find that the court a committed an error of law and a palpable error in its assessment of the facts, when it awarded interlocutory costs in those ex-parte proceedings. It did not call to mind any of the principles that apply to the award of such costs. That order is accordingly set aside

Limitation of the action for judicial review;

[19] Lastly, Rule 5 (1) of *The Judicature (Judicial Review) Rules, 2009* provides that an application for judicial review should be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the Court considers that there is good reason for extending the period within which the application shall be made. "Grounds of the application" in this context is in essence the cause of action. It is that aggregate of operative facts which give rise to one or more legal relations of right-duty enforceable in the courts. Three elements must accrue before "grounds of the application" may be said to exist; (i) a primary right; (ii) a corresponding duty; and (iii) a wrong. Combined they constitute the cause of action in the legal sense of the term.

[20] The court, in determining when an action accrues, is concerned with the existence of the facts giving rise to the entitlement to commence proceedings. Neither the knowledge nor the belief of the applicant as to an entitlement to bring proceedings is relevant to the question of when a cause of action accrues. The cause of action usually accrues on the date that the injury to the applicant is sustained. The statute of limitation clock is intended to tick solely from the time of the wrongful act, not from the time harm is realised. The cause of action accrues when the infringement first occurs, regardless of whether the damage is then discovered or discoverable. Where the operative facts instrumental in bringing into being and shape the legal controversy are a series of acts or events, a cause of action may not arise until the last one of the bundle of acts occurs, or a new cause of action may arise with each new occurrence of each act, whereupon accrual may be held to occur up until the last occasion of such violation.

[21] The court when exercising its judicial review powers does so in order to control the lawfulness of all acts or conduct and decisions of administrative authorities. It is necessary first to analyse the pleaded claim and identify the precise interest infringed by the alleged unlawful act or omission. A reviewable decision is the ultimate determination required or authorised by statute rather than merely a step taken in the course of reasoning on the way to the making of the ultimate decision. It denotes a decision having the character or quality of finality, an outcome reflecting something in the nature of a determination of an application, inquiry or dispute or, effectively resolving an actual substantive issue. For an act or conduct to be reviewable, it must be part of the decision making process and involve something which is procedural, and not substantive. While "decision" refers to administrative activity that is substantive and final or operative, "conduct" refers to administrative activity preceding a decision that may reveal a flawed procedural processes, as opposed to substantive issues.

[22] In the application that was filed subsequent to the impugned ex-parte proceedings, the respondent herein contents that his interdiction of 2nd

September, 2016 was unlawful. *The Uganda Public Service Standing Orders*, January 2010 edition at page 129 under Order 8 (b) of Disciplinary Procedures (F - s), provide that where an officer is interdicted, the Responsible Officer is required to ensure that investigations are done expeditiously in any case within (three) 3 months for cases that do not involve the Police and Courts and (six) 6 months for cases that involve the Police and Courts of Law.

[23] Therefore, the bundle of facts giving rise to the cause of action in that application was triggered by the letter of interdiction dated 2nd September, 2016. Since the accusation would potentially involve the Police and courts, the cause of action did not arise until expiry of six months thereafter, i.e. 2nd March, 2017. The three months' period elapsed on or around 2nd August, 2017. The substantive application, Miscellaneous Application No. 1 of 2019 having been filed more than two years later, was therefore filed outside time. The application is time barred yet there was no application for extending the period within which the application could be made. That application is consequently dismissed.

Order :

[10] In the final result, this application is allowed with the following orders;

a) All proceedings in Miscellaneous Cause No. 4 of 2017, orders and the costs awarded therein against the applicant are hereby set aside.
b) High Court Miscellaneous Application No. 1 of 2019 is struck out.
c) The costs of this application and those of Miscellaneous Application No. 1 of 2019 are awarded to the applicant herein.

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Stephen Mubiru
Resident Judge, Gulu

Appearances

For the applicant : Ms. Elinah Areebwe, State Attorney.

For the respondents: Mr. Otto Gulamali.