

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISC. APPLICATION 137 OF 2011

UGANDA TAXI OPERATORS
AND DRIVERS ASSOCIATION ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. KAMPALA CAPITAL CITY AUTHORITY
2. THE EXECUTIVE DIRECTOR (KCCA):::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE ELDAD MWANGUSYA

RULING ON PRELIMINARY OBJECTION NO.2

At a scheduling conference conducted on 12.12.2011 three points of law were raised by counsel for the applicant. The case was then scheduled for hearing on 21.12.2011 when counsel were allowed to submit on them because there was no way the hearing of the application would proceed unless the issues pertaining to the admissibility of the evidence adduced by way of disputed affidavit and a party that did not file an affidavit in reply were resolved.

The preliminary point of law relates to the 1st Respondent who did not file an affidavit in reply, the affidavit of the 2nd respondent which allegedly offends Order 19 Rule 3 regarding matters to which affidavits shall be confined and non payment of Court fees in respect of the affidavit filed by the second Respondent.

On the first Preliminary Point there is clearly an affidavit in reply filed on behalf of the first respondent. Mr. Caleb Mugisha who made a reply on behalf of the respondents submitted that the affidavit of the second respondent covers the first respondent. My view is that if the affidavit of the 2nd respondent was meant to cover the reply of the first respondent it does not say so. It is immaterial that the 2nd respondent is an official of the first respondent because the respondents

were sued in their separate capacities and may have played different roles as far as the decision complained of is concerned.

Ordinarily under Order 9 Rule 10 in case a party does not file a defence on or before the date fixed, the suit may proceed as if that party has filed a defence. In a strict sense an affidavit in reply is not the same as a Written Statement of Defence because in an affidavit in reply matters deponed to form part of the evidence a party adduces in the trial. So in essence the failure by the 1st respondent to file an affidavit in reply is that no evidence has been adduced to support her case but is not shut out of the trial as far as points of law if any arise from the application. This Court will observe that restriction in respect of the 1st respondent.

As far as the affidavit of the second respondent is concerned, Court is satisfied that the court fees were paid. So it is properly filed on the record.

The other objection in respect of this affidavit is that it offends Order 19 Rule 3 which provides that affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications on which statements of his or her belief may be admitted, provided that grounds thereof are stated. Counsel for the applicant cited several paragraphs of the 2nd respondent's affidavit that offend this rule. My own perusal of the affidavit reveals a number of paragraphs that are glaringly offensive of this rule and others that may not be that offensive of the rule.

The import of this finding is that some parts of the affidavit will be relied upon when the entire case is being evaluated while others which may be relied upon after evaluation. I may add that some of the affidavit that appears offensive to the rule may not even be relevant to the matter of judicial review and it is only after the entire affidavit has been subjected to the scrutiny that this Court is required to subject it to that. We shall be able to establish as to what part of the affidavit Court will rely on and what part it won't rely on.

To that extent the affidavit of the second Respondent will remain part of the record and Court will assume the duty of determining as to what part of the affidavit can be sustained in this trial and what part cannot.

In the circumstances the Preliminary Points of Law raised succeed to the extent that the 1st Respondent did not file an affidavit in reply but the prayer to expunge the affidavit of the 2nd Respondent from the record fails.

I make no order as to costs.

Eldad Mwangusya

J U D G E

22.12.2011