

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO 50 OF 2021

M/S UNWANTED WITNESS (U) LTD ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

- 1. ATTORNEY GENERAL**
- 2. UGANDA COMMUNICATIONS COMMISSION**
- 3. MOBILE TELEPHONE NETWORK (MTN) UGANDA**
- 4. AIRTEL UGANDA**
- 5. AFRICELL UGANDA :::::::::::::::::::::::::::::::::::RESPONDENTS**

BEFORE; HON. JUSTICE SSEKAANA MUSA

RULING

The applicant is brought by notice of motion against the respondents under Articles 20(2) 26, 29(1)(a), 30,40(2), 41,45, and 50(1) and (2), of the Constitution of Uganda, Section 1 (1) and (2), 3, 4, 6, and 9 of the Human rights (Enforcement) Act, 2019, for orders that;

1. Declaration that the actions and conducts of the 1st, 2nd, 5th respondents in arbitrarily shutting down to the internet country, 2021 were unlawful and an infringement of rights enshrined under article 20(2), 29(1)(a), 30, 40(2),41 and 45 of the Constitution of The Republic of Uganda .

2. An order that the 1st respondent refunds all the over the (OTT) Tax Paid for the period from 9th January, 2021 till the end of January 2021.
3. An order that the respondents restore access to all social media services unconditionally.
4. An order restraining the respondents against future arbitrary and unjustified shutdown and restrictions of access to internet and social media services to the public.
5. An order that the respondents pay the costs of this application.

The application was supported by Dorothy Mukasa and Sempala Allan Kigozi, which briefly provides that;

1. The applicant is an independent, Non- Partisan, and for a profit Civil society organization based in Kampala, Uganda whose core objectives includes to seek and create a sure uncensored online platforms for activists, citizens , bloggers, freelance journalists, and writers to promote human rights through writing and informing ; to education the citizenry who also utilize the platforms for strengthening free expression and demand for accountability.
2. The applicant is aggrieved by the actions of the 1st, 2nd, 3rd, 4th, and 5th respondents in as far they constitute a violation of freedom of press and other media, right to practice a profession, right to education, access to information, contrary to Articles 29(1)(a), 40(2), 22, 30, 41 and 45 of the Constitution of the Republic of Uganda.
3. That between 9th January 2021, internet service providers 3rd and 4th Respondents, and 5th Respondent had blocked Google play or documents and app store, Face book video did not play or download on 3rd , 4th, and 5th Respondents networks, later twitter, whatsApp, telegram and Instagram were also blocked on 12th January 2021 to date.

4. That on the 12th January, 2021, the 1st and the 2nd respondent instructed the 3rd, 4th, and 5th Respondents who are internet service providers in the country to immediately suspend any access and use of all messaging apps and social media platforms until further notice.
5. That accordingly, accesses to the social media platforms were restricted on 3rd, 4th and 5th Respondent's Networks.
6. On the 12th day of January, 2021, the president of the Republic of Uganda while addressing the nation said he had ordered a shutdown of the internet without the country a head of the Presidential and parliamentary elections and the same was implemented by the respondents until the 18th January 2021.
7. That between 12th and 18th January 2021, internet services were nonfunctional following the internet shut down by the respondent.
8. That the respondents restored internet services, but shutdown an access to social media platforms has remained and only Ugandans with virtual Private Network (VPN) are currently able to access social media.
9. That member of the public who had paid the OTT tax for the week of 4th-18th, January, 2021 were denied their rights to access OTT services.
10. That the internet shut down disrupted people's lives, endangered the safety and security of citizens, limited to access the information and emergency services, negativity impacted small and large business and their customers, and interfered with the provisions of the education and e services.
11. That as a result of internet shutdown and restrictions to access media services, businesses were unable to provide good and services and many ordinary citizens were unjustly censured and unable to obtain vital information.

12. That the actions of the 1st, 2nd and 5th Respondents violated Article 26, 29(1) (a), (30), 40(2), 42, and 45 of the constitution of the Republic of Uganda in far as they constitute the violation of the right to education, fairness in administrative decisions hearing.

13. That consequently the Applicant brings this application against the Respondents for redress under Article 50 of the Constitution of the Republic of Uganda and sections 1(1) and (2), 3,4,6, and 9 of Human Rights (Enforcement) Act, 2019.

14. That this application be allowed, the prayers there in granted on such term the court deems fair and expedient.

In opposition to this application through the following people who sworn the affidavits in Reply to this application that is;

1. Victoria Sekandi, a female adult Ugandan of sound Mind, an advocate of the High Court and all subordinate courts in Uganda, currently employed by the 2nd Respondent as the Manager compliance and enforcement;
2. Isaac Rusiimwa, of C/o M/s Shonubi and Co. Advocates, a male adult Ugandan of sound mind and the legal officer for the 3rd Respondent Company;
3. Hudson Andrew Katumba of C/o M/s Nangwala, Rezida and Co. Advocates, an adult Ugandan of sound mind, the legal manager of the 4th Respondent;

All authorized to depone the affidavits on behalf of the respondents with knowledge of issues arising in his matter.

It's identified that evidence on court record to support and oppose this application is related and in the interest of time, it shall be evaluated concurrently.

1. The 2nd respondent in the 2nd paragraph of his affidavit in reply denied all allegations and the 3rd respondent in his 5th paragraph denied paragraphs 1,2 of Dorothy's supporting affidavit and 1, 2, 3, and 4 of Sempala's supporting affidavit in support.
2. The 3rd respondent as advised by his lawyer M/s Shonubi , Musoke and company Advocates which advise he believes to be true, that this application is incurable and fatally defective, tainted deliberate falsehood, incompetent, before this Honorable court, frivolous, with bias, devoid of merit and discloses no cause of action against the 3rd respondent which is the same position as in the second respondents reply in paragraph 3 (a) and (b) of his affidavit.
3. The 4th respondent in his affidavit in reply denies allegations in paragraphs 4 to 10.
4. The second respondent in reply to the motion and paragraphs 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, and 16 of Dorothy Mukasa's affidavit in support and paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of Sempala Allan Kigozi's affidavit in support, stated that;
 - a) The Respondent is a statutory body established under Section 4 of the Uganda Communications Act, 2023 with mandate to among others, monitor, inspect, license, supervise, control and regulate all communication and telecommunications services and operators in Uganda accordance with the law.
 - b) In exercise of its regulatory mandate, the 2nd respondent is required to ensure that all operators in the sector provide their licensed services in accordance with the laws of Uganda.
 - c) That between 13th and 18th January 2012, the 2nd Respondent, in exercise of her legal mandate under the Uganda Communications Act 2013, directed all providers of the telecommunication services in

Uganda to suspend a access to the internet and other social media platforms via their respective networks.

- d) I am aware that the 2nd respondent's decision was informed by national security and public interest considerations which necessitated the suspension of access to internet and other social media platforms for limited period when the country was undergoing the presidential and parliamentary elections.
- e) I am aware that the temporary suspension of access to the internet and social media platforms was done in public interest, in order to secure the peace and stability Uganda, following receipt or credible elements in society were planning to use the internet and social media platform to incite, propagate and coordinate violence and other forms of illegal activities, which was likely to undermine the integrity of the president and parliamentary elections.
- f) That on 13th January 2021, the Ministry of Security council, wrote to the second respondent and categorically stated that the National Security Council has decided that the continued use of internet and social media was likely to undermine public safety in Uganda and that it was in public interest that access to internet and social media platform should temporally suspended.
- g) That the 2nd respondent has received similar complaints from security agencies including a complaint from the Ministry of Internal Affairs dated 25th November 2022, that a number of people were using internet and social media platform to incite violence and promote sectarianism through online. Televisions and Facebook accounts. Annexure "B" is the complaint by Ministry of internal affairs.

The applicant was represented by *Akineza Justine* while the 1st respondent was represented by *Franklin Uwizera(SA)*, while the 2nd respondent was represented by *Kenneth Sseguya*, and the 3rd respondent was represented by

Nicholas Mwasame and the 4th respondent was represented by *Brian Kajubi* and *Alex Rezida*

When the matter came up for hearing the respondents raised a preliminary issue which in their view would dispose of the whole cause.

Whether the application is properly before this court?

The applicant's counsel submitted that the application is properly before the court and the considerations to satisfy whether a matter is properly before the court are;

1. *The Locus standi of the party who initiates the proceedings;*
2. *The court or tribunal must have jurisdiction; and*
3. *The procedure adopted by the party who brings the matter before the court.*

Counsel contended that Article 50 of the Constitution of the republic of Uganda and Section 3 of the Human Rights (Enforcement) Act 2019 provides in effect that any person or organization may seek to enforce Human Rights and other Fundamental Freedoms guaranteed under the Constitution in competent court of law him/herself or on behalf of another person, a class of persons or in public interest.

Therefore, the applicant is clothed with locus to bring this application before this Honourable court as a directly affected person and in public interest for many of the public unable to stand themselves.

The applicant counsel submitted that the High Court is the only available forum to the applicant since the matter involves refunds of taxes collected on behalf of the 1st respondent in form of OTT tax and monies paid by the applicant and other Ugandans who had bought data bundles to access social media and other internet services for over five days while internet was shut down.

Lastly, counsel submitted that the procedure adopted was provided under section 4 of the Human Rights (Enforcement) Act which provides that

applications under section 4 of the Act shall be in the form prescribed by regulations. Counsel contended that by the time the application was filed they had not come across regulations prescribing the form envisaged under the Human Rights (Enforcement) Act. Therefore, the applicant applied the procedure of under the Civil Procedure Rules with necessary modifications.

The respondent opposed the application and contended that the application is incompetent and barred in law. The applicant albeit being a juridical person, is not acting on behalf of another person who cannot act in their own name. The respondent contended that the said online bloggers, online publishers and ordinary citizens alluded to by the applicant are persons who can bring actions in their own names like Sempala Allan Kigozi 'a male adult Ugandan and a Bar Course student at Law Development centre' and therefore the applicant failed to demonstrate that they are acting on behalf of persons who cannot act in their own name.

This application is not a representative action and no permission was sought to bring the application. The application is brought by a group of persons described as 'online Bloggers' 'online publishers' and 'Ordinary citizens', therefore these unknown persons have not authorized the applicant to bring this application on their own behalf. The applicant is not acting as a member of or in the interest of a group or class of persons and thus lacks locus to institute the application.

The respondents further submitted that the 'online Bloggers' 'online publishers' and 'Ordinary citizens' depending on internet for news, research and communication is a very small subset of the Ugandan public and that going by the test in *Aboneka Micheal v AG*. Therefore, the application does not affect a significant number of people and not just the individual nor does it raise matters of broad public concern. The application does not meet the public interest requirement.

The respondent's contend that the action/directives made by the respondents in January 2021 concerning limitation of access to internet services and social media platforms contravened Articles of the Constitution and therefore prays for declaration to that effect. Therefore, such prayer falls squarely under Article 137(3)(b) of the Constitution.

This application is therefore disguised for this court to determine whether the limitations ordered on access of internet services and some social media platforms during the month of January 2021 form a justifiable limitation on the rights under Articles 29(1) (a), 30, 40(2) , 41 & 45 of the Constitution. It is counsel's view that this is not the mandate of this court since these are constitutional issues to be determined by the Constitutional Court.

Analysis.

This application is premised on facts which are similar in an earlier matter which was filed by the applicant in Constitutional Court; **Constitutional Petition No.16 of 2017, the Unwanted Witness Uganda and Tumuhimbise Norman vs. Attorney General**, the Court before dismissing the Petition which sought a declaration that shutting down social media during the 2016 General Elections violated articles 29(1), 22 and 45 of the Constitution cited with approval a decision of the Supreme Court of India which laid down a criteria for determining whether a shutdown was permissible. In the cited decision, **Modern Dental College & Research vs. State of Madhya Pradesh (2019) 7 SCC 353**, part of the criteria was that:

An order suspending internet services indefinitely is impermissible under the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017. Suspension can be utilized for a temporary duration, only.

Any order suspending internet issued under the Suspension Rules, must adhere to the principle of proportionality and must not extend beyond the necessary duration.

Shutdown only temporarily might fit well with the politics especially where public order is fronted. As noted from the affidavit evidence, the shutdown was for less than a fortnight and happened in Uganda for the second time, by the same authority. This points to the political connotations around it.

This application would in my view be intended to 'trick' court into making a different decision departing from the earlier binding constitutional decision. The questions that are sought to be canvassed were already determined and this renders this application incompetently and improperly before this court. This application is an abuse of court process. The applicant is trying to re-litigate an action finally and judicially pronounced upon and determined by the Constitutional court.

Once a dispute or matter has been finally and judicially pronounced upon or determined by a court of competent jurisdiction, neither parties thereto nor their privies can subsequently be allowed to re-litigate such a matter in court.

Secondly, the Judicature (Fundamental and other Human Rights and Freedoms)(Enforcement Procedure) Rules, 2019 provides for actions that may be instituted under the rules.

Rule 5(1)(d) An action in public interest.

Rule 7(2) provides that; A public Interest action under Article 5(1)(d) shall be filed in the Constitutional Court under Article 137 of the Constitution.

The applicant claimed that this application is brought in public interest. This would mean that the same was supposed to be brought before the Constitutional Court as provided under the above cited rules.

This application would also be improperly filed in this court and the same ought to be struck off.

The application is dismissed with costs to the respondents.

I so Order.

SSEKAANA MUSA
JUDGE
24thOCTOBER 2022.