

UGANDA / JUDGMENT

Dr. Kiyonga v Kahyana (Miscellaneous Application 71 of 2022) [2023]

UGHCCD 160 (27 February 2023)

[2023] UGHCCD 160

COURT

HC: Civil Division (Uganda)

BEFORE

Wagona, J

CASE / FILE NUMBER

Miscellaneous Application 71 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISCELLANEOUS APPLICATION NO. 0071 OF 2022 (ARISING FROM HCT – 01 – CV –
CS No. 016 of 2020) DR. CHRISPUS KIYONGA APPLICANT
VERSUS
KAHYANA JOLLY RESPONDENT

BEFORE HON. JUSTICE VINCENT WAGONA RULING**Introduction:**

This Application was filed under Order 13 Rule 6, Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act seeking orders that:

- (a) Court enters a judgment on admission against the Respondent.
- (b) The remedies sought in HCT 01 – CV – CS No. 016 of 2020 be granted to the Applicant.
- (c) Costs of and incidental to the application be provided for.

Representation:

The applicant was represented by Counsel Mishele Geoffrey of M/s Bagyenda & Co. Advocates who filed written submissions that I have considered. The respondent was unrepresented and did not respond to the application.

The case of the Applicant:

The Applicant averred as follows: That that the Applicant was the Plaintiff in HCT-01-CV-CS No. 016 of 2020 while the Respondent is the Defendant to the same where the Applicant's cause of action was founded on defamation (libel) which the Respondent has fully admitted in his apology letter dated 27/09/2020 and filed on the record of this Honourable Court on 05/03/2021 (a photocopy of the apology letter was attached and marked "A"). That on 11/3/2021, the Respondent was also convicted on his own plea of guilty before the Chief Magistrate Kasese (a certified copy of the proceedings was attached and marked "B"). That in light of the Respondent's apology letter and his very own plea of guilty, there was nothing left to be tried by this Honourable Court but to pass a judgment on admission against the Respondent and grant the Applicant the relief prayed for in the main suit.

The Applicant averred that he is a Medical Doctor holding a Bachelor of Medicine and Surgery, plus a Masters degree in Health Sciences. That at that material time when the Respondent defamed him, the Applicant was Uganda's Ambassador to the People's Republic of China and has held the following high level positions in the service of his country Uganda: Minister of Cooperatives and Marketing, Minister of Finance, Minister of Internal affairs, Minister of Health, National Political Commissar, Minister of Defence, Consultant with World Bank and the African Development Bank, Founding Chairperson for the Global Fund for HIV/AIDS; Malaria and Tuberculosis, and Member of Parliament from 1980 to 2016. That the Applicant has earned sound reputation as a person of good track record both at National and International fora and the Respondent who is also a

resident of Bwera Sub-County- Kasese District was fully aware of the Applicant's hard earned reputation.

That in early March 2020, the Applicant sang and published a song titled "**Asubwire**" - which literally mean "**he has come back**" That the said song fast spread like wild fire and was played everywhere within Kasese, Bunyangabu, Kabarole, Ntoroko, and Bundibugyo District and spread to the whole country and eastern Democratic Republic of Congo through social media. That the Respondent's song falsely dented the Applicant as a malicious person who has over the years been pursuing persons in Bukonzo West-Kasese District whenever they get for themselves good jobs, good houses and money; that the Applicant pursues such persons until their efforts are brought down. That the Respondent's song further described the Applicant as "**OWERITHIMA**" and "**OWERITSURU**" - Lhukonzo language terms to describe a malicious person who does not wish others well. It was contended that the lyrics of the Respondent's defamatory song sought to demonize the Applicant before the public (An English translation of the whole song was attached and marked "C").

That the Respondent intentionally used his trade (music) to defame the Applicant in pursuance of a political motive and earned money from his defamatory song at the expense of the Applicant's good name and sound reputation. It was further averred that the Respondent used his social position as a musician to politically witch hunt the Applicant without any lawful justification. That the Applicant and other persons who knew the Applicant well got disappointed with the Respondent's defamatory song and reported the matter at Bwera Police Station. That

the Applicant asked the Respondent to peacefully appear before the Applicant and his family and publically apologize and be pardoned but the Respondent refused to show up. That when the Respondent refused to show up, the Applicant followed the law by formally demanding of the Respondent to make an apology and renounce his song but the Respondent refused and insisted that what he sang was a fair comment (Photocopies of the notice and reply thereto are here attached and marked "D" and "E")

That the Respondent had earlier made a live voice communication on Messiah Radio 97.5 FM where he had confessed that he sang about nobody else but the Applicant (a photocopy of the English translation of that communication was attached and marked " F")

That the Applicant filed HCT-01-CV-CS No. 016 OF 2020 against the Respondent and he was served with court process whereupon he filed a very provocative written statement of defence alleging that the Applicant causes the beating of people during elections, causes the exiling of political opponents, and fights the Rwenzururu Kingdom. That the Respondent insisted that he had made a fair comment (a photocopy of his written statement of defence was attached and marked " G"). The Applicant averred that he was completely annoyed by the Respondent's strange allegations. That from early March 2020 up to late September 2020, the Respondent had maintained that what he sang and published was the truth; that the Respondent's apology letter after all that period had come too late and calculatedly made after achieving what the Respondent wanted. That t h e members of the Applicant's family, and other persons of goodwill have been

greatly pained and affected by the defamatory act and disrespectful conduct of the Respondent which was deplorable both at law and culture.

That despite writing an apology letter to t h e A p p l i c a n t the Respondent's defamatory song was still being played all over the country and the Respondent had never bothered to make a public renunciation of the same. That unless the Respondent's defamatory act is officially declared through a court Judgment and a permanent injunction issued against him, he will remain at liberty to take up another negative assignment against me for political or a financial gain. That the immense injury meted on the Applicant by the Respondent called for an award of general damages against him so that the Respondent and his fellow musicians can learn that defamation does not pay and be deterred from taking up such negative assignments for political or financial gain against the Applicant and other innocent citizens of this country.

That it was against that backdrop that the Applicant made this Application seeking a judgment on admission against the Respondent in Civil Suit No. 16 of 2020 since he admitted all the Applicant's claims in the suit by virtue of the plea of guilty in the criminal case against him and the letter dated 27th September 2020.

The case of the Respondent:

The Respondent was served with the application per the affidavit of service on record deposed by a one Muhindo Oniziforo and he acknowledged receipt of the same by writing his name and signature and indicating his phone contact on the copy returned to court as proof of service. The Respondent did not file an answer to the Application

in the manner prescribed by the Civil Procedure Rules and the 15 days with effect from 5/8/2022 when he received the Application lapsed. No explanation was availed to Court regarding the Respondent's inability to file the Reply on time. This in my view is a clear indication that the Respondent did not intend to contest the application at hand.

Order 9 rule 11 (2) of the Civil Procedure Rules provides thus:

Where the time allowed for filing a defence or, in a suit in which there is more than one defendant, the time allowed for filing the last of the defences has expired and the defendant or defendants, as the case may be, has or have failed to file his or her or their defences, the plaintiff may set down the suit for hearing ex parte.

The above order applies both to actions originated by way of an ordinary plaint or applications filed by way of a notice of motion or chamber summons.

In this case the Respondent was duly served with the Application and he was informed that he was to file a response to the same within 15 days from the date of service being the 5th day of August 2022. The Respondent has never filed his response or offered any explanation why he was not in position to file the same on time. The 15 days expired on the 20th day of August 2022. In the premises I will proceed under Order 9 rule 11(2) to determine the application ex-parte.

Issues:

1. Whether this is a proper case for grant of a judgment on admission against the Respondent?

2. Remedies available to the parties.

Representation and hearing:

Counsel Mishele Geoffrey of M/s Bagyenda & Co. Advocates appeared for the Applicant. Counsel invited Court to consider the application and make a ruling.

Resolution:**Burden of proof:**

Whereas the Application is not opposed or contested by the Respondent, the applicant retains the burden to prove his case on the balance of probability. Section 101 of the Evidence Act provides that he who alleges must prove. Therefore, the allegations made by the applicant must be proved on the balance of probability and to the satisfaction of court before grant. In the event the standard is not met, the court retains the discretion to decline granting the same.

Issue one: Whether this is a proper case for grant of a judgment on admission against the Respondent?

A judgment on admission connotes a court's final determination of rights and obligations of a party to a suit on facts which are asserted by one party and admitted by the opposite party as being true.¹ This Court has held in the previous decision that a party to a suit who wishes court to have a judgment on admission entered in his or her favour must prove or demonstrate (a) **that he or she asserted facts and that those facts have been admitted by the opposite party to the suit**, (b) **that the facts admitted relate to the rights and or obligations of the parties to a suit**. That the admission should be on facts which are material to the determination of the

¹Civil Suit No. 06 of 2022, Mary Ochaloi Vs. Mulindwa John Katabarwa.

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parties claims in a suit. That is, that the admission should have the bearing of determining the entire suit or part of the issues that court is called upon to determine in a suit. That an admission of facts that are ancillary to a party's claim or that describe the claim by the opposite party without necessarily admitting the claim itself does not give rise to a judgment on admission. That a strong red line should be drawn between the two competing theories that is of admitted facts in a suit and facts that constitute an admission of a party's claim in a suit to give rise to a judgment on admission.²

The law regulating grant of judgments on admissions is contained under order 13 of the Civil Procedure Rules specifically rules 4 and 6.

Order 13 rule 4 of the CPR provides for the *Notice to admit facts and it states thus; "Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact mentioned in the notice, and in case of refusal or neglect to admit the fact within six days after service of the notice, or within such further time as may be allowed by the court, the cost of proving the fact shall be paid by the party so neglecting or refusing whatever the result of the suit may be, unless the court otherwise directs ..."

Rule 6 thereof provides for *Judgment on admissions and it states thus;*

"Any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the"

2 Ibid.

determination of any other question between the parties; and the court may upon the application make such order, or give such judgment, as the court may think just."

The above rules have been explained, interpreted and applied by court in different decisions notable among others is the case of **Connie Kekiyonzawatuwa & 2 others Vs. Attorney General**³, where **Justice Musa Sekaana** observed making reference to order 13 rules 1 and 6 of the Civil Procedure Rules thus;

"The above provisions use words "either on the pleadings or otherwise" this means that admissions come to court in other ways other than on the parties' pleadings. Circumstances where pleadings before the court contain an admission, the other party is entitled to seek judgment upon such admission. However, an admission may not be disclosed on the pleading but may come to court through other ways. Such other ways include a response to a notice to admit facts as per Order 13 rule 4 of CPR, by way of documents executed by parties, this can either be attached to pleadings or not, or by way of an oral or written statement made by a party during the proceedings before the court" 4*

He further stated thus;

"Under Rule 6 thereof, where an admission of facts has been made, either on the pleadings or otherwise, a party to such a suit may apply to the court for judgment or order as he/she may be entitled to upon that admission, without waiting for the determination of any other question between the parties; and the court may grant"

³Misc. Application No. 544 of 2020 arising from Civil Suit No. 24 of 2018 at page 6. 4 Ibid.

such judgment or order, as it may think just. In my view, the use of the words "either on the pleadings or otherwise" covers admissions that come to the court in other ways other than on the parties' pleadings." 5

In **Future Stars Investment (U) Ltd* Vs *Nasuru Yusuf,*⁶**my brother Justice Stephen Mubiru* while considering order 13 rule 6 of the Civil Procedure Rules observed that, it is a settled principle of the law that a judgment on admission is not a matter of right but rather one of discretion of the court. The admission must be unambiguous, clear, unequivocal and positive. Where the alleged admission is not clear and specific, it may not be appropriate to take recourse under the provision.

Further in *The Board of Governors Nebbi Town S. S. S Vs Jaker Food Stores Limited*⁷*my brother Justice Mubiru* further noted that the judge's discretion to grant judgment on admission of fact under the law is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment.

The applicant in this case averred that although the Respondent made a defence denying his claim, he subsequently wrote a letter dated 27th September 2020 admitting having sung a song that had lyrics or words therein which defamed the Applicant and even apologized over the same. The Applicant further contended that subsequent to filing the written statement of defense in Civil Suit No. 016 of 2020, the Respondent changed his plea on charges of libel upon a complaint by the

⁵ Ibid foot note 3 at page 7.

⁶ *HCCS No. 0012 of* 2017 at page 18.

⁷ HC M. A No. 0062 of 2016 (Arua HC) at page 3.

Applicant to one of guilt where he admitted having sung a song whose content defamed the Applicant.

I have looked at annexure A to the application which is titled "**AN APOLOGY FOR DEFAMING YOUR NAME AND REPUTATION**" dated 27th September 2020 signed by the Respondent. In paragraph 3 of the said letter, the Respondent admitted singing a song titled "**ASUBWIRE**" that had words to wit; "**OWERITHIMA, OWERITSURU and KADUDUNGA**" which he admitted were bad words and directed at the Applicant and thus angered him. He also indicted in paragraph 4 of the letter that he instructed his lawyer to make a written statement of defense indicating that the applicant caused the beating of people in elections, that he caused the exiling of his opponents and fought the ObusingaBwaRwenzururu and other bad statements and apologized to that end.

I have also carefully examined annexure B which are proceedings in the criminal case in Kasese Chief Magistrate's Court Vide KAS – 00 – CR – C0 – 344/2020. The Respondent was charged with Libel contrary to the provisions of the Penal Code Act. It is captured in the proceedings that when the matter came up on the 11th day of March 2021, Counsel for the Respondent, Mr. Chan informed Court that his client, the Respondent, wanted to change plea and requested that the charges be read back to him. The charges were read back to the Respondent and he changed his

plea from **NOT GUILTY** to **GUILTY**. He also admitted facts that he composed a song that attacked the character of the Applicant and he was convicted on his own plea on the charge of libel.

The charge of libel preferred against the Respondent is provided for under part XVII of the Penal Code which provides for defamation. Section 179 of the Penal Code Act defines libel and it provides that; Any person who, by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, commits the misdemeanour termed libel. Therefore, by the Respondent pleading guilty to the charge of libel, he admitted having published information that was defamatory to the Applicant.

I have also paid due attention to annexure C which is a translation of the song that was published by the Respondent. At page 1, the Respondent indicated in his song thus;

"Bukonzo West, he has again comeback! The Evil minded one has returned. The Arch-selfish one has returned. Because of his orientation (mentality) of not wanting to assist other persons in their endeavors (eritima), he is given a job as an envoy in another country but abandons it because of his persistently pursuing other people who want to prosper in order to bring them down-great malice (eweritsuru). You are given a job and you abandon it to come and fail other people you left at home because of the great malice. Bukonzo west we are under attack in broad daylight."

At page 2 of the translation, the Respondent also indicated in his song thus;

..... Katushabe you are a man. What is not done in 35 years, I doubt whether he can do it in 5 years. oh evil – minded one, what are you up to. Whatever you left in parliament, we shall send Katushabe and he will convey it to you as a child of

*integrity. He will bring it, Mzee feel at home."*At page 3, he stated in the said song that; *".... people don't want to tell you, but they are fed up of you...."*

In my view the natural meaning of the said words portrays the Applicant as an evil person and a very greedy one. That he was a failure as a member of parliament for the last 35 years he was a member of parliament. The song also demeaned the applicant as a person whose integrity was questioned and that the people of Bukonzo west were tired of him. The applicant admitted singing the song and that the same defamed the Applicant. There is no valid defense whatsoever to these defamatory statements and utterances.

Therefore, although the Respondent denied the Applicant's claims in his Written Statement of Defense filed on record, he later admitted the same by virtue of the letter dated 27th September 2020 and his own plea of guilty to the charge of libel in which he confirmed having published a song that contained defamatory content directed to the Applicant. The clear and plain narrative deducible from the letter dated 27th September 2020 and the plea of guilty to the

charge of libel in the lower court is an unequivocal admission by the Respondent that he published defamatory content against the Applicant. I have also considered the content complained off and found it to be defamatory since it had the effect of lowering the applicant in the eyes of the general public as a former member of parliament of Bukonzo West, a former minister and now an ambassador of Uganda in China by then.

I thus find that this is a proper case for grant of a judgment on admission against the Respondent since he admitted the claim by the Applicant and he made an

unequivocal admission that he published the defamatory statements against the Applicant by virtue of the letter dated 27th September 2020 and his own admission of the offence of libel to which he was convicted and sentenced and he has never appealed against both the conviction and sentence.

Remedies

Having resolved the first issue in the affirmative, this application succeeds and I thus issue the following orders;

- **1. A judgment on admission is entered against the Respondent in HCT 01 –CV – CS No. 016 of 2020 with the following orders;**
 - **(i) A declaration that the statements made and published by the Respondent/Defendant in his song titled "ASUBWIRE" defamed the Plaintiff/Applicant.**
 - **(ii) A permanent injunction is hereby issued restraining the Respondent, his agents, assignees or those claiming in his title from continuing to broadcast or publish the song titled "ASUBWIRE" whose content is defamatory.**
 - **(iii) The Applicant/Plaintiff is awarded general and exemplary damages of Ugx 4,000,000/= (Four Million Shillings). Since the Applicant had sought to pursue a reconciliatory approach, I believe a sum of Ugx 4,000,000/= would be commensurate given the political climate under which the song was published and the fact that the Respondent was looking for something to fend for himself. I believe granting large sums of money would be unjust against the Respondent a local artist and would strangle his talent.**
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- **(iv) The Respondent shall also offer a public apology which he will run on the local radio stations in Kasese District for three (3) days at his own cost within two days from this ruling.**
 - **(v) I also order that each party bears its own costs in the head suit. This is intended to promote reconciliation between the parties.**

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- 2. The Respondent shall pay to the Applicant the costs of taking out this application.

It is so ordered.

Vincent Wagona High Court Judge FORT-PORTAL

27.02.2023

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