THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA.

CORAM:

HON. JUSTICE G.M. OKELLO, JA.
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. JUSTICE C.N.B. KITUMBA, JA.

CIVIL APPEAL NO. 14 OF 2007.

1. **GORDON SENTIBA**
2. **AMBASSADOR PAUL ORONO ETIANG:::::APPELLANTS.**
3. **ENGINEER ZIKUSOOKA**

VERSUS.

INSPECTORATE OF GOVERNMENT::::::::::RESPONDENT.

[Appeal from the ruling and order of THE High Court of Uganda at Kampala (Kasule, J. dated 16th March 2007 in Miscellaneous Application No. 65 of 2007 arising from HCCS No. 431 of 2007].

JUDGMENT OF KITUMBA JA.

This is an appeal from the ruling of Kasule J. whereby he dismissed the preliminary objection that was raised by the appellants in Miscellaneous Application No. 65 of 2007.

The facts of the appeal as agreed upon by both parties during scheduling conference are as follows; -

> *"Appellants were former Shareholders of Nyanza Textile Ltd and owned 1% of the shares. The Appellant sued in the representative capacity for all the shareholders for compensation arising from the divestiture of Nytil. The suit was against Attorney General and culminated into a consent judgment of 2nd January 2007.*
>
> *On 15th January 2007, the Appellants obtained Garnishee Nisi against Stanbic Bank to attach the money from the Divesture Account.*
>
> *Before the order could be made absolute, the respondent applied to High Court seeking review or set aside the consent judgment that had been entered between the Appellant and Attorney General.*
>
> *At the hearing of Miscellaneous Application No. 65 of 2007, the Appellants raised preliminary objections to the effect that the application was statute barred and the respondent had no locus standi to lodge an application on behalf of Government. The*

Attorney General also raised objections on affidavits supporting the application.

The Presiding Judge on 16th March 2007 overruled the objections. The Appellants applied for and obtained leave to appeal against the ruling. Hence this appeal on four grounds namely; -

1) **The learned trial Judge erred in law when he held that Section 19(1) (a) of the Inspectorate of Government Act No. 5 of 2002 does not bar the Inspectorate of Government from filing an application in the High Court to review and/or set aside a decision(s) of the said court to which the Inspectorate was not a party, resulting in the wrong decision not to strike out the application for being statute barred.**

2) **The learned trial Judge erred in law when he failed to find that that S. 19(1) (c) barred the Inspectorate of Government from investigating any civil matter that had been commenced in a court of law prior to the beginning of the Inspectorate of Government's investigations resulting in the wrong decision not to strike out the application for being statute barred.**

3) **The learned trial judge erred in law when he failed to find that the right to represent the Government of Uganda in civil matters before a court of law was the exclusive constitutional and legal preserve of the office of the Attorney General resulting in the wrong decision notto strike out the application on the basis of lack of locus standi.**

4) **The learned Judge erred in law when he failed to find that the Respondent's application was incompetent by reason of the fact that it was supported by defective affidavits.**

The appellants prayed court that; -

(a) The Ruling and order of the High Court be set aside and

(b) That Miscellaneous Application No. 65 of 2007 be dismissed for being incompetent with costs in this Court and in the High Court.

During the hearing of the appeal, the appellants were represented by Mr. Erbert Byenkya and Mr. Oscar Kihiika, while Mr. Vincent Kasujja and Mr. Hosea Lwanga appeared for the respondent. Counsel for both parties agreed on the following issues for determination, namely: -

1. ***Whether the respondent's application to set aside the consent judgment was statute barred = Grounds 1 and 2.***

2. ***Whether the respondent had locus standi to file an Application = Ground 3.***

3. ***Whether the Application could be sustained based on defective affidavits = Ground 4.***

They argued the grounds of appeal according to those issues. I will also handle them in the same order.

Regarding issue No.1, Mr. Byenkya relied on section 19 (1) (a) and (c) of the Inspectorate of Government Act 2002, which state:

> **"19. Limitation on Investigations by Inspectorate.**
>
> **(1) The Inspectorate shall not have power to question or review any of the following matters -**
>
> (a) ***the decisions of any court of law or of any judicial officer in the exercise of his or her judicial functions;***
>
> (b) **……..**
>
> (c) ***any civil matter which is before court at the commencement of the Inspectorate's investigations;***

Mr. Byenkya contended that contrary to section 19 (1) (c) of the Inspectorate of Government Act, the respondent purported to investigate or seek to investigate the matter in the High Court that had not only been commenced in court but had been concluded. Counsel argued that the plaint had been filed in court on 13/7/2006. The Attorney General had filed a written statement of defence on 17/8/2006. The consent judgment was entered on 21/1/2007. The complaint was not raised with the respondent until 29/1/2007, which was a couple of weeks after judgment had been entered. Counsel contended that section 19(1) (c) of the Act barred the Inspectorate from investigating any matter that is before court at the commencement of such investigation.

Mr. Byenkya further argued that Article 225 of the Constitution sets out the functions of the IGG. However, according to article 232 of the Constitution, it is Parliament which is empowered to make laws to give effect to the provisions of the Constitution that relate to the Inspectorate of Government. Counsel contended that what the respondent was seeking to do was manifestly illegal. He argued that section 19(1) (c) of the Inspectorate of Government Act was intended to safeguard the independence of

the judiciary. According to counsel, in his ruling the learned trial judge did not consider their submissions on this point. He, therefore, prayed this Court to consider it.

Turning to section 19(1) (a) of the Inspectorate of Government Act, counsel complained that the respondent was contravening that sub-section. In counsel's view, the respondent was questioning the consent judgment between the Attorney General and the appellants. The respondent was also questioning the representative order and the garnish order, which had been issued by the Registrar. In that way the respondent was inquiring into and analysing the judgment and orders of the court, which in his view, amounted to a review.

In conclusion, counsel submitted that according to S. 19(1) (a) and (c) of the Inspector General of Government Act, the respondent was statute barred from bringing the application for review before the High Court.

Mr. Vincent Kasujja, learned counsel for the respondent, disagreed. He contended that the application was not statute barred. The respondent was mindful of the provisions of section 19(1) (a) and (c) of the Inspectorate of Government Act and that is the reason why she filed the application for review in court. He submitted that the Inspector General of Government was dissatisfied with the consent judgement which the Minister of Finance had raised a complaint about. The Attorney General had failed to take any remedial measures to the complaint of the Minister of Finance. Counsel further argued that in the opinion of the Inspector General of Government, the consent judgement was likely to cause financial loss to government and to affect the interests of the other shareholders who had been left out. He argued that the application for review was intended to highlight the irregularities of the consent order between the appellants and the Attorney General. In counsel's view, the irregularities amounted to abuse of office. Pursuant to articles 225, 226, 227 and 230 (2) of the Constitution and sections 9 and 10 of the Inspectorate of Government Act, the IGG was mandated to deal with those irregularities by filing the application in issue.

Counsel supported the learned trial judge's holding that it was not the respondent who was reviewing or setting aside the consent judgement. The respondent had only

filed the application seeking the court to review or set aside its own decision after considering the merits of the application. Counsel prayed court to dismiss grounds 1 and 2.

I have carefully considered the submissions of counsel for both parties and perused the record. Issue No. 1 which comprises grounds 1 and 2 of appeal was canvassed during the trial. The submissions of both counsel during trial and on appeal are similar. I do not accept the argument by counsel for the appellants that the learned trial judge did not consider the provisions of section 19 (1) (a) of the Inspectorate Act. When considering the provisions of S. 19 (1) (a) and (c) of the Act the learned trial judge stated thus in his judgement at page 147-151 of the record of appeal:

> "**The first ground is that Section 19(1) (a) and (c) of the Inspectorate of Government Act expressly bars the applicant from questioning or reviewing a decision of any Court of law or any civil matter which is before Court at the commencement of the inspectorate investigations. For the Court to allow the applicant to question or review the consent judgement. Gamishee Order and Representative Order, all relating to H.C.C.S. No. 431 of 2006, is to condone a nullity. The Court ought not to do that.**
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> **As to the first ground section 19(1) (a) and (c) of the Inspectorate of Government Act 5/02 provides that –**
>
> > ***'19 (1) The Ispectorate shall not have power to question or review any of the following matters –***
> >
> > (a) ***the decision of any Court of law or any judicial officer in the exercise of his or her judicial functions***
> >
> > (b) ***any civil matter which is before Court at the commencement of the Inspectorate's investigations.'***
>
> **The intent of the above provisions is to preserve the independence of the judiciary and to ensure that the operations of the Inspectorate are not above, but are subject to the jurisdiction of the Courts of Judicature.**

It is, however, in the considered view of Court to misinterpret those provisions, if they are taken to mean that the Inspectorate, in appropriate cases barred by law from moving Court for the Court itself, and not the Inspectorate, to question by way of review a court decision. It has to be appreciated that in such a case, it is not the Inspectorate questioning or reviewing the decision of Court. It is the Court itself reviewing its decision. The Inspectorate just adduces evidence to Court and the Court decides, on the basis of the evidence adduced and the law, whether to review its decision or not.

Would for example, the Inspectorate be barred by Section 19(1) (a) and (c) to move Court to review by setting aside or otherwise, a consent judgement in a running down involving a Government owned Motor-vehicle executed and filed in Court, benefiting a Plaintiff who from the facts the Inspectorate obtains, subsequent to the execution and filing of a consent judgement, was never a victim of the traffic accident but a cheat?

Court is of the considered view, that the Inspectorate would not be barred by law from moving Court for the Court to review such a consent judgement on the grounds of fraud and corruption.

This is the more so because the law is now settled that the Inspector-General of Government has capacity to sue or to be sued. See Constitutional Court Constitution Application No. 13 of 2006. *Inspector General of Government Vs Kikonda Butema Farm Ltd. and Attorney General, when the Court held:-*

"We think that there are legal provisions in the Constitution that set up the Inspectorate of Government and the Act that operationalised those provisions that indicate to us that the applicant has capacity to sue and to be sued."

The considered view of court is that when the Applicant moves Court to review the consent judgement or any Court decision, it is not the applicant carrying out the review of questioning, but rather the Court itself. The Court depending on the evidence and the law before it may refuse or allow to review such a decision. The applicant can only be said to question or to review a Court decision if, on her own, without resorting to Court, she interferes with giving effect to that Court decision. This is not what the applicant has done in this case. Accordingly there is no illegality being condoned."

The learned judge overruled the objection based on Section 19 (1) (a) and (c) of the Inspectorate of Government Act. I am unable to fault the learned trial judge on his reasoning and the conclusion he reached. Grounds 1 and 2 must fail.

I now turn to ground 3 which is **"Whether the respondent had locus standi to file an application."**

Counsel for the appellant contended that the respondent had no locus standi to file the application. He submitted that the dispute in court was between private citizens and the Government of Uganda. He argued that according to section 10 of the **Government Proceedings Act (Cap. 77)** it is only the Attorney General who can file defences in cases against the Government. He submitted that this is rooted in article 250 of the Constitution. He contended that while the respondent had powers to prevent corruption and abuse of office the current dispute was not of that kind. Appellant's counsel argued that the powers of the respondent as provided by article 225(1)(a) of the Constitution are restricted only to administrative actions of Public Officers and authorities.

Counsel for the respondent did not agree. He supported the learned trial judge's holding that the respondent had the locus standi to bring the application. Counsel contended that according to section 82 of the Civil Procedure Act (Cap. 71) and Order 46 Rule 1 of the Civil Procedure Rules the respondent was an aggrieved party who had the right to file the application for review. In support of his submission counsel relied on **Ladak Abudallah Muhamed Hussein Vs Griffiths Isingoma Kakiiza & 2 Others SCCA No. 8 of 1995, Muhamed Allibhai Vs Bukenya Musoke & Departed Asian Property Custodian Board SCCA No. 56/96.**

Counsel submitted further that from the contents of the Attorney General's letter dated 15th February 2007, it was evident that the Attorney General was contented with the consent judgement. The respondent is an independent body which does not have to be controlled by the Attorney General. In counsel's view, the respondent was right to file the application. In support of his submission he relied on **Inspectorate of Government V Kikonda Butema Farm Ltd and Attorney General, Constitutional**

Application No. 13 of 2006 and Kabagambe Asol & 2 Others vs Electoral Commission and Dr. Kizza Besigye, Constitutional Petition No. 1 of 2006. Counsel prayed court to dismiss ground 3.

The law is now settled that the respondent is an independent body created by the 1995 Constitution with the capacity to sue and to be sued. See: **Inspector General of Government vs Kikonda Butema Farm Ltd and Attorney General (supra).** The complaint raised in ground 3 is that the respondent has no locus standi, to apply for review of a judgement that is between private citizens and the government. I appreciate the submissions by counsel for the respondent that according to Order 46 Rule 1 and 2 and section 82 of the Civil Procedure Act, any aggrieved party may move court to review a judgment. That may be done by an aggrieved party who may not necessarily be a party to the proceedings. The arguments by the respondents counsel concerning the constitutional and statutory duties of the respondent as provided in the Constitution and the Inspectorate of Government Act are well taken. In his ruling the learned trial judge while interpreting the legal provisions, which allow court to set aside the consent judgment stated thus at page 150-157 of the record of appeal; -

> **"The applicant has moved Court first Under Order 9 Rule 12 which empowers Court to set aside a judgment entered by the Registrar under order 50 of the Rules. It is also made under Order 46 Rules 1 and 2 Section 82, which provide for Review.**
> **In <u>Ladac Abdullah Mohamed Hussein versus Griffiths Isongoma Kakiiza & 2 others</u>, the Supreme Court, Odoki J.S.C. as he then was, held with regard to Order 9 Rule 9, now Rule 12, that; -**
>
> *'Order 9 Rule 9 is therefore not restricted to setting aside ex-parte judgments, but covers consent Judgment entered by the registrar. It gives the Court unfettered discretion to set aside or vary such judgments upon such a term as may be just. See <u>**Mbogo vs Shah**</u> (1969) EA 93. Nor is it restricted to parties to the suit but includes any person who has a direct interest in the matter, who has been injuriously affected: See <u>**Jacques vs Harrison (1883-4) 12 AC 165, Employers Liability Assurance Corporation Ltd vs Sedgwich Collins and Company Ltd (1927) AC 95. The Supreme Court practice, 1988, P. 129.**</u>'*
>
> **The applicant has asserted that the first Respondents are not representative of all those non-Government Shareholders entitled to compensation; and that Government is likely to suffer loss if those left out re-surface later on and the Government in future. To the applicant this would amount to corruption as one constitutionally mandated to eliminate corruption in public offices, applicant prays**

Court to be heard on merit as to the appropriateness of the consent Judgment whether it is tainted with corruption, abuse of power or not.

The Court, in the exercise of its discretion holds that the applicant has put forward sufficient averments for her to have shown locus in the matter: namely to prevent corruption and possible future loss to Government. It is a constitutional and statutory duty she has to perform. She should therefore be heard on merit". sic

The judge also observed that the application before him was peculiar in that the respondent was questioning the conduct of officers of the Attorney General Chambers/Ministry of Justice. According to him, it was impracticable for the respondent to rely upon their advice. The respondent could not trust the representation by the same people who were the subject of the complaint. I agree with the finding of the learned trial judge.

Ground 3, therefore, fails.

I now turn to issue 3 i.e. ground 4.

The complaint by the appellant's counsel is that the application could not be sustained because it was based on defective affidavits. Counsel contended that the main affidavit of Hon Justice Faith Mwondha, did not show in the jurat where it was sworn. The affidavit of Dr. Suruma was drawn by the Ministry of Finance and Economic Development and not the Attorney General.

Mr. Kasujja disagree. He submitted that the argument about the defective affidavits had been raised by the Attorney General at the trial. However, the Attorney General had only filed a notice of appeal and failed to pursue the appeal any further. Counsel argued that the omission to state in the jurat the place at which the affidavit was sworn was a mere clerical error and failure to state who drafted it was not fatal. Regarding the affidavit of Dr. Suruma, counsel contended that the argument by the appellant's counsel that it was not drafted by the Attorney General and was, therefore, defective is not tenable. The argument that the Attorney General did not consent to its drafting is not valid either. According to counsel section 66 (2) of the Advocates Act provides that the restrictions regarding unqualified persons preparing documents does not apply to public officers.

Counsel for the appellants has correctly stated that section 6 of the Oaths Act, requires the Commissioner for Oaths to state in the jurat at what place and date when the

affidavit is taken or sworn. There is no place stated in the jurat in the affidavit of Lady Justice Mwondha of the 14th February 2007. The learned trial judge did not find that to be a fatal defect because there were sufficient particulars in the affidavit itself to show that it was drafted at Kampala. The judge observed that there is no penalty provided for non compliance with section 6 of the Oaths Act.

I agree with the learned judge's observations and finding. Additionally, I am of the considered view that failure to state in the jurat the place at which, the affidavit was sworn, can be ascertained from the body of the affidavit is a mere technicality. Such a failure must not deter court from administering substantive justice as provided by Article 126(2) (e) of the Constitution.

Regarding the affidavit of Dr. Suruma, the fact that it was drawn by the Ministry of Finance does not make it incompetent. I accept the argument by counsel for the respondent that section 66(1)(a) of the Advocates Act does not apply to Public officers. I would observe further that the Attorney General who was bent on supporting the consent judgment in issue could not have given permission for the drafting of the affidavits. Similarly, the Attorney General could not have drafted that affidavit. In my opinion Application No. 65 of 2007 was the effort of the respondent to try to have the consent judgment reviewed. I find that the objection on the affidavits lacks merit. Ground 4 also fails.

In the result I would dismiss the appeal with costs to the respondent here and in the trial court.

Dated this 28th day of March 2008.

C.N.B. Kitumba
JUSTICE OF APPEAL.

JUDGMENT OF GM. OKELLO

I have had the opportunity to read the draft judgment of Kitumba JA. I entirely agree with her reasoning, the conclusion reached and the order she proposed. I have nothing useful to add.

As Mpagi-Bahigeine,JA also agrees, that appeal shall stand dismissed with the order proposed by Kitumba, JA

Dated at Kampala this 28th day of March 2008

GM. OKello
Justice of Appeal

JUDGMENT OF AEN MPAGI-BAHIGEINE

I have read in draft the judgment of Kitumba JA. I entirely agree that this appeal is devoid of merit and should be dismissed with orders proposed therein.

Dated at Kampala this 28th day of March 2008

Hon AEN Mpagi-Bahigeine
Justice of Appeal