

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

5 **CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.**  
**HON. JUSTICE C.N.B. KITUMBA, JA.**  
**HON. JUSTICE A.S. NSHIMYE, JA.**

**CIVIL APPEAL NO.35 OF 2007**

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**BANK OF UGANDA**

**..... APPELLANT**

**VERSUS**

15 **CARING FOR ORPHANS, WIDOWS & ELDERLY LTD:RESPONDENT**

*[Appeal from the Ruling and Orders of the High Court of Uganda at Kampala (Akiiki-Kiiza J) dated 14/11/2006) in Miscellaneous Cause No. 202 of 2006 arising out of Miscellaneous Cause No. 188 of 2006]*

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**JUDGEMENT OF KITUMBA JA.**

This is an appeal from the ruling and orders of the High Court, given in Miscellaneous Cause No. 202 of 2006, in which the respondent successfully applied for the prerogative orders of certiorari and prohibition against the appellant's decision to freeze the respondent's bank accounts.

The background to the appeal is briefly as follows; The appellant is the Central Bank and the respondent is a company limited by guarantee to offer charitable assistance to venerable, disadvantaged widows, orphans and elderly persons throughout Uganda.

30 On the 4<sup>th</sup> September 2006, the appellant in its capacity as the Central Bank wrote to the respondent. It informed the respondent that it had received information that the respondent was taking deposits from the public without a licence in contravention of section 4 (1) of the Financial Institutions Act 2004. The appellant requested the respondent to stop taking

deposits and to refund all deposits taken from account holders. The appellant further requested the respondent to submit to it records of the refund of deposits within three weeks.

On 5<sup>th</sup> September 2006, the appellant wrote another letter to the respondent requesting it to provide specific documents to enable the appellant to assess the operation of the respondent.

5 On the 15<sup>th</sup> September 2006, the appellant wrote to the respondent requesting for information and assured it that all information provided will be treated in confidence. On Monday 18<sup>th</sup> September 2006 at approximately 9.00 am, the appellant froze the respondent's accounts country wide.

The respondent applied to the High Court for judicial review of the appellant's decision and  
10 sought for the orders of certiorari and prohibition. It was challenging the manner in which the decision was made. The learned review judge decided the application in favour of the applicants/respondents and made the following orders; -

- a) *“The decision of the Respondent freezing the Applicant’s Bank accounts countrywide is hereby quashed.*
- 15 b) *The matter be remitted to the Respondent with directions that the Respondent carry out proper investigations on the alleged breach of the relevant Acts governing Financial institutions which investigations must include giving a chance to the Applicant to explain their case before the Respondent exercises its powers of control under the said Financial*  
20 *Institutions Act.*
- c) *The Respondent is prohibited from taking further decisions in regard to the Applicant’s Bank accounts basing on their earlier and now quashed orders to freeze the Applicant’s Bank accounts.*
- d) *The Respondent is also prohibited from interfering with the Business of*  
25 *the Applicant until it carried out proper investigations and give the Applicant an opportunity to be heard in the process.*
- e) *The Applicant is awarded General damages to the tune of Ug. Shillings 3,000,000/- (Three million shillings).*
- f) *The Applicant is awarded costs of both the Application for leave and the*  
30 *substantive Application”.*

The appellant being dissatisfied with the ruling and orders of the High Court, has filed an appeal to this court on the following grounds; -

1. **The learned judge erred in law in quashing the respondent's decision to freeze the applicant's accounts.**
- 5 2. **The learned judge erred in law and in fact in holding that the respondent made its decision to freeze the applicant's accounts without first giving it a hearing.**
3. **The learned judge erred in law and in fact in holding that it was necessary for the respondent to give applicant a hearing**  
10 **first before declaring the applicant's activities illegal.**
4. **The learned judge erred in law and in fact in interpreting statutory provisions whose purpose is to prevent criminal activities and avert their consummation.**
- 15 5. **The learned judge erred in law in not holding that Bank of Uganda was immune from the proceedings out of which the appeal is brought.**

It prayed court to allow the appeal with costs in this court and in the High Court.

During the hearing of the appeal the appellant was represented by, learned senior counsel, Dr. Joseph Byamugisha and learned counsel Mr. Caleb Alaka, appeared for the respondent. Dr.  
20 Byamugisha argued grounds 1,2,3 and 4 together followed by ground 5. Mr. Alaka argued the grounds in the same way.

In this judgment I will deal with the grounds in the same manner counsel argued them.

Regarding grounds 1,2,3 and 4, Dr. Byamugisha complaint is that the learned judge erred in law in holding that the appellant made a decision to freeze the respondent's accounts without  
25 first hearing it and that the appellant's action was contrary to the rules of natural justice.

He submitted that according to the evidence contained in the affidavit of Margaret Kaggwa Kasule, the legal counsel of the appellant, the Bank of Uganda received information that the respondent was taking deposits from the public and engaging in lending money though it was not licensed to do so by the appellant. He argued that according to section 118 of the  
30 Financial Institutions Act (Act 20 of 2004), the appellant has the duty to inform anybody who is contravening the Act. In counsel's view this does not require hearing.

The appellant wrote to the respondent a letter dated 4<sup>th</sup> September 2006 which is Annexure C to Ms Margaret Kaggwa Kasule affidavit. The appellant wrote a letter dated 5<sup>th</sup> September 2006 requiring the respondent to provide documents but the latter refused to comply. As soon as the respondent received the inquiry, it began withdrawing large sums of money from its accounts. The appellant's members of staff from its Bank Supervision Department embarked on investigation of the respondent's activities but the latter was not co-operative. It did not allow the appellant's staff full and free access to the books of accounts. Counsel contended that, conduct was prima facie evidence that the respondent was operating without a license contrary to section 6 of the Micro Finance Deposit-Taking Institutions Act. Counsel argued that it was not, therefore, true that the appellant froze the respondent's bank accounts without investigations because there is ample evidence from the affidavit of Ms Margaret Kaggwa Kasule and annexures thereto, showing that investigations were done.

Counsel submitted crucial averments in the affidavit in reply were not controverted by the respondent. Dr. Byamugisha contended that when the respondent got the letter from the appellant querying their activities they should have explained. In support of his submissions he relied on **Post Louis Corporation vs Attorney General of Mauritius [1965] AC 1111**.

He contended that before the appellant closed the respondent's accounts it did not have the duty to hear it. Counsel argued that the statutory law has enough safe guards. In his view, on receipt of the letter from the appellant, the respondent should have replied. Even after freezing of the accounts, the respondent should have approached the appellant instead of filing a suit in the High Court for review. Counsel compared the situation in the instant appeal to a criminal investigation and submitted that the police do not have to hear the accused before arresting him/her. For that submission he relied on **Wiseman vs Borneman and Others [1971] AC 297**. in which, the House of Lords discussed at length the application of the rules of fair hearing before a decision is made by a tribunal.

Mr. Alaka for the respondent, opposed the appeal and supported the ruling of the learned review judge. Counsel submitted that he was only challenging the decision making process by the appellant but not the decision that was made. He contended, that it is settled law that, the respondent had a right to fair hearing which is provided by Article, 28 (1) and 42 of the Constitution. He referred this court to the decision of **Pius Niwagaba vs Law Development Centre, Civil Application No. 18 of 2005** (un reported).

Counsel argued that under section 118 of the Financial Institutions Act a hearing is not required. He submitted that the above section is used where the appellant believes that the funds on the account are proceeds of crime. He argued that the section should be literally interpreted. Counsel contended that in section 118 of the Financial Institutions Act, crime is not defined. In an attempt to give instances when one is not entitled to benefits from crime, he relied on **Halsbury's Laws of England 4<sup>th</sup> Edition para 572 p. 349.**

Counsel vehemently argued that all along the appellant did not use the Financial Institutions Act but tried to widen its scope of operation by using both the Financial Institutions Act and the Micro-Finance Deposit – Taking Institutions Act. According to counsel, the appellant had to use one Act at the time and not both, otherwise those concerned would suffer double jeopardy.

Counsel argued that from the chronology of events, the appellant did not act fairly. He submitted that the appellant got a complaint from the Chairman of the District of Ibanda and swung into action that very day. The appellant wrote a letter on 4/9/2006, directing the respondent to stop taking deposits from the account holders, refund deposits and submit records of such refunds to the appellants. On the following day, they requested for several documents like certificate of incorporation. By their letter 15/9/2006, the appellant still requested for information but before such information could be gathered and sent on Monday 18/9/2006, the Central Bank froze the respondent's accounts without giving the respondent a hearing. He submitted that the letter of 5/9/2006 was different. Counsel contended that the respondent did not refuse to cooperate. He submitted that the learned review judge was right. He prayed court to dismiss the appeal.

In reply, Dr. Byamugisha submitted that by annexure E to Ms. Kaggwa Kasule's affidavit, the appellant informed the respondent that it had not allowed the staff of the Central Bank access to their books of accounts. This letter remained un-controvated and the respondent is bound by it.

Dr. Byamugisha submitted that all along the respondent are challenging the decision making process by the appellant and not the application of section 118 of the Financial Institutions Act. The judge made no finding regarding the section. Since counsel did not cross-appeal or file grounds affirming the decision of the judge, he should not submit about the above section.

I have carefully perused the record, listened to the submissions of both counsel. The crucial point for decision in this appeal is whether the appellant acted contrary to the rules of natural justice, when it froze the respondent's bank accounts country wide without first giving the respondent a fair hearing.

- 5 The record shows that the appellant which is the Central Bank of Uganda, is empowered to freeze bank accounts under section 118 of the Financial Institution Act, which provides;

10 **118 (1) The Central Bank shall if it has reason to believe that any account held in any financial institution has funds on the account which are the proceeds of crime, direct in writing the financial institution at which the account is maintained to freeze the account in accordance with the direction.**

**(2) A financial institution acting in compliance with a direction under subsection (1) of this section shall incur no liability solely as a result of that action.**

- 15 The submissions by appellant's counsel that no hearing is provided for before the Central Bank orders for the freezing of the account is correct.

Section 4 of the Micro-Finance Deposit – Taking Institutions Act (Act 5 of 2005) makes its mandatory that any one who transacts micro finance businesses must be licensed by the appellant. The sections states; -

20 **4. (1) No microfinance business shall be transacted in Uganda except by a company, which is in possession of a valid license granted by the Central Bank authorizing it to conduct microfinance business in Uganda.**

25 **(2) Any person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding two hundred and fifty currency points or imprisonment not exceeding two years or both; and in case of a continuing offence to a higher fine not exceeding fifty currency points for each day following which the offence continues after conviction.**

- 30 Section 6 of the same Act further provides; -

6 (1) Whenever the Central Bank has reasons to believe that a person is transacting microfinance business in Uganda without licence, the Central bank shall, at all times ;-

5 a) have full and free access to the premises at which that person is suspected of transacting microfinance business without a licence or at which that person may have books, accounts and records; and

10 b) have the power to examine, copy or take possession of the books, accounts and records of that person in order to ascertain whether or not that person has contravened, or is contravening any of the provisions of this Act.

15 (2) Any refusal to allow full and free access to the premises referred to in subsection (1) or to submit any books, accounts or records to which subsection (1) applies shall be prima facie evidence of the fact of operation without a licence.

20 According to the evidence on record, on 4/9/2006, the appellant wrote to the Director General Secretary of the respondent, informing it that the Central Bank has received information and documents that the company was taking deposits from the public without licence. This was in contravention of section 4 (1) of the Financial Institution Act. The respondent was requested to cease from taking such deposits and to refund deposits taken from account holders. The respondent was further requested to submit the records of the refund to the Bank of Uganda.

25 By the letter dated 5/9/2006, the appellant requested the respondent to provide certain documents e.g. copy of certificate of incorporation of COWE Ltd etc. This request was made for the purpose of assessing the operation of the respondent. Again on 15/9/2006, the appellant wrote to the respondent requesting it for information, for example, list of all branches, sub-branches or agencies, among others, by 15/9/2006.

30 It should be noted that the information required by each of the two letters was different. We appreciate the argument by counsel for the appellant that the Bank of Uganda ordered for the freezing of the accounts after the respondent had refused to cooperate. Paragraph 9 of the affidavit in support of the application by Balikoowa Nixon, is not true where he stated; -

***“9. The Respondent in reaching its decision to demand that the Applicant makes a refund of deposits to the Public and ordering the***

***freezing of the Applicant's Bank accounts relied on information that it did not independently verify by investigations, giving the Applicant an opportunity to be heard or a fair hearing".***

5 There is on record un-controveted evidence of annexure 'E' of Ms. Kaggwa Kasule's affidavit. This is a letter dated 13<sup>th</sup> September 2006 from the appellant. The letter was written by the Executive Director Inspection. The letter reads in part; -

10 ***'I have been informed that staff from Bank Supervision Function were denied by COWE Ltd Head Office to carry out examination of the books of accounts because such information is confidential. Please take note that refusal to allow full and free access to the books of accounts shall be prima facie evidence of the fact of operation without a Micro Deposit taking Institution licence (see section 6 of MDI Act 2003).***

15 ***In this regard, you are hereby directed to cooperate with staff from Supervision, Bank of Uganda and avail all the necessary information to enable them accomplish their assignment'.***

Annexure 'F' to Kaggwa Kasule's affidavit is evidence of the investigations that were done by the appellant in respect of the respondent.

20 When the respondent did not allow the appellant's staff to examine its record and books of accounts that was prima facie evidence that it was transacting business without a licence from the Central Bank. The respondent by transacting micro-finance business without a licence from the appellant had committed a criminal offence as it is specified in section 4 (1) (2) of the Micro-Finance Deposit – Taking Institutions Act.

25 The argument by respondent's counsel that crime is not defined in section 118 of the Financial Institutions Act is not tenable. The authority of **Hasbury's Law of England paragraph 349**, is not applicable to the instant appeal.

Dr. Byamugisha's argument is quite correct, that the learned judge did not make a finding on section 118 of the Financial Institutions Act. The ruling of the High Court was entirely on the way the decision to freeze the respondent's bank accounts was made.

30 Taking into account the functions of the appellant as provided in the Constitution, the Financial Institutions Act, and the Micro-Finance Deposit Taking Institutions Act, the



appellant did not have to hear the respondent before taking the action that it did. Requiring such a hearing would be stretching the right to fair hearing too far.

I respectfully agree with the statement of Lord Reid in **Wiseman & another vs Borneman and Others** (supra) where he stated; -

5           **“Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For along time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that**  
10           **to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation”.** (Underlining is mine)

15           With due respect, the learned trial judge was wrong to hold that the respondent should have been given a hearing before the freezing of the accounts.

I now consider the last issue and ground 5 in this appeal which is a complaint that the learned judge erred in law in not holding that the Bank of Uganda was immune from proceedings out of which this appeal is brought.

20           Dr. Byamugisha contended that the appellant is immune for anything intended to be done or is done in good faith under both the Financial Institutions Act and the Micro Finance Deposit – Taking Institutions Act. Since the respondent did not plead or prove that the appellant acted in bad faith it did not have a cause of action.

25           Counsel for the respondent contended that since the respondent did not fall under the ambit of the Financial Institutions Act or Micro-Finance Deposit – Taking Institutions there was no need to plead bad faith.

Section 124 of the Financial Institutions Act and section 86 of the Micro-Finance Deposit Taking Institutions have similar provisions which state; -

30           **“No suit or other legal proceedings shall lie against the Central Bank.....for anything which is done or intended to be done in good faith under this Act”.**

Since the respondent received communication from the appellant whereby it was alleged that it was contravening the Financial Institutions Act and the Micro-Finance Deposit-Taking Institutions Act it had the obligation to plead and prove bad faith on part of the appellant.

In view of the above, the application for review before the High Court was incompetent.

5 I find merit in the whole appeal. I would allow the appeal with costs to the appellant in this Court and in the High Court. The award of general damages of Shs. 3,000,000/- is set aside.

**Dated this.....26<sup>th</sup> .....day of.....August.....2009.**

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**C.N.B. KITUMBA**  
**JUSTICE OF APPEAL.**

**JUDGMENT OF HO. A.E.MPAGI BAHIGEINE, JA**

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I am entirely in agreement with the findings of Kitumba JA in the lead judgment.

Since A.Nshimye, JA also agrees, the appeal succeeds with costs here and below, as proposed by Kitumba JA.

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Dated this .....26<sup>th</sup> ....day of.... August,..... 2009.

25 HON JUSTICE A.E.N.MPAGI-BAHIGEINE,  
Justice of Appeal

**JUDGMENT OF A.S.NSHIMYE, JA**

30 I have had the benefit of reading in draft, the judgment of Hon Justice C.N.B.Kitumba. I agree that the appeal be allowed in terms as proposed by her.

Dated this .26<sup>th</sup>.....day of ....Aug.....2009

HON A.S.NSHIMYE  
JUSTICE OF APPEAL