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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 76 OF 2014

SHAFT SINKERS OF UGANDA.....APPELLANT

VERSUS

10 **THE COMMISSIONER GEOLOGICAL }
 SURVEYS AND MINES DEPARTMENT.....RESPONDENT**

*[Appeal from the Decision / Ruling of Honourable Justice V. F. MUSOKE -
 KIBUUKA dated 15th February 2013 in Miscellaneous Application Cause
 15 No. 474 of 2008 High Court of Kampala (Civil Division)]*

Coram:

Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ
Hon. Mr. Justice Kenneth Kakuru, JA
 20 **Hon. Mr. Justice Geoffrey Kiryabwire, JA**

JUDGMENT OF THE COURT

This appeal arises from the decision of Hon Justice V.F Musoke –Kibuuka dated 15th February 2013 in High Court Miscellaneous Application No. 47 of 2008.

25 The appellants had by way of Originating Motion, under *Rule 42 A, Rule 6(2) (b), 7 and 8* of Civil Procedure Rules (The Judicature (Judicial Review Rules, 2009) sought the following orders:-

- 30 a) *An order of certiorari, quashing the decision of the respondent which was contained in a letter dated 19/08/08, rejecting the applicant’s application for an exploration licence in respect of Kiiwa Wolfiam Mines, Kisoso District.*
- b) *An order of Mandamus requiring the respondent to revoke the exploration licence No. B 0370 and prospecting licence No.0376, granted to Messers Videocom Natural Resources Plic;*





5 c) *A declaration that the refusal by the respondent to grant the exploration licence to the applicant and the grant of an exploration licence No. 0370 to Videocon Natural Plic, was unfair, unlawful and unjustified.*

d) *An order awarding the costs of this application to the applicant.*

10 The respondent to the motion was named as “The Commissioner, Geological Survey and Mines Department”. When the matter came up for hearing preliminary objections to the motion were raised by both parties and the Court was required to determine them first.

They were namely:-

1. *Whether the affidavit in reply filed after, the applicant had filed a rejoinder was sustainable at law.*
- 15 2. *Whether one Tebaro Balu an Assistant Commissioner of Geological Survey and mines could depone to an affidavit in a matter in which he was not a party. The motion having been brought against the substantive Commissioner of Geological survey and mines.*
- 20 3. *Whether an action against Commissioner, Geological survey and mines was sustainable at law.*

The Judge dismissed the first two preliminary objections raised by the appellant herein. He upheld the 3rd objection raised by the respondent and dismissed the motion hence this appeal.

The appellant filed this appeal on the following grounds of appeal.

- 25 1. *The learned trial Judge erred in law when he dismissed the application without hearing it.*
- 30 2. *The learned trial Judge erred in law and fact when he held that to sue the Commissioner for Geological Surveys and Mines Department would amount to an illegality.*
- 35 3. *The learned trial Judge erred in law when he held that Mr. Balu had authority to make an affidavit in reply to the application.*

5 4. *The learned trial Judge erred in law and fact when he found that there was no merit in the objection to the legal representation by Mr. Galisonga of both Videocon Natural Resources Plc (a party served because it was likely to be affected by the outcome of the application) and the respondent the Commissioner for Geological Surveys and Mines Department.*

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5. *The learned trial judge erred in law and fact when he held that there was no second affidavit in reply on the record and dismissed the objection as to its competence.*

15 When this appeal came up for hearing on 13th May 2016, *Mr. Denis Kwizera* appeared for the appellant while *Mr. Phillip Mwaka* Principal State Attorney appeared for the respondent. The Coram at that time was constituted as follows:- Kavuma, DCJ, Kakuru, Byabakama-Mugenyi JJA. Judgment was reserved to be delivered on notice. However, before Judgment could be delivered both Kavuma DCJ and Byabakama Mugenyi JA left
20 this Court. A new Coram was constituted and on 18th January 2018 the appeal was re-heard, at which hearing both Counsel adopted their earlier submissions. It is on the basis of those earlier submissions that this Judgment has been made.

As a first appellate Court we are alive to the requirement of the law to re-evaluation the evidence and come to our own conclusion on all issues of law and fact. See:- Rule 30 of
25 the Rules of this Court, *Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997 and Fr. Narcensio Begumisa & others vs Eric Tibebaaga, Supreme Court Civil Appeal No. 17 of 2002*

The suit from which this appeal arises was determined on a question of law and as such we have not found it necessary to reproduce the submissions of Counsel in detail.

30 We consider that, ground 3 of appeal has the potential of determining the whole of this matter and we shall therefore consider it first.

The appellant's case is that the learned trial Judge erred when he found that, the motion having been brought against the Commissioner Geological Surveys and Mines was unsustainable as all civil actions against Government must be to the name of the Attorney
35 General.

Counsel submitted that in judicial review proceedings, as action can be brought against the specific officers of government who made the orders sought to be reviewed.

5 Mr. Mwaka for the respondents in reply, opposed the appeal and supported the decision of the learned trial Judge. He submitted that under Article 119 of the Constitution and Section 10 of the Government Proceedings Act, a suit against government must be brought against the Attorney General.

10 We have read both Counsel's lengthy arguments. We have also read the record and the the authorities cited to us.

Article 119 (3) and (4) of the Constitution provide as follows:-

'(3) *The Attorney General shall be the principal legal adviser of the Government.*

15 (4) *The functions of the Attorney General shall include the following—*

(a) *to give legal advice and legal services to the Government on any subject;*

20 (b) *to draw and peruse agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest;*

25 (c) *to represent the Government in courts or any other legal proceedings to which the Government is a party; and*

(d) *to perform such other functions as may be assigned to him or her by the President or by law.'*

30 The Supreme Court in *Gordon Sentiba and Others vs Inspectorate of Government Supreme Court Civil Appeal No 06 Of 2008*, the Supreme Court while discussing the powers and role of the Attorney General held as follows:-

35 *'It is trite law that the Attorney General is the Principal Legal Advisor to Government as provided for in Article 19(3) of the Constitution, and that the legal opinion of the Attorney General is generally binding on Government and public institutions like the respondent. See Bank of Uganda vs Bank Arab Espanol (supra). Therefore the respondent is not correct in submitting that it can intervene*

5 *or take over a case where the Attorney General has decided not take action or taken a different action in order to save the Government from losing colossal sums of money.'*

Section 10 of the Government Proceedings Act (CAP 77) stipulates that:-

10 *"Civil proceedings by or against government shall be instituted against the Attorney General."*

Section 11 of the same law provides as follows:-

'11. Service of documents.

15 *All documents required to be served on the Government for the purpose of or in connection with any civil proceedings by or against the Government shall be served on the Attorney General.'*

20 The Attorney General's professional advice generally binds all government officers. It is from the Attorney General that legal advice is sought by government departments. An individual government officer cannot bear the burden of litigation on his or her shoulders in respect of matters brought against him/her in his/her official capacity.

Judicial review proceedings are 'civil proceedings' within the meaning of Section 10 of the Government Proceedings Act. That Section is couched in mandatory terms. The word 'shall' in the Section is not regulatory as it is directed at potential litigants against government. It is mandatory in our view.

25 In this case the proceedings were not brought in the name of Attorney General and therefore contravened the above cited law.

While determining this issue, the learned trial Judge stated as follows at page 5-6 of this Judgment.

30 *'Lastly and in court's view, most importantly, this motion for judicial review 'was filed against the Commissioner for Geological Survey and mines. The commissioner is not a body corporate. He or she cannot sue or she be sued. This matter was raised in paragraph 4 of the affidavit Engineer Tabaro Balu. However, it was neither argued before court nor was it answered in the affidavit in rejoinder by the applicant in substance.*

5 Finds it necessary, in the Circumstances, to invoke the principle in *Jagal Singh Bains vs. Ishmael Mohamed Chogley* (1949-1950) EACA 27, a decision of the Court of Appeal for Eastern Africa, in which Sir Barclay Nihil quoted with approval the statement of Scrutton LJ, in *Phillips vs. coping* (1935) 1K.B 15, that.

10 It is the duty of the Court when asked to give judgment which is contrary to a statute to take the point although the litigants may not take it" in other words, where an illegality is not pointed out to the Court by any of the parties, it is the duty of the Court to do so.

15 To Court, in light of Article 119 (4) (c) and section 10, of the Government Proceedings Act, to sue the Commissioner for Geological Survey and Mines, would amount to an illegality. This court still holds the same views which were expresses by it upon this point in earlier similar applications. In England where Commissioners and even Ministers are sued in similar and other proceedings, the situation is different. There are enabling laws to that effect and certainly, there may not be the equivalent of Article 20 119(4) (c) of the Constitution and section 10 of the Government proceedings Act.

Upon the above reasons, Court would dismiss this motion would do so with costs to the respondents.'

25 We agree with the above statements the law, by the learned trial Judge. We have found no reason to fault him.

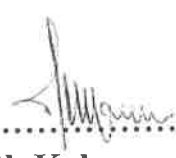
However, we hasten to note that, Statutory Agencies of Government can be sued directly and suits may be brought for and or against specific government officers where the law so provides, such as the Commissioner for Land Registration under the Registration of Titles Act (CAP 230).

30 The Commissioner for Geological Survey and Mines does not fall under this category. We note further that in Judicial Review Proceedings the Court is at liberty to issue orders directly to specific government official.

Accordingly we find no merit in this appeal, which is hereby dismissed with costs.

5 Dated at Kampala this 16th day of April 2019.


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10 **Alfonse C. Owiny-Dollo, DCJ**
JUSTICE OF APPEAL


.....
15 **Kenneth Kakuru**
JUSTICE OF APPEAL


.....
20 **Geoffrey Kiryabwire**
JUSTICE OF APPEAL

