

5 THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO 313 OF 2021
[ARISING OUT OF CIVIL APPLICATION NO 96 OF 2021]
[ARISING OUT OF CIVIL APPEAL NO 13 OF 2021]

10 1. VIVO ENERGY UGANDA LTD}
2. TOTAL UGANDA LTD}
3. GAPCO UGANDA LTD} APPLICANTSS

VERSUS

UGANDA CIVIL AVIATION AUTHORITY}RESPONDENT

15 *(Appeal from the decision and orders of Hon. Lady Justice Esta Nambayo dated 31st August 2021 in High Court Miscellaneous Cause No 88 of 2020)*

RULING OF CHRISTOPHER MADRAMA, JA

20 The Applicants sought an interim order under the provisions of article 134 (2) of the Constitution, section 10 and 12 (1) of the Judicature Act, rules 2 & 3 (2) (b), 42 and 53 (1), 43 and 44 of the Judicature (Court of Appeal Rules) Directions to restrain the Respondents from decommissioning the Applicants' storage and hydrant facility at leasehold register volume (LRV) 941 Folio 5 at plot 38 circular Road, Entebbe, at Entebbe International Airport till the hearing of Civil Application No 96 of 2021 for temporary
25 injunction and determination of civil appeal No 13 of 2021.

30 An order that the costs of and incidental to the application abide the result of the application for temporary injunction. The application is supported by the affidavits of Stephen Chomi, the Company Secretary of the first Applicants and Ms Sophia Wadda, the Company Secretary/legal officer of the second and 3rd Applicants.

5 The grounds of the application are that the Applicants filed Civil Appeal No
13 of 2021 against the decision and orders of the High Court in Miscellaneous
Cause No 88 of 2020 and Civil Application No 96 of 2021 for temporary
injunction and both are pending hearing and determination in this court.
Secondly, the appeal is neither frivolous nor vexatious and raises triable
10 questions of fact and law. Thirdly, the Applicants is developed, owned and
operate an aviation fuel storage and hydrant facility currently in use at
Entebbe International Airport. Fourthly, the storage facility is on the suit
property described above at plot 38 circular Road Entebbe. Fifthly, the
Applicants applied for and are in the process of renewing their lease on
15 Leasehold Register Volume (LRV) and 41 folio 5 at plot 38 circular Road
Entebbe from the Uganda Land Commission, the lessor. On the 6th the
ground, the Applicants indicated that the Respondent indicated that it would
decommission the hydrant facility by the year 2022 which facility is
currently in use at Entebbe International Airport thereby conscripting the
20 Applicants into the mandatory use of the impugned fuel storage hydrant
facility by Tri-Star Transport LLC.

In addition, the Applicants aver that they will suffer irreparable damage
which cannot be atoned for by an award of damages if an interim order is
not issued to restrain the Respondent as prayed. They contend that despite
25 their best efforts to have the Applicants' application for a temporary
injunction fixed before a panel of 3 justices of the Court of Appeal, these
efforts yielded no fruits and therefore the Applicants' application for a
temporary injunction is likely to be rendered nugatory unless the orders
sought in this application are granted. Last but not least the Applicants
30 stated that the was no in ordinate delay in presenting the application and it
is just and equitable that the orders sought in the application are granted.

The grounds of the application are further contained in the affidavit of
Stephen Chomi, the Company Secretary of Vivo Energy (U) Ltd, the first
Applicants who states that he is familiar with the facts of the application
and authorised by virtue of his position to make the affidavit in that capacity.
35

5 The facts as contained in the affidavit are that the Applicants entered into a
joint ownership agreement to maintain, develop and operate certain storage
and hydrant facilities (known as joint facilities) for the supply of aviation
fuel on the terms and conditions contained in the agreement at Entebbe
International Airport. Since 1976 in agreement with the Uganda Civil Aviation
10 Authority jointly owned and operated the aviation storage and hydrant
facility and an unregistered association known as the Entebbe Joint Aviation
Facility (EFAF). On 5th October 1976, the Government of Uganda through its
landholding arm the Uganda Land Commission leased the land known and
described as LRV 948 folio 1 plot 138 Circular Road at Entebbe to Shell & BP
15 for a period of 46 years. The fuel storage facility is located on the joint
aviation facility land. On 5th June 2006 the members of the joint aviation
facility renewed the agreement. Under that agreement the members of the
joint aviation facility agreed that on a rotational basis, they would appoint
one of their own to operate and maintain the facility on behalf of other
20 members for a period of 4 years. According to the agreement TOTAL Uganda
limited has operational control of the joint aviation facility and as such is
registered as the proprietor of the joint aviation facility land. The aviation
fuel storage facility connects to the throne of the airport via the hydrant
system/facility with the piping running from the joint aviation facility land
25 through that of the Respondent to the apron. Mr Stephen Chomi deposed
that the arrangement is supported by a wayleaves or similar agreement
between the Applicants and Uganda Civil Aviation Authority.

Further, Mr Stephen Chomi deposed that since 1976, the Applicants at all
times diligently executed their mandate and met their end of the bargain
30 with the Respondent by consistently maintaining adequate stock of aviation
fuel and ensuring the uninterrupted fuelling of aircrafts at the Entebbe
International Airport according to international standards. In 2009, the
Government of Uganda prepared a National Transport Masterplan including
a Transport Masterplan for the greater Kampala Metropolitan area which
35 set out a framework for development of the transport sector over the next
15 years from 2008 to 2023. In line with the masterplan, the first Respondent
developed the civil aviation masterplan which emphasised Entebbe airport

5 infrastructure upgrade and development to accommodate Uganda's future air traffic. Accordingly, the civil aviation masterplan proposed certain projects namely (a) a new fuel farm construction worth US\$25,000,000 and the; (b) a new fuel farm parking fees to at US\$5,400,000.

10 The first Respondent's business plan prepared in conformity with the masterplan noted that the aviation fuel supply at Entebbe airport was inadequate with the capacity of only 7,600,000 L combined with infrastructural constraints on the supply side. The plan indicated that the issues were to be solved by locating the current fuel facility to a modern fuel farm on plot M1 21 to be implemented with major inputs by the oil companies. The Applicants are and have always been the "oil companies" and the first Respondent negotiated accordingly. The civil aviation masterplan called for the relocation of the joint aviation facility to another location close to the new apron in the expanded and enhanced Entebbe International Airport as indicated in the masterplan. In 2018 the Applicants became aware of the overtures of the Respondent without following the mandatory provisions of the Public Procurement and Disposal of Public Assets Act (PPDA) to identify and contract a new entity to develop a new aviation storage and hydrant facility to support the expanded and enhanced improved Entebbe International Airport. Accordingly, the Applicants brought the Minister of state for Transport in the Ministry of Works and Transport plus testing the overtures and requesting that they are given an opportunity to be incorporated in the plans and programmes of expanding the airport under the civil aviation masterplan.

30 He further states that on 15th of February 2018, the Minister of state for works & Transport wrote to the Chairman of the Board of Directors of the Respondent pointing out the Government's commitment to honour its agreement with the Applicants. Secondly, acknowledging that the Applicants fulfilled their mandate under the agreement. Thirdly acknowledging the Applicants' operations have always met international standards and lastly directing the Respondent to hold the process of contracting a new party to build a new aviation facility to service the

5 expanded airport. The Respondent did not heed the ministers said directive
nor their undertakings. The Applicants continued to communicate with the
Respondent and also engaged in various meetings which resulted in an
agreement to set up a joint committee to plan the relocation of the existing
joint facility. He deposed that the Respondent is still adamant and reluctant
10 to call meetings and get the committee to work. The Applicants and the
Respondent met on further allocations for instance on 3rd July 2019 but the
Respondent continued to 'mark time' rather than move to achieve the
objectives of the joint committee.

15 Subsequently the Applicants became aware that the Respondent had
awarded an exclusive contract to the second Respondent to build and
operate an aviation fuel storage and hydrant facility connected to the new
apron at the expanded and upgraded International Airport. The exclusive
contract between the Respondent and TriStar Transport LLC was kept
secret until the Applicants were forced to produce it in their pleadings in
20 Miscellaneous Cause No 88 of 2020 which is the subject matter of the
appeal to this court.

Mr. Chomi further deposed that on the basis of his training and experience
as a lawyer and on the advice of the lawyers of the Applicants, the award to
TriStar was illegal on the ground that it was awarded without complying
25 with the mandatory provisions of the PPDA Act. Secondly it contravened the
Petroleum Supply Act 2003 which prohibits the establishment of
monopolies and activities against fair competition and the restrictive trade
practices. Thirdly it contravened international standards, specifications and
codes of practice in the operation of aviation oil storage and hydrant system
30 that Uganda ratified or acceded to. Fourthly it contravened the Protocol on
the Establishment of the East African Customs Union.

Further he deposed that the award of the exclusive contract to TriStar was
irrational on the following grounds. It rendered the Entebbe joint aviation
facility redundant in light of the ongoing lease on LRV 948 folio 1 plot 138
35 circular Road, Entebbe. Secondly it effectively locked out the Applicants out
of the business of refuelling aircraft at Entebbe International Airport.

5 Thirdly, the Respondent let the Applicants to believe that they were being incorporated into the expanded and upgraded Entebbe International Airport whereas it was just a ruse for the award of the contract to someone else. Fourthly, refusing or omitting or ignoring to operationalise the UCAA/EJAF joint committee on incorporating the Applicants in the expanded and
10 upgraded Entebbe International Airport projects under CAMP. Fifthly, the Respondents seek to effectively close the Applicants out of the business of refuelling aircraft at Entebbe International Airport for no-fault, failing, in adequacy or misdeed on their part.

MR. Chomi further deposed that the Applicants have a running lease on LRV
15 948 folio 1 plot 138 circular Road Entebbe whose essence is to run and operate the aviation fuel and hydrant system at Entebbe International Airport. Secondly the Government of Uganda and the Respondent by communications and conduct assured the Applicants that they will be incorporated in the expanded and enhanced Entebbe International Airport.
20 Thirdly the Applicants have a right of first offer as they have been satisfactorily running the aviation storage and hydrant system at Entebbe International Airport since 1976. Fourthly stated that the Applicants have a constitutional right to carry on and participate in the lawful business/trade of refuelling aircraft at the expanded and enhanced Entebbe International
25 Airport.

Because of the grounds above, the Applicants jointly instructed lawyers and filed Miscellaneous Cause No 88 of 2020 for judicial review of the Respondent's actions and decisions. The Applicants application was not
30 successful and on 2nd September 2020 filed a notice of appeal against the decision of the High Court. Secondly the Applicants filed Civil Appeal No 13 of 2021 against the High Court decision. Thereafter the Applicants filed Civil Application No 96 of 2021 for a temporary injunction on 14th April 2020 which application is yet to be fixed for hearing before a panel of three Justices of appeal. On 26 May 2021, the Applicants lawyers wrote to court requesting
35 for an expedited hearing and disposal of the application for a temporary injunction. Despite the vigilance of the lawyers pursuing the application for

5 a temporary injunction, it is not certain when the court will allocate and fix
the application for hearing. That the Applicant's lease at Entebbe will soon
expire and the Applicants have already commenced the process of
renewing the lease from the Uganda Land Commission.

10 MR. Chomi further deposed that the Respondents intend to decommission
the hydrant facility currently in use at Entebbe International Airport by the
year 2022 and the Applicants will have no option but to be conscripted into
the mandatory use of the impugned facility run by TriStar Transport LLC.

15 Further, the Applicants secretary deposed that on the basis of his training
as a lawyer and on the basis of the advice of the lawyers of the Applicants,
the Applicants appeal has merit and discloses a prima facie case with a
probability of success. Further also, the appeal is neither frivolous nor
vexatious and raises triable questions of law and fact. He believes that
20 unless the application is granted, the Applicants will suffer damage,
irreparable by an award of damages. This damages include being
conscripted into using the fuel hydrant and storage facility of TriStar
Transport LLC which is an effective monopoly, uncompetitive and in
violation of the law. Secondly the Applicants will be disabled from
participating in the aviation fuel business at the country's only International
25 Airport. Thirdly it is the constitutional right of the Applicants to participate
in a lawful business or trade and to freedom of Association which will be
infringed. Fourthly they will lose the huge investment made in the aviation
storage and hydrant system at Entebbe International Airport and instead be
forced to pay an access charge exclusively agreed between the Respondent
and TriStar Transport LLC.

30 Finally, he deposed that the Applicants appeal and application for a
temporary injunction will be rendered nugatory because if the interim order
is not granted, the Applicants will before determination of the appeal, be
conscripted into the mandatory use of the impugned fuel storage hydrant
facility built by TriStar Transport LLC potentially rendering many aspects of
35 the appeal overtaken by events. Further the Applicant's fundamental
constitutional rights and freedom of Association to carry out and participate

5 in any lawful trade would be abused even before the hearing and
determination of the temporary injunction application and the appeal.
Thirdly, the financial loss the Applicants arising out of the Respondent
conscripting them into the storage and hydrant facility built by TriStar
10 storage and hydrant facility currently in use at Entebbe International Airport
will be enormous and yet the Respondent has not demonstrated a
willingness and ability to compensate the Applicants. That it is just and
equitable that the court allows the application.

The application is further supported by the affidavit of Sophia Wadda, the
15 Company Secretary of Total (U) Ltd the second Respondent which primarily
supports the affidavit of the Company Secretary of the first Respondent Mr
Stephen Chomi.

In reply, Mr Joseph Joel Okwalinga, the Manager Legal Services of the
Respondent states that he is conversant with the facts of the matter by
20 virtue of his position in the Respondent company and as an advocate of the
High Court and made the affidavit in that capacity.

The Respondent opposed the application and denied the contents of the
affidavit in support of the application, in paragraphs 2, 4, 6, 7, 8, 10, 11, 12, 13,
15, 16, 17, 31, 32, 33 and 34. He deposed that the Respondent is established
25 under the Civil Aviation Authority Act as amended with the objective of
providing the safe, regular and secure and efficient use and development of
civil aviation inside and outside Uganda. In order to carry out its mandate,
the Respondent is responsible for ensuring the efficient, safe and secure
supply of aviation and other fuels at the Entebbe International Airport.
30 Further the Applicants own and operate fuel tanks known as the fuel farm
with a maximum speed of 7,500,000 L at Entebbe International Airport
through an unincorporated association known as the Entebbe Joint Aviation
Facility. He admitted that the Applicants only fuel farm about 400 m from
the passenger terminal but maintains that it is unsafe and very dangerous.
35 Further that in the year 2009, Entebbe International Airport experienced a
near disaster when a fuel tanker loaded with 40,000 L caught fire just

5 adjacent to the fuel farm as it was getting into the compound to deliver the fuel and it required 3 hours of firefighting services to put out the fire.

Further that the Respondent has been informed by security agencies that there has been an increased threat level at Entebbe International Airport caused by Al Shabbab terrorist groups that have increased their terror
10 operations in Uganda. The target for terrorist activities was the fuel tanks located at the airport.

Due to the increased threat to security and safety posed by the location of the fuel farm, a meeting was held between the Deputy Inspector General of police, the Respondent's representatives and representatives from the first
15 and second Applicants to devise means to mitigate the threat to safety and security posed by the location of the fuel farm. Following the meeting, the Civil Aviation Master Plan was developed and the plan provided for the relocation of the current fuel facility to a new modern fuel farm with an increased fuel capacity with safer security measures. Under that plan, and
20 which the Applicants were aware of and participated in its development, provision is made for a fuel pier as well as a fuel hydrant system to be owned by the Respondent. The Applicants were advised to take up the land as set out in the Civil Aviation Master plan to develop a new fuel farm at the southern end of the airport far from the main operational and terminal
25 building area which they failed or refused to do.

On 10th August 2015, TriStar Transport LLC made a proposal to the Ministry of Works and Transport for the development of 20,000 m² of land (5 acres) with a fuel farm at Entebbe International Airport and consideration to be made for location of the land planned for the fuel farm under the Civil
30 Aviation Master Plan. On 14th August 2015, the Ministry of Works and Transport proposed that increased Transport LLC be availed the land on a lease and concession basis for purposes of investing in a depot for aviation fuel at Entebbe International Airport. On 31st of August 2015, the managing director of the Respondent had requested the director airports and aviation
35 security to confirm the availability of land in the designated fuel farm area and the same was confirmed as being available. On 13th October 2015, the

5 managing director of the Respondent wrote to the chairman of the board of
directors confirming that the Civil Aviation Master Plan provided for the
allocation of 8 acres of land for aviation depots and that the land requested
for was available. On 19 October 2015, the Ministry of Works and Transport
wrote to the Respondent advising that 5 acres of land should be leased to
10 TriStar Transport LLC for a period of 25 years. On 27th October 2015, 10th
November 2015, 13th December 2015 and 18th December 2015 the
Respondents contracts committee considered TriStar Transport LLC
application for land and on 26th April 2016 the Respondent's Contracts
Committee approved the sublease of the 5 acres of land to TriStar Transport
15 LLC for the establishment of a fuel farm subject to the payment of premium
and concession fees with the initial supplies for a period of 5 years
renewable for 20 years subject to the development of the land according to
the proposal of TriStar Transport LLC approved by the Respondent.

On 14th July 2016, the Respondents Board Finance Committee considered all
20 applications for land leases including that of the first and second Applicants
and TriStar Transport LLC and resolved that: TriStar Transport LLC be
granted the sublease on 5 acres of land for 5 years' renewable for 20 years'
subject to the development covenants in accordance with the Respondents
20-year master plan and the Entebbe International Airport land use plan.
25 Secondly the first Applicants and the second Applicants be granted a
sublease on 5 acres of land each for 5 years' renewable for 20 years'
subject to the development of the land for a fuel facility in accordance with
the CAA 20-year master plan and the Entebbe International Airport land use
plan. Thirdly the sublease should have a provision that if the conditions of
30 development of the fuel facility were not complied with, the Respondent
would re-enter and possess the land allocated.

A draft lease agreement between the Respondent and TriStar Transport LLC
was submitted to the Solicitor General on 19th September 2016 for clearance
which was obtained in September 2016. On 21st February 2017 the
35 Respondent and TriStar Transport LLC signed the sublease agreement for
the land comprised in LRV 2697 Folio 9 Plot No 121 with the condition to

5 design, develop and construct affiliation fuel tanks and all necessary
accessories. TriStar Transport LLC paid a premium of over US\$200,000 and
agreed to pay an annual ground rent of US\$20,000. According to the airport
master plan the current fuel hydrant system was to be relocated to pave
10 way for the extension of the passenger terminal and to take care of the
safety and security concerns at the airport and as such in order for TriStar
Transport LLC to evacuate and supply fuel from the fuel farm it was
necessary to redevelop the fuel hydrant system.

On 29th December 2017 it was further agreed that TriStar Transport LLC
would on behalf of the Respondent construct a fuel hydrant facility on a
15 build and operate transfer model. The fuel hydrant line is a common use
facility for Entebbe International Airport and shall be used by all fuel
marketers and operators at Entebbe International Airport.” The
development of the fuel hydrant facility was an investment arising from a
proposal from TriStar Transport LLC whereby it would invest its own
20 resources, develop the common use facilities and charge a fee to recover
the cost.

The Respondent denies the assertion of the Company Secretary of the first
Respondent that the steps it took were illegal and avers that the steps were
legal and the necessary legal procedures concluding the agreement with
25 TriStar Transport LLC to build, operate and later transfer the aviation
hydrant facility were lawful. Further there was no irrational decision or
action by the Respondent. Further states that the execution of the sublease
agreement between the Respondent and TriStar Transport LLC is not illegal
and does not contravene the provisions of the Petroleum Supply Act 2003
30 or the Protocol for the Establishment of the East African Customs Union as
no monopoly or distortion of fair competition has occurred as alleged by the
Applicants. Further the Respondent did not deprive the Applicants of the
business of refuelling aircraft at Entebbe International Airport or at all as
they are still able to take up the lease offer extended by the Respondent to
35 develop a fuel farm and are able to make use of the hydrant facility built by

5 TriStar Transport LLC which is a common user facility available to all fuel marketers operating at Entebbe International Airport.

Further that no legitimate expectation crystallised between the Respondent and the Applicants. The Respondent has not infringed on any of the Applicants' constitutional rights to carry on and participate in a lawful
10 business/trade and the Applicants are still able to participate in the business of refuelling aircrafts at Entebbe International Airport. On 7th May 2020 the Applicants filed High Court Miscellaneous Application No 88 of 2020 challenging the decision of the Respondent to award Christer Transport LLC the contract constructed fuel hydrant facility on a build
15 operate and transfer model. The Applicants' application for judicial review was dismissed on 3rd of August 2020 by the High Court on account that the Applicants application for judicial review was time barred and for failure of the Applicants to exhaust the remedies under the PPDA Act.

After dismissal of the Applicants' application for judicial review, the
20 Applicants appeal to the Court of Appeal in Civil Appeal No 13 of 2021. On the basis of advice of the Respondent's lawyer's M/s K & K advocates, he deposed that the application is misconceived and bad in law due to the fact that the orders sought in the application do not directly or incidentally arise out of the orders sought in Civil Appeal No 13 of 2021. Secondly the
25 application is an abuse of court process for the Applicants to obtain an injunction based on the merits of their judicial review application which was dismissed by the learned trial judge on the ground of limitation. Further that a dismissal on the ground of limitation and time bar, bars the Applicants from reopening the merits of the judicial review application by way of an
30 interim order application to set aside or reverse the decision of the trial judge. Further the Applicants seek to preserve a claim for an interest in an expired lease which has not been renewed and which is allegedly pending renewal by the Uganda Land Commission which is a different body and under a different legal regime distinct from the judicial review proceedings
35 which are the subject matter of the appeal.

5 Further the Applicants challenge the award of the contract to TriStar Transport LLC in civil appeal No 13 of 2021 but the application in this court seeks to stop the Respondent from decommissioning the hydrant facility, a facility which the Applicants have no legal or equitable interest in whatsoever.

10 On the basis of advice of the Respondent's lawyers Messrs K & K advocates, Mr Joseph Okwalinga further deposed that the Applicants presented new matter entirely which should be entertained by the High Court and not by the Court of Appeal. Further the application does not disclose any urgency or imminent threat to warrant the intervention of the court by way of an
15 interim order. Further the appeal of the Applicants does not have merit or disclose a prima facie case with a probability of success because the Applicants judicial review application was time barred, which was the basis upon which it was dismissed.

He further states that the Applicants will not suffer irreparable damage if
20 the application is not granted as they do not own the fuel hydrant facility and in any case there will still be able to participate in the business of providing aviation fuel should they subscribe for user rights to use the new fuel hydrant facility constructed by TriStar Transport LLC and owned by the Respondent. Further the issuance of orders sought shall curtail the
25 implementation of the projects created in line with the objectives of the Respondent and will have far-reaching impact on the community at large and the use of the Entebbe International Airport. The Respondent is nearing the completion of the expansion works of the Entebbe International Airport and the grant of the orders sought by the Applicants would only stall the
30 completion of the works to the detriment of the general public. Lastly he deposed that the application for an interim order was brought after a prolonged period of time considering that the Applicants filed a notice of appeal on 2nd September 2020 and application was filed on 2nd November 2021.

35 When the application came for hearing, the Applicants was represented by learned counsel Mr John Musiime appearing together with learned counsel

5 Mr. Kenneth Agaba. The Respondent was represented by learned counsel Mr. Usama Sebuwufu. The Court was addressed in written submissions.

In their written submissions, learned counsel for the Respondent raised grounds in opposition to the application for the interim order of injunction which are of a preliminary nature and which if determined in favour of the Respondent, would dispose of the application. I would therefore consider these points first and proceed with the merits of the application if the preliminary objections are overruled.

The Respondents counsel submitted that the application is a nonstarter and is not properly before the court in as far as the Applicants are seeking to obtain an interim order of injunction based on the merits of their judicial review application which was dismissed by the High Court on the ground of limitation and time bar. Secondly, the Respondents counsel submitted that the Applicants are barred from reopening the merits of their judicial review application in an application for an interim order until the setting aside or reversal of the learned trial judge's decision by the Court of Appeal. The status quo is that the judicial review application was dismissed and there is nothing to stay or to grant a restraining order against by way of a temporary injunction. He contended that by allowing the application on the grounds of alleged irrationality, creation of a monopoly and competitiveness of the decision which is the gist of the Applicants' application for the interim order, this would amount to overturning the decision of the learned trial judge before hearing.

Further the Respondent submitted that the Applicants filed a notice of appeal in Civil Appeal No 13 of 2021, and the interim order of injunction sought in the application does not necessarily arise out of the appeal filed and as a result there is a disconnect between the orders sought under the appeal and the application for an interim order. He relied on **Nairobi City Council versus Resley [2002] 2 EA 493** where the court held that the court has no jurisdiction to make a decision on an application not based on a notice of appeal. Counsel submitted that the Applicants' appeal is largely focused on the award of the contract to TriStar Transport LLC by the

5 Respondent. The memorandum of appeal indicates that they seek orders
which include but are not limited to an order of certiorari calling the record
of proceedings and quashing the decision of the Uganda Civil Aviation
Authority, arbitrarily, illegally and unreasonably contracting TriStar LLC to
10 build and operate a storage and hydrant facility at Entebbe International
Airport. Secondly, an order of certiorari calling the record of proceedings
and quashing the decision of the Respondent excluding the Applicants from
the commercial operation of aviation fuel storage and hydrant facility at
Entebbe International Airport. Thirdly an order of prohibition or permanent
15 injunction against the first Respondent prohibiting it from allowing or
suffering the second Respondent continuing, completing or operating a
monopoly or exclusive aviation fuel and storage facility at Entebbe
International Airport.

The Respondent contends that none of the orders sought by the Applicants
under the appeal seek to stop the decommissioning of the fuel hydrant and
20 storage facility located at the suit property. Instead the orders challenge
the decision of the Respondent awarding the contract to TriStar Transport
LLC. He further contended that the application seeks to preserve the claim
for an interest in an expired lease which has not been renewed which is
allegedly pending renewal before the Uganda Land Commission which is a
25 different body under a different legal regime distinct from the judicial
review proceedings the subject matter of the appeal. In the premises the
orders by the Applicants are not available to them under the scope of the
judicial review proceedings and because they do not naturally arise out of
the appeal arising from those proceedings.

30 In reply, the Applicants in their rejoinder submissions contended that the
Respondent created the false impression that the application before the
court is one for stay of execution which it is not though the same rules of
court apply to applications for injunction. He invited the court to appreciate
the fact that the Applicants only filed the application on 2nd November 2021
35 and filed Civil Application No 96 of 2021 on 14th 2021. They filed a notice of
appeal on 2nd September 2020 and lodged the memorandum of appeal on

5 18th of January 2021. This demonstrated that the Applicants did not file the
application wantonly but only filed it after failing to have the appeal and
injunction application fixed, heard and determined. The imminence of the
threat to render Civil Appeal No 96 of 2021 and the appeal nugatory arose
10 from the passing of one year before they could fix and determine their
application.

He contended that the Respondents submitted that the essence of civil
application No 96 of 2021 and the appeal No 13 of 2021 is that the Respondent
intends to decommission the Applicants fuel and hydrant storage facility.
He submitted that rule 2 (2) of the Rules of Court and the authority of **Crane
15 Bank Ltd (in liquidation) versus Sudhir Ruparelia and another SCCA No 2 of
2021** come into play. It shows when the court can use its inherent powers
for not rendering the pending matters academic.

The Respondents counsel submitted that the application for interim order
is concerned with two important matters namely (a) preserving the
20 Applicants' right to be heard; and (b) preserving the court's authority to have
a meaningful or impactful adjudication of the pending matters. In other
words, the aim is to ensure that the pending matters are not rendered
nugatory.

The Respondents counsel further submitted that the status quo is not the
25 state at which the litigation is but is the actual obtaining factors regarding
the Applicants facility at Entebbe International Airport. He contended that
from the pleadings and arguments as a whole, it is clear that the
Respondent is intent on decommissioning the Applicants facility. The
question is that the Respondent has chosen not to address court on this
30 issue. What does decommissioning of the Applicants facility portend for the
pending matters? He submitted that the impact is ominous and will render
nugatory the pending matters before the court.

Consideration of the preliminary matters.

I have carefully considered the submission that the High Court dismissed
35 the Applicants' application for judicial review on the ground that it was filed

5 out of time. The Applicants application in the High Court was for an order of
certiorari calling the record of proceedings and quashing the decision of the
Uganda Civil Aviation Authority, the first Respondent, arbitrarily, illegally
and unreasonably contracting TriStar Transport LLC, the second
Respondent to exclusively build, own, and operate an aviation fuel storage
10 and hydrant facility and the expanded and enhanced Entebbe International
Airport. Secondly for an order of certiorari calling the record of proceedings
and/or quashing the decision of the Uganda Civil Aviation Authority
excluding the Applicants from the commercial operation of an application
fuel storage and hydrant facility at Entebbe International Airport. Thirdly, for
15 a declaration that the grant by Uganda Civil Aviation Authority of an
exclusive contract to TriStar to build and operate an aviation fuel storage
and hydrant facility at Entebbe International Airport without following the
provisions of the Public Procurement and Disposal of Public Assets (PPDA)
Act and to the exclusion of the Applicants is uncompetitive and/or illegal.
20 Fourthly, for an order of prohibition and/or a permanent injunction against
the first Respondent prohibiting it from allowing or suffering the second
Respondent continuing, completing the construction and (or) operating a
monthly or exclusive aviation fuel storage facility at Entebbe International
Airport.

25 In her judgment, Hon Lady Justice Esta Nambayo *inter alia* considered
whether the application had been filed more than 3 months after the
grounds for judicial review first arose. This follows rule 5 (1) of the
Judicature (Judicial Review) Rules, 2005 which provides that an application
for judicial review shall be made promptly and in any event within 3 months
30 from the date when the grounds of the application first arose, unless the
court considers that there is good reason for extending the period within
which the application shall be made. She found that the time of the wrongful
act was the time when the Respondents signed the amendment to the sub
lease agreement on 27th December 2017. That by the time the Applicants
35 filed the application on 7th of May 2020, time within which to file an
application for judicial review had long run out. Obviously, having found that
the application was time barred, it was improper to proceed with the second

5 issue of whether the Applicants exhausted all the remedies available before applying for judicial review. I would therefore not consider that aspect of the ruling and would straightaway consider the grounds of appeal in the memorandum of appeal. Ground 3 of the memorandum of appeal avers as follows:

10 The learned trial judge erred in law and fact when she held and found that the time within which the Applicants ought to have filed the application for judicial review started to run on 21st December 2017 when the Respondents signed the amendment to the sub lease.

This is followed by ground 4 of the memorandum of appeal which is to the effect that:

The learned trial judge erred in law and fact when she failed/omitted/declined/omitted to take into account the fact that the sub lease and the amendment thereto were never communicated to the appellants.

20 In a subtle way, ground 4 introduces a matter of fact that the application was filed possibly out of time because the sub lease and the amendment thereto were never communicated to the appellants (and time ran from the date of receipt of such communication). The question of whether the application for judicial review was time barred seemed to have been considered as a crucial and a turning point in the application for judicial review. Nonetheless, it is clear from the first order sought of certiorari that the Applicants complains about a contract with the TriStar Transport LLC to exclusively build and operate an aviation fuel storage and hydrant facility at the expanded and enhanced Entebbe International Airport.

30 The learned the trial judge considered the fact that by 12th of February 2018 in a letter written by the managing director of the Applicants to the Minister of state for Transport, there was a complaint among other things that the first Respondent's masterplan published in 2014 called for the relocation of the existing facility the Applicants were concerned with and that a new party had been given rights to develop the facility without a competitive bidding

5 process or any prior consultation with the Applicants. Thereafter the
Minister communicated to the first Respondent (the Civil Aviation Authority)
about the concerns of the Applicants. Thereafter the learned trial judge
considered a notice of intention to sue dated 28th of January 2020 addressed
10 to the first Respondent and particularly paragraph 2 of the notice of
intention to Sue which refers to previous meetings and correspondences
between the members of the Entebbe joint aviation firm and the Uganda
Civil Aviation Authority on the subject of the letter purporting to grant an
exclusive contract to an entity known as TriStar to build own and operate
15 the aviation and hydrant system at the expanded Entebbe International
Airport. Last but not least she considered the submission whether the
Applicants were served with official communication on the decision sought
to be impeached or nullified.

The above facts would prove to be crucial in the appeal and therefore it
would be erroneous to consider the merits of the application for judicial
20 review even in an application for an interim order.

I have considered the fact that the Respondent relies on the grant of the
lease to Messieurs TriStar Transport LLC for the establishment of a fuel
farm subject to the payment of premium. Secondly the Respondent asserts
that the lease of the Applicants expires in the year 2020 or has expired and
25 the renewal is pending before the Uganda Land Commission. The question
of whether a contract was properly executed between the Respondent and
the Messieurs TriStar Transport LLC for the establishment of a fuel farm
ought not to have been considered by the High Court because the High Court
found that the application for judicial review was time barred.

30 That is the dilemma faced by the Applicants as well as the courts. Can the
court go into the merits of the application of the Applicants?

The practice of the Court of Appeal when resolving an application for an
interim order pending consideration by the bench is considered in several
precedents. Jurisdiction to issue an injunction is expressed in Rule 6 (2) (b)
35 of **The Judicature (Court of Appeal) Rules** which provides that:

5 6. Suspension of sentence and stay of execution

(2) Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may-

(a) ...

10 (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these rules, order a stay of execution, an injunction, or a stay of the proceedings on such terms as the court may think just.

The Applicants lodged a notice of appeal in accordance with Rule 6 (2) (b) of the Rules of this Court on second September 2020 and filed a substantive application for injunction in Civil Application No. 13 of 2021.

15 In an application for an interim order, the Court of Appeal may exercise jurisdiction to preserve the right of an intending appellant to have his or her appeal heard and not rendered nugatory under **Rule 6 of the Judicature (Court of Appeal) Rules**. Sometimes, the court may proceed under **Rule 2 (2)** of the rules of this court. The rationale for stay of proceedings was held in the celebrated decision of **Wilson v Church (1879) Vol 12 Ch. D 454** and as applied in Uganda in innumerable decisions that:

20 As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the Judgment appealed from as will prevent the appeal if successful from being rendered nugatory.

25 This rationale was applied by the Supreme Court of Uganda in **Constitutional Application No 03 of 2014; Hon. Theodore Ssekikubo and 4 Others v the Attorney General and 4 others** and in **Uganda Revenue Authority versus Nsubuga Guster and another; Supreme Court Miscellaneous Application No 16 of 2018**. In **Uganda Revenue Authority v Nsubuga Guster (supra)** it was held that rule 2 (2) of the Judicature Supreme Court Rules gives the court very wide discretion to make such orders as may be necessary to achieve the ends of justice and that one of the ends of justice is to preserve the right of appeal and to help the parties to preserve the status quo before their

5 dispute can be considered on the merits by the full court according to the rules.

10 In terms of doctrine, the Applicants appeal can only consider the preliminary issue as to whether the Applicants' application for judicial review was time barred. An application which is time barred cannot be heard unless time is extended. In the Applicants' application for a temporary injunction, the Applicants maintains that if the Respondent goes ahead to decommission its storage and hydrant facility at Leasehold Register Volume 941 Folio 5 at Plot 38 Circular Road, Entebbe it would suffer damage and irreparable harm that cannot be atoned for by an award of damages. 15 The Applicants despite their best efforts, the application for a temporary injunction is yet to be allocated to a panel of 3 justices of appeal and fixed for hearing.

20 In High Court Miscellaneous Cause No. 88 of 2020, the Applicants filed an application for judicial review against Uganda civil aviation authority and TriStar Transport LLC. They sought inter alia orders of certiorari to quash the decision of the Applicants excluding them from commercial operation of an aviation fuel storage and hydrant facility. Further the complain about the award of an exclusive contract to TriStar Transport LLC to exclusively build, own and operate an aviation fuel storage and hydrant facility. TriStar 25 Transport LLC is not a party to the intended appeal and therefore no order can be made against it in violation of the right to a fair hearing under article 28 (1) of the Constitution of the Republic of Uganda and which cannot be derogated from under article 44 (c) of the Constitution.

30 Further, the Respondent in the affidavit in opposition to the application before this court and particularly paragraphs 43, 44 and 45 of the affidavit of Joseph Joel Okwalinga the Respondent averred as follows:

35 43. That I am aware that by this application the Applicants seek to preserve a claim for an interest in an expired lease which has not been renewed or which is allegedly pending renewal before the Uganda Land Commission which is a different body and under a

5 different legal regime distinct from the judicial review proceedings
which are the subject of this appeal.

10 44. That I am further advised, that whereas the Applicants challenge
to the award of the contract to TriStar Transport LLC in Civil Appeal
No 13 of 2021, this application seeks to stop the Respondent from
decommissioning the hydrant facility, a facility which the Applicants
have no legal or equitable interest whatsoever.

15 45. That I am advised by the Respondent's lawyers Messieurs K & K
advocates, whose advice I verily believe to be true on account of the
foregoing averments, the Applicants application presents a new
matter entirely which should be entertained by the High Court and not
this honourable court.

In light of the fact that the Applicants' application for judicial review was
against two parties including TriStar Transport LLC, the question of the
contract to TriStar Transport LLC cannot be considered in this application
20 because TriStar Transport LLC is not a party. Secondly, the issue of
decommissioning of the hydrant facility was not considered because the
application was time barred. The court would be restricted to considering
whether the Applicants' application was time barred. Last but not least, the
Applicants has an application to renew its sublease before the Uganda Land
25 Commission. According to grounds 5 and 6 of the Notice of Motion the
Applicants averred as follows:

30 5.The Applicants have applied and are in the process of renewing the
lease on leasehold register volume (LRV) 941 Folio 5 at plot 38
circular Road, Entebbe, at Entebbe from Uganda Land Commission,
their lessor.

35 6.The Respondent has indicated that it will (at any rate in the year
2022) decommission the hydrant facility currently in use at Entebbe
International Airport, thereby conscripting the Applicants into the
mandatory use of the impugned fuel storage and hydrant facility built
by TriStar Transport LLC.

5 The renewal of the sublease is before another authority not in court and can proceed without interference from the court. Secondly, what would happen in the year 2022 could not have been the subject matter of an application for certiorari filed in the year 2020.

10 Thirdly, the jurisdiction of the Court of Appeal arises from article 134 (2) of the Constitution of the Republic of Uganda which provides that:

134. Court of Appeal of Uganda

(1)...

(2) An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law.

15 This was further enacted under section 10 of the Judicature Act which provides that the Court of Appeal hears appeals from decisions of the High Court:

10. Jurisdiction of the Court of Appeal.

20 An appeal shall lie to the Court of Appeal from decisions of the High Court prescribed by the Constitution, this Act or any other law.

In other words, an appeal lies from the decision striking out or dismissing the Applicants appeal on the question of whether the application before the High Court was time barred. Granted, this court has power to grant an application for an injunction pending appeal or an interim order of injunction pending the hearing of the substantive application. However, the Applicants in its application clearly indicated that its lease is expired. The hydrant facility that it wants to stop the Respondent from decommissioning has nothing to do with the grant of an exclusive contract to TriStar Transport LLC. Further the hydrant plant is on a lease which is for consideration of an application for its renewal of term before the Uganda Land Commission, the lease having expired. There is therefore no decision of the Respondent which can be challenged in this court by way of an appeal in a matter that could have been raised by way of judicial review. The question of the

25
30

5 imminent threat to decommission the hydrant facility operated by the Applicants can be the subject matter of fresh proceedings in the High Court.

In the premises, I accept the submissions of the Respondent's counsel that the Applicants application lacks merit. It is hereby dismissed with costs.

10 Dated at Kampala the 22nd day of Feb 2022



Christopher Madrama Izama

Justice of Appeal