THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 0127 OF 2021

AUDITOR GENERAL::APPELLANT

VERSUS

ACHIMO RUTH ETIBOT:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Soroti before Masalu-Musene, J. dated the 24th day of March, 2021 in Miscellaneous Cause No. 4 of 2021)

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF CHEBORION BARISHAKI, JA

This appeal is against the decision of the High Court (Musene, J.) allowing a judicial review application filed by the respondent against the appellant.

Background

Between 2018 – 2020, the appellant conducted investigations concerning Soroti University, and thereafter issued three separate reports setting out the findings from those investigations, namely: 1) Forensic Investigation Report into alleged diversion of funds from Capital Development Fund by Officials of Soroti University Quote No. DCG. 46/47/074 dated March 2020 (Forensic Report); 2)

Special Investigation Report by the Auditor General on the Internal Audit Findings for Soroti University for the Period 1st April 2018 to 30th June 2018 Quote No. DCG. 79/340/01 dated 23rd November, 2018 (Special Investigation Report); and 3) Report of the Auditor General on the Financial Statements of Soroti University for the Year ended 30th June 2018 Quote No. DCG. 158/293/01 dated 18th December 2018 (Annual Report).

During the time of the making of the reports, the respondent was the University Secretary for Soroti University, and also its Accounting Officer. She was aggrieved with the findings made in the appellant's reports and felt that they wrongly implicated her in commission of financial misconduct. Therefore, she filed an application for judicial review, challenging the reports as illegal, irrational and motivated by malice and bad faith against her. The respondent further claimed that she was not given a fair hearing during the investigations prior to the making of the reports.

The respondent's application for judicial review was combined with an application for extension of time, given that the time within which the application ought to have been filed had expired.

The appellant opposed the respondent's application, and claimed that the impugned reports were issued following investigations that were lawfully carried out. The appellant further claimed that the findings in the reports were accurate. The appellant also denied that the making of the reports was motivated by malice and bad faith against the respondent. The appellant also averred that the

investigators sought information and also obtained documents from the respondent during the investigations. The appellant further claimed that in any case, the Auditor General does not sit as a quasi-judicial body when conducting investigations and accordingly does not make any decisions that can be challenged under judicial review. The Auditor General merely issues reports setting out expert opinion and recommendations designed to correct Government accounting systems. Further, that the reports of the Auditor General are intended for Parliament's consumption, and cannot be challenged in the Courts of law before Parliament has considered them, as was the case in the present case. The appellant urged the High Court to find no merit in the application and to dismiss it.

In his ruling, the learned trial Judge allowed the respondent's application for extension of time and entertained the judicial review application. He found that the appellant acted illegally, with irrationality and was motivated by malice and bad faith when he issued the impugned reports. Further, that the appellant acted illegally, because, although he was required to table the impugned reports before Parliament before proceeding to rely on them, this had not been done. Further, the learned trial Judge found illegality in the fact that the Chairperson Council – Soroti University Mr. Lubanga F.X, who requested the appellant to conduct the investigations that culminated in making the impugned reports had no mandate to request the investigations. Moreover, that the request by Mr. Lubanga was not backed by a resolution of the University Council. The learned trial Judge also found that the appellant acted ultra vires in the making of the impugned reports

in that the reports contained matters outside the scope of the requested investigations, for example, the appellant made findings on the procurement of legal services from M/S Okurut and Co. Advocates, which had not been requested by Mr. Lubanga. Further, with respect to the findings by the appellant on the lawfulness of the procurement of legal services from M/S Okurut and Co. Advocates, the learned trial Judge found that the appellant had no authority to determine issues on lawfulness of a procurement process and that such issues ought to be determined by the PPDA Authority or tribunal in quasi-judicial proceedings or by the Attorney General in his capacity as Chief Legal Advisor to Government, or by the Courts exercising judicial power. The learned trial Judge also found that the respondent was not given a fair hearing when the appellant conducted the relevant investigations, and that the appellant had only invited the respondent to offer responses to queries raised in an internal audit report, which was not enough as the respondent ought to have been given an actual hearing. The learned trial Judge also found that the investigations against the respondent were actuated by the bad faith of Mr. Lubanga who had a bad working relationship with the respondent and wanted to remove her from office.

In view of his findings, the learned trial Judge allowed the application for judicial review and granted the following remedies – he made declarations that the three impugned reports were illegal and of no legal consequence; issued an order of certiorari quashing all the three impugned reports; made a prohibition order preventing the respondent from implementing the findings in the impugned reports; made a declaration that the findings in the impugned reports relating to

procurement of legal services from M/S Okurut and Co. Advocates were irregular for non-compliance with the procedure for challenging procurement processes set out in the PPDA Act. The learned trial Judge also made a declaration that the appellant acted illegally and ultravires when he extended his audit or investigation beyond the scope of the requested special audit, thereby usurping the mandate of the Attorney General, the Procurement and Disposal of Public Assets Authority and the High Court of Uganda when he made findings that the procurement of legal services from M/S Okurut and Co. Advocates was irregular. He further made a permanent injunction to restrain the appellant from implementing, relying on or disseminating the impugned reports for the benefit of third parties other than Parliament. The learned trial Judge also granted the costs of the application to the respondent.

The appellant was dissatisfied with the decision of the learned trial Judge and now appeals to this Court on the following grounds:

1. **The learned trial Judge erred in law and fact when he misdirected himself on the law and facts of the case and held that Miscellaneous Cause No. 4 of 2021, Achimo Ruth Etibot vs. Auditor General was competent, filed on time and that it was not premature and or misconceived at law.**

2. **The learned trial Judge erred in law and fact when he misdirected himself on the law and facts of the case and held**

that the respondent had locus standi to file Miscellaneous Cause No. 4 of 2021, Achimo Ruth vs. Auditor General.

3. **The learned trial Judge erred in law and fact when he issued orders with far reaching effects on the audit function affecting other Government institutions, Ministries, Agencies and Departments not party to the dispute before the trial Court.**

4. **The learned trial Judge erred in law and fact when he held that the Special Audit of Soroti University prepared by the appellant was procedurally irregular and illegal because it was done at the request of the Chairperson of the University who had no legal mandate or authority to request for the same.**

5. **The learned trial Judge erred in law and fact when he held that all the three impugned reports of audits of accounts of Soroti University prepared by the appellant were made for the benefit of Chairperson of the University Council and not Parliament as required by law and of no legal consequence.**

6. **The learned trial Judge erred in law and fact when he held that all the three impugned reports of audits of account of Soroti University prepared by the appellant contained decisions capable of judicial review and issued an order of certiorari quashing them.**

7. **The learned trial Judge erred in law and fact when he misdirected himself on the law and facts of the case and held that the statutory immunity of the appellant under Section 38 (1) and (2) of the National Audit Act, 2008 did not cover the three impugned reports of accounts of Soroti University prepared by the appellant.**

8. **The learned trial Judge erred in law and fact when he misdirected himself on the law and facts of the case and held that the statutory immunity of the appellant under Section 38 (1) and (2) of the National Audit Act, 2008 only covers reports of the appellant submitted by letter to Parliament.**

9. **The learned trial Judge erred in law and fact when he misdirected himself on the law and facts of the case and held that the respondent was not accorded a hearing by the appellant when he issued all the three impugned reports of the accounts of Soroti University and a decision to prosecute the respondent.**

10. **The learned trial Judge erred in law and fact when he misdirected himself on the law and facts of the case and held that the respondent was not accorded a hearing by the appellant when he issued his forensic report of the accounts of Soroti University and a decision to prosecute the respondent.**

11. **The learned trial Judge erred in law and fact when he misdirected himself on the law and facts of the case and held that the forensic report of the appellant was issued for the purpose of prosecuting the respondent rather than and or before submission to parliament and debated (sic).**

12. **The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and came to the wrong conclusions on all issues framed for determination of the trial Court.**

The appellant made the following prayers to this Court: 1) that the appeal be allowed and the ruling and orders of the High Court be set aside; 2) that the respondent pays the costs of the appeal and of the suit in the High Court.

The respondent opposed the appeal.

Representation

At the hearing, Mr. Okello Oryem Alfred, learned counsel, represented the appellant. Mr. Oluka James, also learned counsel, represented the respondent.

The parties' written submissions are on record and have been considered in this judgment.

Appellant's submissions

The appellant argued the grounds of appeal in the following order: ground 1, ground 2, grounds 4 and 5 jointly, grounds 6, 9 and 10 jointly, grounds 7, 8 and 11 jointly and lastly ground 3 independently.

The appellant contends in ground 1 that the learned trial Judge erred in law and fact when he misdirected himself on the law and facts of the case and held that Miscellaneous Cause No. 4 of 2021 was competent, had been filed on time and was neither premature nor misconceived at law. Counsel submitted that this ground arises out of one of the issues –whether the application was competent – which was framed for determination in the trial Court, and in counsel's view, that issue should have been resolved in favour of the appellant for several reasons. First, the application was filed out of time contrary to Section 36 (7) of the Judicature Act, Cap. 13 and Rule 5 of the Judicature (Judicial Review) Rules 2009, which stipulates that an application for judicial review shall be brought promptly and in any event within three months 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. The three relevant reports were respectively made on 10th March 2020; 23rd November, 2018 and 18th December, 2018, and thus the last of the three reports was issued on 10th March, 2020, which was at least 9 months before the filing of the judicial review application, and thus the application was time barred. Counsel further submitted that the respondent acknowledged that she filed the application out of time which was why she filed an application for extension of time. Counsel

however pointed out that the learned trial Judge did not specifically rule on the application for extension of time for filing the applicant's application, and he had only suggested in his judgment that the time requirements for filing judicial review applications are directory and not mandatory, which was an error of law and fact. Secondly, counsel submitted that the learned trial Judge erred in entertaining the respondent's omnibus application that combined an application for judicial review and another for extension of time without ruling on its propriety. He further submitted that in any event, the High Court had no power to extend the time set by the Judicature Act as was in the present case where the Judicature Act fixed timelines for bringing judicial review applications. Counsel referred to the authority of ***Makula International Limited vs. His Eminence Cardinal Nsubuga and Another, Supreme Court Civil Appeal No. 4 of 1981*** for the principle that a Court has no residual or inherent jurisdiction to enlarge a period of time laid down by statute.

Thirdly, counsel submitted that in any case as the High Court did not grant an order for extension of time, and there was also no order for validation of the belatedly filed judicial review application, the Court should not have entertained the judicial review application. Fourthly, counsel submitted that in any case, the High Court made no determination on whether there were sufficient reasons for extending time to file the respondent's judicial review application. Counsel contended that the respondent did not demonstrate any sufficient reasons as to why she filed her application late, and thus the applicant was guilty of dilatory conduct. Counsel asserted that the principle is that extension of time cannot be

granted where a party has been guilty of dilatory conduct. He relied on ***Horizon Coaches Ltd vs. Rurangaranga and Another, Supreme Court Criminal Appeal No. 18 of 2009 (unreported).*** Counsel urged this Court to find that the respondent's judicial review application ought to have been struck out. Counsel submitted that ground 1 of the appeal ought to succeed.

In support of ground 2, counsel contended that the respondent had no locus standi to institute a judicial review application to challenge the relevant reports. This was for two reasons. First, the respondent was not the auditee for the relevant reports, but Soroti University was. In counsel's view, the respondent not being the auditee could not sustain an action against the appellant for audits undertaken in respect to Soroti University, even if she had any legal grievance, especially since the respondent had not been called by Parliament to answer the audit issues. Secondly, it was submitted that the respondent had no locus standi because to grant the reliefs sought by the respondent in the judicial review application would result in the respondent insulating herself from criminal proceedings based on the report. Counsel contended that the respondent should have proceeded by challenging the evidential value of the relevant reports during the criminal proceedings but not in a judicial review application. For those reasons, counsel invited this Court to find that the learned trial Judge erred in law and fact in finding that the respondent had locus standi to institute the judicial review application.

Counsel submitted that the learned trial Judge erred in finding that report from the special audit of Soroti University, one of the three relevant reports, was

procedurally irregular and illegal on the ground that it was made at the request of the Chairperson of the university who had no legal mandate or authority to request the Auditor General to make that report. Counsel submitted that the Office of the Auditor General is an independent constitutional office created under the provisions of Article 154 (3) and 163 (3) of the 1995 Constitution, and in accordance with the National Audit Act, 2008, with one of its functions being to conduct investigations and audits in respect of public funds. In exercise of his constitutional mandate, the Auditor General acts independently and does not act at the invitation or direction of anyone.

Counsel further contended that as stated in ground 5 of the appeal, the learned trial Judge erred in finding that the relevant reports were made for the benefit of the Chairperson Soroti University and not for the benefit of Parliament. Counsel contended that under Article 163 (4) of the 1995 Constitution and under Section 19 (3) and (4) of the National Audit Act, 2008, all reports made by the Auditor General including the impugned reports must be submitted to Parliament and are made or published for the benefit of Parliament. Furthermore, all reports of the Auditor General are not actionable in a Court of law before Parliament has considered them and taken appropriate action. Thus, in the present case, the respondent's judicial review application was misconceived as it was filed before Parliament considered the impugned reports.

Counsel submitted that the impugned reports did not contain decisions amenable to judicial review. He asserted that reports of the Auditor General are mere findings, recommendations, suggestions or observations. Furthermore,

that the Auditor General, while performing its constitutional function, does not have to perform any quasi-judicial hearing beyond examination of accounting processes and documents. Counsel cited ***Bank of Uganda, COWE, Court of Appeal Civil Appeal No. 35 of 2007*** in support of his submissions.

Furthermore, counsel submitted that in any case, the respondent, as the accounting officer for Soroti University, being the host of the audit process was given a fair hearing, either personally or by official delegation. The evidence contained in the affidavit of Bashir Lubega was that the appellant heard the respondent personally in the process of making the report. In respect of the forensic report requested by the Police Criminal Investigation Department, Lubega averred that the appellant interviewed the respondent about matters that required her response. The respondent will also be heard by the trial criminal Court concerning the allegations in the report. In addition, that a forensic audit is by its very nature investigation of crime and is done for purposes of gathering materials for possible prosecution, and it is common for police, Parliament and other Government departments to request for such audits.

With regards to the investigations prior to the appellant making the second report – the special investigation report, counsel submitted that the appellant was also given a hearing. He pointed out that the purpose of the audit covered in that report was to verify an internal audit report and to test its veracity, and that, when, during the relevant audit there was a need for clarifications from the respondent, the same were sought and obtained. Counsel further submitted that

the findings in the special investigation report did not implicate the respondent in any wrong doing, and thus, the respondent had no legal grievance.

As for the third report – the Report of the Auditor General on the Financial Statements of Soroti University for the year ended 30th June, 2018, counsel submitted that this report arose from an annual statutory audit such as the Auditor General ordinarily conducts. Further, that during the investigations prior to the making of the third report, explanations were sought from the respondent regarding procurements and payments. Further still, that the third report was not prompted by the special investigation report of the respondent. Counsel further submitted that all findings and recommendations in the third report were directed at the respondent in her capacity as University Secretary and also to the management of Soroti University, and were also submitted for the benefit of Parliament. In addition, counsel submitted that the third report did not contain any findings or decisions against the respondent personally, but only contained advice to the respondent on how to ensure proper financial management at Soroti University.

In view of the above submissions, counsel prayed that this Court resolves grounds 6, 9 and 10 of the appeal in favour of the appellant.

Counsel submitted that the appellant enjoys absolute and full immunity from court proceedings by virtue of Section 38 (2) of the National Audit Act, 2008 in respect of the reports made by him including the three impugned reports because all reports made by the appellant are made for the benefit of Parliament.

Counsel asserted that all reports by the appellant are intended to correct government accounting systems and are also final on the subject of audit. Counsel therefore urged this Court to find that the learned trial Judge erred when he found that the statutory immunity under the National Audit Act, 2008 did not cover the three impugned reports and that such immunity only covers reports by the appellant that are submitted by letter to Parliament. On the principle of statutory immunity of the Auditor General, counsel urged this Court to consider the following persuasive High Court authorities – ***Dott Services Ltd vs. Attorney General and Auditor General, Miscellaneous Cause No. 125 of 2009***; *and* ***Comtel Integrators Africa Ltd vs. Auditor General, Miscellanous Cause No. 17 of 2010.***

Furthermore, counsel submitted that all reports of the Auditor General are submitted to Parliament for debate and consideration through the Office of the Auditor General's institutional structure, whether they are accompanied by letters addressed to parliament or not. Therefore, to counsel, the learned trial Judge erred when he reasoned that in the absence of letters submitting the impugned reports to Parliament, those reports were not meant for Parliament but rather for the benefit of the Chairperson Soroti University.

Counsel further submitted that the learned trial Judge erred when he found that the forensic report was issued for the purpose of prosecuting the respondent rather than and or before submission to Parliament for debate. He asserted that when the contents of the report are considered, nowhere does it state that the purpose of the report was for prosecution of the respondent. The report was

prepared at the request of the Uganda Police and it is the latter which was the beneficiary of the report. Moreover, to counsel, the choice of whether to prosecute the appellant or not was the exclusive choice of the Director of Public Prosecutions and not the appellant. Further still, counsel asserted that an audit report is meant to be used only as evidence in the prosecution process, and does not as of itself contain or be a decision to prosecute, as was held by the learned trial Judge.

It was Counsels further submission that the learned trial judge erred when he issued orders which had far reaching effect on the audit function of the appellant regarding other Government institutions. That the orders and remedies the judge issued should have been limited to the issues framed and not beyond as they did in this case.

Respondent's submissions

The respondent argued the grounds of appeal as follows: grounds 1, 2 and 3 independently in that order; followed by grounds 4 and 5 jointly; then grounds 6, 8, 9, 10 and 11 jointly and lastly ground 12 independently.

Counsel submitted that the appellant's submission that the learned trial Judge had no jurisdiction to extend time to allow the respondent to file her judicial review application was incorrect. He submitted that the High Court could exercise its jurisdiction under Section 36 (7) of the Judicature Act, Cap. 13 and Rule 15 of the Judicature (Judicial Review) Rules, 2009 to extend time for filing a judicial review application if there was sufficient reason for doing so. For his

submissions, counsel relied on two High Court authorities – ***Philadelphia Trade & Industry Ltd vs. Kampala Capital City Authority, High Court Revision No. 15 of 2012; and Koluo Joseph Andrew and 2 Others vs. Attorney General and Others, Miscellaneous Cause No. 106 of 2001 (both unreported)***. Counsel thus asserted that because the relevant Rules allow for extension of time, the appellant's reference to the ***Makula International case (supra)*** was misconceived as in that case the statute specifically barred the extension of time.

Counsel further submitted that there was sufficient reason to explain the respondent's late institution of the judicial review application, which, according to the respondent's uncontroverted evidence, was due to the fact that she only became aware of the impugned reports on 8th October, 2020 after the prosecution disclosed that the reports were part of the evidence to be relied on in criminal proceedings against her. Prior to that, the respondent had had no idea of the existence of the impugned reports because the appellant had neither informed her that she was being investigated nor served her with a copy of the report. Counsel cited the authority of ***Hon Justice Anup Singh Choudry vs. Attorney General, High Court Civil Suit No. 57 of 2012 (unreported)*** for the principle that failure to communicate the decision that is later challenged under judicial review constitutes a good reason for the delay in filing a judicial review application and also a good ground for allowing an application for extension of time for filing the application. In addition, counsel submitted that the respondent raised serious illegalities in her application for judicial review which required

consideration by the High Court despite the application having been filed late. Counsel cited the following illegalities – the fact that Mr. Lubanga, the Chairperson of Soroti University Council who initiated the investigations leading to the making of the first report had no authority to do so; the three impugned reports having been made for the benefit of other persons not being Parliament contrary to Article 163 (4) of the 1995 Constitution and Section 19 (3) of the National Audit Act, 2008. In counsel's view, the highlighted illegalities, most of which were admitted by the appellant could not be ignored in favor of technicalities, and that an illegality can be raised at any time and when raised a court cannot simply ignore it. For this submission counsel relied on ***Nakachwa vs. National Drug Authority and Another, High Court Miscellaneous Cause No. 186 of 2017 (unreported)*** where Musota, J. held to the effect that an illegality cannot be time barred under Rule 5 of the Judicature (Judicial Review) Rules, 2009. In the premises, the learned trial Judge rightly extended time following an application by the respondent, albeit the application was an omnibus application considered filed jointly with the main judicial review application. Counsel contended that the respondent suffered no prejudice and thus the application was properly entertained.

As for the appellant's submission that the learned trial Judge did not make a finding on the issue of extension of time, counsel submitted that this was not. He referred to paras 20 and 25 at page 8 of the learned trial Judge's ruling where the learned trial Judge noted that the provision setting out the three-month timeline for filing judicial review applications was directory and not mandatory,

and thereafter went ahead to determine the applicant's application for judicial review.

Furthermore, counsel submitted that the learned trial Judge rightly overlooked technicalities and decided the respondent's applications on its merits and this had also benefitted the appellant as the affidavit of Bashir Lubega deponed in reply could have been struck out on the technicality that it did not contain a written authorization from the Auditor General. In addition, counsel referred to the authority of ***Banco Arab Espanol vs. Bank of Uganda [1999] 2 EA 22*** for the principle to the effect that the interests of administration of justice require that disputes be decided on their merits and that errors or lapses relating to failure to adhere to rules should not debar a litigant from pursuing his or her rights, unless those errors or lapse render the hearing process difficult or inoperative. Counsel contended that the above holding is in conformity with Article 126 (2) (e) of the 1995 Constitution which stipulates that in adjudicating cases of both civil and criminal nature, shall, subject to the law, administer substantive justice without undue regard to technicalities.

Counsel submitted that ground 1 of the appeal should fail for lack of merit.

Counsel submitted, in reply to ground 2, that the respondent had locus standi to institute the application for judicial review because she was prejudiced by several procedural issues surrounding the impugned reports as well as by the substance of those reports. Counsel cited the following issues – the appellant making three reports for the period of one year yet he was only required to make

one report; the appellant failing to submit the reports to Parliament for whose benefit they were made but instead submitting those reports to third parties; the appellant making the first report to verify an internal audit report affecting the respondent yet she had no knowledge about said report, according to counsel, the internal audit report was the malicious work of the University Vice Chancellor and Chairperson Council, both of whom had a bad working relationship with the respondent. Counsel submitted that the reports covered matters not included in their terms of reference and the findings on those matters were malicious, false and misrepresented. Counsel contended that it was the above issues that caused injustice to the respondent and resulted to her losing her job and also left her facing criminal prosecution, and had thus prompted the respondent to file the judicial review application.

In respect to the appellant's submission that the respondent had no locus standi as she was not the targeted auditee for the relevant reports, counsel submitted that while the respondent may not have been the auditee, she was nonetheless affected by the findings in the said report which gave her locus standi to bring the relevant application.

Counsel submitted that ground 2 of the appeal must also fail.

Counsel submitted that the learned trial Judge's ruling did not in any way interfere with the constitutional mandate of any government institution as alleged in ground 3 of the appeal. Counsel contended that the learned trial Judge's ruling only required that the appellant acts in accordance with the law

by submitting the impugned report to Parliament before the same could be relied on, whether in criminal proceedings or elsewhere.

Counsel submitted that ground 3 of the appeal ought to be disallowed.

Counsel submitted that under Section 13 (3) and (4) of the National Audit Act, 2008, the power to request the appellant to conduct a special audit and make a report is only vested with Parliament of Uganda and the responsible minister. Further that under Article 163 (4) of the Constitution and Section 19 (3) of the National Audit Act, 2008 all audit reports made by the appellant must be submitted to Parliament which will consider them and recommend any appropriate action. Counsel further submitted that in the present case, the evidence indicates that the first report was made at the request of the Chairperson of the Soroti University Council, who in view of the above highlighted legal provisions had no mandate to request that report, and also that in view of the evidence, the appellant's submission that the impugned reports were made for the benefit of Parliament are farfetched.

Furthermore, counsel submitted that the appellant's submission that the second report – the statutory report, was served on Parliament via an institutional mechanism was also misplaced, because in counsel's view, proof of service of a report on Parliament is only by evidence that a copy of the report was transmitted to the Speaker of Parliament as was done in the case of ***Dott Services Ltd vs. Attorney General and Another, High Court Miscellaneous Cause No. 125 of 2009 (unreported).*** Counsel further submitted that failure to serve the

impugned reports on Parliament indicated that the reports were not made for the benefit of Parliament as the appellant claimed, but rather that the reports were made for the benefit of Mr. Lubanga and the Police CID Department.

Counsel also submitted that the Auditor General does not enjoy the statutory immunity provided for under Sections 38 and 39 of the National Audit Act, 2008, in respect of reports made for the benefit of persons other than Parliament, as the three impugned reports were.

For the above reasons, counsel asserted that grounds 4 and 5 of the appeal must fail.

In reply to the appellant's submissions on grounds 6, 9, 10 and 11, counsel submitted that the impugned reports of the appellant could rightfully be challenged by judicial review as the respondent did. To counsel, the contents of the impugned reports contained decisions that could be the subject of quashing orders and not mere recommendations as submitted for the appellant. Further that the findings in the impugned reports were born out of illegality, irrationality, malice and bias against the respondents. For example, the investigations leading to the making of the reports were conducted in contravention of several of the respondent's constitutionally guaranteed rights, namely – the right to a fair hearing and the right to fair treatment when appearing before an administrative body. As regards the violation of the respondent's right to a fair hearing, counsel contended that the appellant did not hear the respondent when making the special investigative audit report, and neither was the respondent given a copy

of the allegations in the Soroti University internal audit report, which formed the basis of the special investigative report. As for the right to be treated fairly when appearing before an administrative body, counsel submitted that this right was violated because the respondent refused to avail to the appellant a copy of the special investigative report. Counsel contended that the making of the reports led to the unjust removal of the respondent from her office as an accounting officer which was unlawful. He cited the authority of ***Mafabi vs. Attorney General, Constitutional Petition No. 14 of 2012*** where the Court stated that it is unlawful to dismiss a person from office basing on allegations that were not presented to him.

Counsel further submitted that the although the respondent was invited to give clarifications during the making of the special investigative report, that did not qualify as a fair hearing, especially considering that the clarifications were sought after the making of the report. In counsel's view, the conduct of the appellant purporting to interview the respondent a year after making the special investigative report, pointed to malice on the appellant's part. Further that although the respondent could have received a hearing from Parliament on the contents of the report, she was not given a chance and instead, the reports were forwarded to police to commence criminal proceedings against the appellant, without Parliament considering them.

Counsel further submitted that the appellant was guilty of disregarding the law in several respects which justified the filing of an application for judicial review, among which was that the appellant made the three impugned reports for the

benefit of other third parties and not Parliament as envisaged under the law. Counsel contended that the impugned reports formed the basis for institution of criminal proceedings against the respondent. In this context, counsel referred to the principle set out in ***Makula International Ltd vs. Cardinal Nsubuga [1982] HCB*** that an illegality, when brought to the attention of the Court has to be considered.

In relation to the appellant's submissions on ground 8, counsel for the respondent submitted that the statutory immunity accorded to the appellant does not extend to reports of the auditor general that are tainted by illegality like the three impugned reports.

Counsel concluded by submitting that the Court ought to disallow grounds 6, 8, 9, 10 and 11.

Counsel submitted that ground 12 was a general ground that is covered by the earlier submissions in respect of the other grounds.

Appellant's submissions in rejoinder

In response to the respondent's submission that the impugned reports formed the basis for the criminal proceedings instituted against her, and that the criminal proceedings were in any case premature because the impugned reports have not been discussed by Parliament, counsel for the appellant submitted that the issue surrounding the criminal proceedings cannot be properly considered in civil proceedings like those in the lower Court or the present appeal. Counsel further contended that moreover it was the DPP and not the appellant who was

responsible for instituting the relevant criminal proceedings and therefore, the appellant was not answerable. Furthermore, counsel contended that the respondent could have presented her objections against the impugned reports during trial in the relevant criminal proceedings.

Counsel reiterated the earlier submissions in support of the appeal.

Resolution of Appeal

I have carefully studied the Court record and considered the submissions of counsel and the law and authorities cited in support thereof.

I reiterate that pursuant to Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10, this Court, when considering a first appeal, is expected to reappraise the evidence and draw inferences of fact. Further, this Court when hearing a first appeal has a duty to review the evidence of the case and to reconsider the materials before the trial Judge and thereafter make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it. See: ***Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.***

The appellant raises 12 grounds of appeal in his Memorandum of Appeal. However, in my view, those grounds can be covered under the following three issues:

1. **Whether the respondent's application for extension of time for filing her judicial review application should have been denied.**

2. Whether the respondent's judicial review application should not have been entertained.

3. Whether there were grounds for allowing the respondent's application for judicial review.

5. What remedies are available to the parties

I will consider issue 2 first, followed by issue 3, issue and lastly issue 4.

Issue 2 – Whether the respondent's judicial review application should not have been entertained. This issue covers grounds 2, 5, 6, 7 and 11 of the appeal. The gist of grounds 2 and 6 is that the respondent's application was improper as a judicial review application. I note that judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. See: ***Halsbury's Laws of England/Judicial Review (Volume 61 (2010) 5th Edition).*** The High Court's judicial review jurisdiction is exercised pursuant to Section 36 (1) of the Judicature Act, Cap. 13 which grants the High Court powers to grant the common law judicial review prerogative orders of mandamus, prohibition and certiorari. Section 36 (1) provides:

36. Prerogative orders.

(1) The High Court may make an order, as the case may be, of—

(a) mandamus, requiring any act to be done;

(b) prohibition, prohibiting any proceedings or matter; or

(c) certiorari, removing any proceedings or matter to the High Court.

The granting of orders in judicial review is based on three separate grounds which were articulated by Lord Diplock in ***Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935***, as follows:

> *"...one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.*
>
> ...
>
> *By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should*

be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal."

Furthermore, it is worth pointing out that as Lord Brightman stated in the decision of the UK House of Lords in ***Chief Constable of the North Wales Police vs. Evans [1982] 3 All ER 141***:

"judicial review is concerned, not with the decision, but with the decision-making process."

In ***Attorney General vs. Tinkasimiire and Others, Court of Appeal Civil Appeal No. 208 of 2013***, this Court quoted with approval the following passage from the ruling of the High Court (Mwangusya, J). about the nature of judicial review:

> *"The purpose of judicial review is concerned not with the decision but the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality."*

The Court then stated:

> *"As rightly observed by the trial Judge, in judicial review proceedings, the Court is not required to vindicate anyone's rights but merely to examine the circumstances under which the impugned act is done to examine whether it was fair, rational and or arrived at in accordance with rules of natural justice."*

I have endeavored to set out the principles on judicial review because the gist of the appeal is that the respondent's application did not satisfy the principles for judicial review. I will consider each of the points raised by the appellant.

First, the appellant claimed in ground 6 of the appeal, that none of the three reports made by the appellant which were challenged in the respondent's judicial review application contained "decisions" of such nature as can be challenged

under judicial review. Counsel for the appellant's submission was that reports of the Auditor General do not contain "decisions" but are mere findings, recommendations, suggestions or observations. This calls for a discussion of whether reports of an auditor generally, or those of an Auditor General, specifically contain "decisions" that can be challenged under judicial review. According to the ***Merriam-Webster Dictionary, 2022***, auditing involves a formal examination of an organization's or individual's accounts or financial situation. When understood in that context, auditing is akin to investigating, and therefore, it can be stated that the auditors investigate accounts and make reports to set out the findings from their investigations.

At common law, decisions to investigate and make reports of the investigations could be challenged for unfairness. This duty is traceable to the authority of ***Re Pergamon Press Ltd [1970] 3 All ER 535***, a case concerning investigations by inspectors appointed to investigate matters relating to a company. Lord Denning, M.R had this to say:

> *"It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings: see Re Grosvenor and West End Railway Terminus Hotel Co Ltd. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings: see Hearts of Oak Assurance Co Ltd v A-G. They do not even decide whether there is a prima facie case, as was done in Wiseman v Borneman.*

But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding-up of the company, and be used itself as material for the winding-up: see Re SBA Properties Ltd.

Seeing that their work and their report may lead to such consequences, I am clearly of opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, although they are not judicial, nor quasi-judicial, but only administrative: see R v Gaming Board for Great Britain, ex parte Benaim."

The principle stated in the above authority is that those persons whose duty it is to investigate and report, bear a duty of fairness towards people who may face significant consequences arising from their investigations. I reiterate here that one of the grounds of judicial review is procedural impropriety or failure of a decision maker to act with fairness in the decision making process.

In the present case, one of the allegations was that the Auditor general, in conducting investigations concerning the financial activities of Soroti University and making findings adversely affecting the respondent, stated without giving her a fair hearing, amounted to breach of the duty to act fairly. Thus, it would

appear, at least at common law, that the Auditor General's decision to carry out the said investigations and produce the three impugned reports, could be challenged for unfairness, by way of judicial review.

Furthermore, contrary to the submission of counsel for the appellant that, because the Auditor General, when conducting audits, does not exercise a quasi-judicial function, his reports cannot be challenged under judicial review, it must be noted that at common law, the fact that a body did not exercise quasi-judicial functions was not conclusive to preclude its decisions from being challenged under judicial review. In the ***Re Pergamon case (supra)***, Sachs, LJ stated as follows:

> *"...it is, as recent decisions have shown, not necessary to label the proceedings 'judicial', 'quasi-judicial', 'administrative' or 'investigatory'; it is the characteristics of the proceedings that matter, not the precise compartment or compartments into which they fall—and one of the principal characteristics of the proceedings under consideration is to be found in the inspectors' duty, in their statutory fact-finding capacity, to produce a report which may be made public and may thus cause severe injury to an individual by its findings."*

I stated earlier that decisions to investigate and make reports, like most auditors do, could at common law be challenged under judicial review. However, in respect to the Auditor General, it is worth considering whether he enjoys statutory immunity against suits related to reports made by him. Counsel for

the appellant submitted on ground 7 of the appeal that the impugned reports were covered by statutory immunity which shielded the Auditor General from Court proceedings concerning reports made by him. Counsel for the appellant based his submission on the provisions of Section 38 of the National Audit Act, 2008, which provides:

> **38. Protection of Auditor General's Report from court proceedings.**
>
> **(1) All reports of the Auditor General published for the benefit of Parliament shall be treated as Parliamentary reports and shall enjoy all privileges accorded to Parliamentary reports.**
>
> **(2) For the avoidance of doubt, no civil or criminal proceedings shall be instituted against the Auditor General on the basis of any report published by him or her for the benefit Parliament.**

The office of the Auditor General is established under Article 163 of the 1995 Constitution which provides:

> **163. Auditor General.**
>
> **(1) There shall be an Auditor General who shall be appointed by the President with the approval of Parliament and whose office shall be a public office.**
>
> **(2) ...**
>
> **(3) The Auditor General shall—**

(a) audit and report on the public accounts of Uganda and of all public offices, including the courts, the central and local government administrations, universities and public institutions of like nature, and any public corporation or other bodies or organisations established by an Act of Parliament; and

(b) conduct financial and value for money audits in respect of any project involving public funds.

(4) The Auditor General shall submit to Parliament annually a report of the accounts audited by him or her under clause (3) of this article for the financial year immediately preceding.

(5) Parliament shall, within six months after the submission of the report referred to in clause (4) of this article, debate and consider the report and take appropriate action.

(6) Subject to clause (7) of this article, in performing his or her functions, the Auditor General shall not be under the direction or control of any person or authority.

(7) The President may, acting in accordance with the advice of the Cabinet, require the Auditor General to audit the accounts of anybody or organisation referred to in clause (3) of this article.

(8) ...

(9) ...

(10) ...

The Auditor General's main function under the provisions of Article 163 (3) (a) and (b) of the 1995 Constitution, is the carrying out of audits of public accounts. Under the National Audit Act, 2008, the Auditor General is empowered to carry out different types of audits, including: special audits and investigations, or other audits he considers necessary under section 22; audits of accounts of the central government under section 15; audits of accounts of local governments (Section 16; audits of accounts of public organisations section 17; and value for money audits section 21. The Auditor General is expected to make a report on the audits made under sections 15, 16, 17 or 18, and submit the same to Parliament. See: section 19 (3) of the National Audit Act. Under Section 19 (4), Parliament is expected to debate and consider them. Further, the auditor general is expected to make an annual report on all the other audits, including special audits and investigations and value for money audits, and submit a report of the same to Parliament under Article 163 (4) of the Constitution for debate and appropriate action by Parliament. All reports of the Auditor General are expected to be submitted to Parliament, and Parliament is expected to debate and consider them before taking proper action. In my view, it is in that context that reports of the Auditor General are said to be for the benefit of Parliament, because, they assist Parliament to scrutinize public expenditure.

I therefore accept the submissions for the appellant that, upon proper interpretation of Article 163 and the provisions of the National Audit Act, 2008,

as a matter of law, all reports of the Auditor General are made for the benefit of Parliament. I would allow ground 11, as in my view, the primary use of a report of the Auditor General is not for prosecution of any person.

Further still, in my view, it does not matter who the originator of the request for an audit made by the Auditor General is. Once an audit is undertaken by the Auditor General, he immediately owns it and must submit a report to Parliament. In that way, the report will have been made for the benefit of Parliament. In the present case, it is immaterial that the investigations resulting in the Special Investigation Report were requested by Mr. Lubanga or that those leading to the Forensic Report were originated by the Uganda Police, what matters is that the two reports are reports from special audits and investigations of the type envisaged under Section 22 of the National Audit Act, 2008 and that such audits are made for the benefit of Parliament. I would allow ground 5 of the appeal.

Therefore, having earlier stated that all reports by the Auditor General, including the impugned reports are made for the benefit of Parliament, I would find that the three impugned reports in this case were protected by statutory immunity granted to reports of the Auditor General under Section 38 of the National Audit Act, 2008 and thus the learned trial Judge should not have sustained the respondent's suit against the appellant. I would answer issue 2 in the affirmative.

The manner of resolution of issue 2 disposes of the entire appeal and renders it unnecessary to discuss the rest of issues; 1, 3 and 4.

I would therefore allow the appeal and set aside the ruling and orders of the learned trial Judge, and substitute instead an order dismissing the respondent's suit in the trial Court, with costs to the appellant.

Since my brothers Musota and Madrama, JJA agree, the Appeal succeeds with costs to the appellant.

It is so ordered.

Dated at Kampala this 16th day of March 2023.

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 0127 OF 2021

AUDITOR GENERAL :: APPELLANT

VERSUS

ACHIMO RUTH ETIBOT :::::::::::::::::::::::::::::::::::::: RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Cheborion Barishaki, JA.

I agree with his analysis, conclusions and orders he has proposed.

Dated this 16th day of March 2023

Stephen Musota
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MUSOTA AND MADRAMA, JJA)

CIVIL APPEAL NO 0127 OF 2021

AUDITOR GENERAL} .....APPELLANT

VERSUS

ACHIMO RUTH ETIBOT} ..... RESPONDENT

(Arising from Soroti High Court Miscellaneous Cause No. 4 Of 2021, decision of Masalu Musene J dated 24th March 2021)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Cheborion Barishaki, JA.

I concur that in the circumstances, the Auditor General enjoys immunity from civil proceedings as commenced in the High Court. I further agree with my learned brother that the appeal be allowed with the orders he has proposed and for the reasons he set out in the judgment and I have nothing useful to add.

Dated at Kampala the 16th **day of** March **2022**

Christopher Madrama

Justice of Appeal