THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO 3 OF 2011

1. **PEARL IMPEX (U) LTD }**
2. **EDISON MUBANDIZI T/A MIRAMBA TRADING STORES }**
3. **AFRISTOCK COMPANY LTD }………………………………….……….. PLAINTIFFS**

VERSUS

1. **THE ATTORNEY GENERAL OF UGANDA}**
2. **CITY COUNCIL OF KAMPALA }…………………………… DEFENDANTS**

BEFORE HON MR. CHRISTOPHER MADRAMA

RULING

The is an application by originating summons brought under order 37 rule 6 and 8 of the CPR supported by the affidavit of Edison Mubandizi Kwesiga for determinations of three questions namely:

1. Whether or not a foreign trader can validly be issued with an entry permit by the Directorate of Immigration without a certificate of remittance of BOU in accordance with section 10 (5) (6) (7) and (8) of the investment Code Act

2. Whether or not a foreign Trader can validly be issued with a trading license by the City Council of Kampala without a certificate of remittance from BOU in accordance with section 10 (5) (6) (7) (8) and (9) of the Investment Code Act.

3. Whether entry permits and trading licenses issued by the above authorities without the requisite certificate of BOU are liable to cancellation.

Counsel Kavuma Terrence submitted that the plaintiffs are interested in the proper construction of the aforementioned provisions of the of the Investment Code Act cited above Vis-à-vis the issuance of entry permits and trade licenses by the defendants without compliance with the Investment Code Act. That the interests of the plaintiffs are primarily business interests. The plaintiffs are engaged in the business of general trade in Kampala and have interest in conducting trade in an environment that is not permeated by foreign traders who have not complied with the provisions of the Investment Code Act. In other words the implication is that foreign traders who have not complied with section 10 of the Investment Code Act are issued licenses unlawfully.

Counsel for the Applicants submitted that order 37 rule 6 empowers this court to issue an originating summons in cases such as the present one where the plaintiffs seek a simple construction of the provisions of the Investment Code Act with regard to the practice of issuing entry permits to foreign traders and trading licenses without a certificate of remittance from the Bank of Uganda. Counsel contended that this is a simple and straightforward interpretation of the Investment Code Act and does not necessitate calling of additional evidence outside the affidavit in support of the summons. He referred to the cases of **Jaffer Ramji and Another vs Abdu Hussein Jaffer (1957) EA 699** for the proposition that originating summonses are primarily designed for at page 701:

> "the summary and Ad hoc determination of points of law or construction or of certain questions of fact or for obtaining specific directions, usually for safeguarding or guidance of persons acting in a fiduciary capacity or acting under the general directions of the court, such as trustees, administrators or (as here) the court's own execution officers. That dispatch is an object of the proceedings is shown by order XXXVI which provides that they shall be listed as soon as possible and heard in chambers unless adjourned by the judge into open court. "

Counsel submitted that originating summonses have been used the High Court in interpreting substantive legislation such as the Investment Code Act. He referred to **Makabugo vs Francis Drake Serunjogi (1981) HCB 58** a decision of Hon Justice Benjamin Odoki, judge of the High Court as he then was and holdings number 5 and 6.

He contended that this court is empowered to issue OS No 3 of 2011 since it is seeking only the construction of the Investment Code Act and the plaintiffs have shown sufficient interest as required by Order 37 rule 6 to warrant the issuance of the summons.

At the hearing I asked counsel whether the words *written instrument* appearing under order 37 rules 6 of the Civil Procedure Rules include Acts of Parliament and whether he had given the Defendants statutory notice.

On the second issue concerning statutory notice counsel referred the court to annexure "E" to the affidavit in support of summons. Annexure E is a statutory notice to the Attorney General and Kampala City Council. It shows that both defendants received statutory notice on 30th of March 2010. As far as the words "other written instrument" is concerned Counsel submitted that this provision has been interpreted by the High Court **E Makabugo vs Francis Drake Serunjogi [1981] HCB 58.**

I have carefully considered the submissions of Counsel for the Applicant. With due respect to the decision of the High Court in **E Makabugo vs Francis Drake Serunjogi [1981]** HCB 58 rule 6 of order 37 was not considered in that case. In that case the issue before court arose when counsel for the defendant raised a preliminary objection to the effect that "the OS raised questions of the existence or validity of the contract of sale of land, and these could not be determined by way of originating summons under order 34 rule 3. On the other hand the plaintiff argued that the plaintiff was not challenging the existence of the contract by its terms as described by the defendant in the transfer form, the only matter in dispute being the piece of land the plaintiff gave to the defendant. The court held that order 34 rules 3 of the Civil Procedure Rules permit the vendor of immovable property at any time to take out originating summons returnable before the judge

in chambers for determining any question which may arise in respect of any requisitions or objections or any claim for compensation or any other questions arising out of or connected with the contract of sale, not being a question affecting the existence or validity of the contract. Holding number 5 of the report when put in context deals with construction of a statute arising from questions of interpretation. It does not deal with an application to only interpret a provision of the statute. It reads “normally originating summons is a suitable procedure where the main point at issue is one of construction of that document or statute or is one of pure law.” Rule 3 referred to above is equivalent to two order 37 rule 3 of the current revised Civil Procedure Rules. Consequently the above case, the court was dealing with the equivalent of order 37 rules 3 of the civil procedure rules.

The wording of rule 6 is very different it provides as follows:

> 6. Summons by the persons interested in deeds or wills.
>
> “any person claiming to be interested under a deed, wills or *other written instrument* may apply in chambers by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested.” (Emphasis added)

In the first place, the head note specifies that the provision deals with a summons by persons interested in deeds or wills. I have also considered the case of **KULSUMBAI GULAMHUSSEIN JAFFER RAMJI AND ANOTHER v. ADBULHUSSEIN JAFFER MOHAMAD RAHIM AND OTHERS [1957] EA 699**. The case was brought under the provision of the rules which deals with “the determination of any question arising in the administration of the estate or trust.” This is the equivalent of order 37 rule 1 (h) of the current revised Civil Procedure Rules. The case arose from Zanzibar and the Windham, CJ quoting from (In Re Giles (2) (1890), 43 Ch. D. 391, agreed that:

> “was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual

> way, not to enable the court to determine matters which involve a serious question."

At page 701 the CJ further quoted from Salemohamed Mohamed v. P/N. Saldanha about originating summons as:

> "such procedure is primarily designed for the summary and 'ad hoc' determination of points of law or construction or of certain questions of fact or for obtaining specific directions, usually for safeguarding or guidance of persons acting in a fiduciary capacity or acting under the general directions of the court, such as trustees, administrators or (as here) the court's own execution officers. That dispatch is an object of the proceedings is shown by order XXXVI which provides that they shall be listed as soon as possible and heard in chambers unless adjourned by the judge into open court. "

My readings of rule 6 of order 37 of the Civil Procedure Rules casts doubts in my mind as to whether rule 6 can be invoked purely for the interpretation of an Act of Parliament without showing the interest the applicant has in the "written instrument". Firstly those cases never interpreted the equivalent of order 37 rule 6 of the Civil Procedure Rules. They should therefore be taken to refer to cases arising within the other rules invoked which may involve a construction of a statute. I.e. the construction of a statute may arise when a vendor or purchaser takes out originating summons under order 37 rule 3 "for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale, not being a question affecting the existence or validity of the contract." Such cases may involve the construction of a statute or a pure point of law. However rule 6 of order 37 should be considered on its merits.

> "any person claiming to be interested under a deed, wills or other written instrument may apply in chambers by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested.

Firstly, there has to be a person claiming to be interested under a deed, will or written instrument. The operating words as far as this provision is concerned are "written instrument". The person claiming must claim an interest under the written instrument. The term "written instrument" is construed *ejusdem generis* as being of the nature of things such as deeds or wills, powers of attorney or other written instruments. It is hard to conceive whether legislature intended it to be applied to an application to interpret a law and have not used the terms *Act of Parliament* or *provision of any law*". The words *written instrument* are not defined by the Civil Procedure Act, neither is it defined by the Interpretation Act cap 3. On the other hand the words "Act" or "Act of Parliament" is specifically defined under section 2 (a) to mean with reference to legislation the law made by Parliament. Secondly the word "statutory instrument" is defined under section 14 of the Act to mean powers conferred by an act of Parliament and exercised by the President, a Minister or any other authority to make proclamations, rules, regulations, by laws, statutory orders or statutory instruments, any document by which that power is exercised is to be known as a statutory instrument. Why did legislature not use the words "Act of Parliament" or "statutory instrument" or provision of laws?

Secondly, rule 6 of order 37 envisages a tangible interest under an instrument such as a power of attorney. It is therefore inconceivable to read under the words "any other written instrument" an Act of Parliament or Statutory Instrument. There must be a kind of right or interest conferred by the document or written instrument giving a standing to the applicant to invoke order 37 rule 6.

The previous judgments have referred to English cases which interpret a slightly different wording of provisions dealing with originating summons. Moreover as we will note the provisions of the English civil procedure rules have changed over time while that of East African Countries are worded differently and have remained the same as far as similar provisions to order 37 rule 6 of the CPR are concerned. Generally speaking leave to issue originating summons will not be given where there are serious disputes of fact or serious questions to be tried. In **Mucheru v Mucheru [2000] 2 EA 455 (CAK),** the Court of Appeal of Kenya held that the procedure by originating summons is intended to enable simple matters

to be dealt with in a quick and summary manner. They interpreted the Kenyan order 36 rule 1 which provides:

> "any person claiming to be interested in the relief sought as ... heir ... of a deceased person ... may take out ... an originating summons ... for such relief of the nature or kind following, as may by the summons be specified and the circumstances of the case may require, that is to say, the determination ... of any of the following questions:
>
> (a) any question affecting the rights or interest of the person claiming to be ... heir ...".

They noted that:

> What is more, the issues involved in the originating summons were, as the Learned Judge herself, as already shown, admitted, of a complex nature and which should not have been dealt with by way of the originating summons as the Learned Judge did. As Newbold AVP espoused in his judgment in Bhari v Khan [1965] EA 94 at 101: "An originating summons is a form of legal proceedings designed to give in certain specific cases, a quick summary and inexpensive remedy". Newbold AgVP then went on at page 105 to observe as follows: "The other items were, however, certainly not matters which could be agitated on an originating summons under Order 36, and while Rules 9 and 10 of that Order permit of evidence being taken, this is only so if the matters in respect of which relief is sought can be disposed of in a summary manner".
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> Subsequently, in Kibutiri v Kibutiri [1982-88] 1 KAR 60 Law JA had this to say: "The procedure by way of originating summons is intended: 'to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question' "..... When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by

> ordinary suit . . . Finally, I would like to advise judges who have to deal with an originating

The Court quoted extensively from English cases. As far as the Uganda order 37 rule 6 is concerned, it is similar to but not the same as the English Order 5 rule 4. This can be gleaned from the case of **Re Old Wood Common Compensation Fund Arnett v Minister of Agriculture, Fisheries and Food and Others [1967] 2 All ER 1146** per GOFF J. It was argued in the case that the case raised a serious dispute of fact and was not convenient to be tried by originating summons but should proceed by a writ action. The learned judge quoted order 5 rule 4 at page 1148 bottom to 1149.

> " RSC, Ord 5, r 4(2) is in these terms:
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> "Proceedings—(a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or (b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons … "
>
> ...I do not have to be satisfied that the proceedings were wrongly commenced by originating summons, and indeed, with the exception of certain proceedings which must be begun by writ, there is a general paragraph in RSC, Ord 5, r 1 that, subject to the provisions of any Act and of the rules, proceedings may be begun by writ, originating summons, motion or petition. I do have to consider, however, whether for any reason the proceedings should be continued as if the matter had been begun by writ..."

Odgers Principles of Pleading and Practice in Civil Actions in the High Court of Justice. 27th Edition London Steven and Sons 1981 page 11 thereof provides for the foundation of originating summonses to interpret a provision of law. In the United Kingdom this is under order 5 rule 4 by 1980 which used to provide as follows:

> "(a) where the suit or principle question at issue is, or is likely to be, one of the construction of an Act or any instrument made under an act, or of any deed, will, contract or other document, or some other question of law, or
>
> (b) in which there is unlikely to be any substantial dispute or fact,"

The wording of the above rule is quite different from order 37 rule 6 of the Ugandan Civil Procedure Rules. The words instrument and Act are used separately. According to Odgers cited above the above actions in (a) and (b) are both ordinarily to be begun by originating summons unless the plaintiff intends to apply for summary judgment.

At page 325 of Odgers:

> "where the main point at issue is one of construction of a document or statute, or is one of pure law, then this is the appropriate procedure. It is not, however, appropriate where there is likely to be any substantial dispute of fact. It is also inappropriate if the plaintiff thinks that the action is one in which summary judgment can be obtained.

At 326…

> Before the recent revisions of the rules of the supreme court there was no general right to proceed by originating summons; but its simplicity and speed had led to a great and growing number of rules statutes prescribing this procedure. It is now, as we have seen above, available generally. Its merits lie in the fact that there are no pleadings or (in general) witnesses, the question for decision being raised directly by the summons itself, and the evidence being given by affidavit, and that often there is no necessity to resort to any interlocutory proceedings such as discovery.

Notwithstanding my finding that order 37 rule 6 does not directly cater for direct applications for the interpretation of legislation (An Act of Parliament of Statutory Instrument), I find that originating summons would be an appropriate procedure where the facts are not in dispute for the interpretation of statutory provisions. In this case, the plaintiffs have given statutory notice to the defendants who are

entitled to it. They have been put on notice as to the points of law for interpretation arising from section 10 of the Investment Code Act. Section 10 of the Investment Code Act Cap 92 provides as follows:

> **"10. Regulation of foreign investment.**
> (1) A foreign investor shall not operate a business enterprise in Uganda otherwise than in accordance with an investment licence issued under this Code.
> (2) No foreign investor shall carry on the business of crop production, animal production or acquire or be granted or lease land for the purpose of crop production or animal production; but a foreign investor may—
> (a) provide material or other assistance to Ugandan farmers in crop production and animal production; or
> (b) lease land for purposes of manufacturing or carrying out the activities set out in the Second and Third Schedules to this Act.
> (3) This section shall not be construed so as to deprive a foreign investor of any land acquired by or granted to him or her or of any interest in land accrued to him or her before the commencement of this Code.
> (4) The Minister may, on the advice of the authority and with the approval of Cabinet, by statutory instrument, exempt any business enterprise or class of business activities from the provisions of this section where, in the opinion of the Minister, it is necessary that for the purpose of ensuring a regular supply of raw materials the enterprise should lease land.
> (5) A foreign investor who is intending to engage in trade only shall not be required to comply with subsection (1) but shall—
> (a) incorporate a company with the Registrar General as is required by law;
> (b) deposit a sum of one hundred thousand United States dollars or its equivalent in Uganda shillings at the Bank of Uganda, which shall be specifically used for importation or direct purchase of goods for the business.
> (6) Upon compliance with subsection (5), the Bank of Uganda shall issue a certificate of remittance to the foreign investor.
> (7) A foreign investor who obtains a certificate of remittance under subsection (6) shall lodge an application, in writing, to the immigration department which shall contain the certificate of remittance and other information that may be required by the department.

> (8) Subject to compliance with the provisions of this section and the immigration laws, the immigration department may issue an entry permit to the foreign investor.
> (9) A foreign investor who obtains an entry permit under subsection (8) shall lodge an application, in writing, to the local authority where the business will principally be carried out for a trade licence.

The questions raised by the plaintiffs for interpretation would determine the correct procedure for issuance of entry permits and trading licences by the authorities to foreign investors. The only question left would be to determine whether there would be disputed facts. At this stage, all the averments of fact are that of the applicants. The plaintiffs assert in the affidavit of Edison Mubandizi filed in support of the summons at paragraph 5 thereof that the Directorate of Immigration and Kampala City Council respectively have been issuing entry permits and trading licences to foreign traders without the requisite certificate of remittance of Bank of Uganda. It is unfortunate that no instances are given of the issuances of such certificates by the defendant's servants. However paragraph 6 raises questions of interpretation as to whether issuances of trading licences and entry permits by Kampala City Council and the Directorate of Immigration respectively are in accord with the Investment Code Act. Notwithstanding the inadequacy of the affidavits as to concrete examples of issuance of licences without remittance certificate, I am of the view that the statute can be interpreted without such facts. For instance what if the defendants deny issuing such permits? The potential denial cannot stop the parties from interpreting the law for the benefit of law enforcement agencies and the public at large.

Secondly, where it is alleged that the law is being infringed or is likely to be infringed, there would be sufficient interest in a trader such as the plaintiffs to come to court to ensure that the law dealing with issuance of trading licences to foreign traders is enforced according to the letter of the law and not in contravention. Having sufficient interest or being interested is analogous to being aggrieved.

The traditional view is that a person aggrieved is one who has been injuriously affected in his rights or has suffered a legal grievance. In **Re Nakivubo Chemists [1979] HCB P.12** the terms "any person considering himself aggrieved" under section 82 (Now 83) of the CPA was held to mean a person who has suffered a

“**legal grievance”** The definition of the term is traced to the case of **Ex parte side Botham in re Side Botham (1880) 14 Ch. D 458 at 465 per James L.J where he states:** “But the words “*person aggrieved*” do not really mean a man who is disappointed by a benefit which he must have received if no other order had been made: A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has **wrongfully deprived him of something, or wrongfully affected his title.**

The Defendants servants are public servants and the general rule is that a citizen may move court for declarations that the actions of a public authority are *ultra vires* and affect the rights of citizens. A member of the public may come to court to ensure that the law is enforced or upheld. In the case of **Attorney General versus Independent Broadcasting Authority [1973] ALL ER 689** Lord Denning held at page 699 paragraphs C-D:

> “I have said so much because I regard it as a matter of high Constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way that offends or injures thousands of her majesty’s subjects, then in the last resort any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced.”

Lord Denning held that this gives any member of the public a right to come to a court of law. Lord Denning further held in the case of **Reg vs. G.L.C. Ex p. Blackburn [1976] 1 WLR 550** that a tax payer has locus standi to approach court where breach of public law is being committed and seek intervention**.** In this case, Mr. Blackburn filed a case in court alleging that pornographic films were being filmed in London and elsewhere and that such showing of grossly indecent films was an offence against the common law of England. Lord Denning had this to say: at pages 558 H – 559 A:

> "It was suggested that Mr. Blackburn has no sufficient interest to bring these proceedings against the G.L.C. It is a point, which was taken against him by the commissioner of Police… Who then can bring proceedings against when a public authority is guilty of misuse of power? Mr. Blackburn is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has. I think he comes within the principle, which I stated in McWhirter's case…"

Secondly, as far as having sufficient interest is concerned, breach of law by a public authority is actionable in common law. In the case of **Dawson vs. Bingley Urban Council [1911] 2 KB 149,** it was held by Farwell L.J. at page 156 that:

> "breach of a statutory duty created for the benefit of an individual or a class is a tortuous act, entitling anyone who suffers special advantages there from to recover such damages against the tortfeasor"

VAUGHAN WILLIAMS L.J. at page 153 held that although well established authorities make it clear that public bodies representing the public are not liable to be sued by an individual member of the public who has sustained injuries in consequence of the omission of such a body to perform a statutory duty created for the benefit of a class of which such a person is one, yet the Public body may be liable if by its acts, it alters the normal condition of something which it has a statutory duty to maintain and in consequence some person of a class for whose benefit the statutory duty is imposed is injured. The reason why the Public Body is liable in such a case is that it is not mere non-feasance but a misfeasance of the public body, which has caused the injury. Kennedy L.J. at page 159 held that the proper remedy for a breach of statute is an action for damages especially where the statute lays no rule for non-compliance or breach and in appropriate cases an injunction.

In this case what the member of the public or a class of the public in the person of the plaintiffs is interested in, is, the interpretation of a statute and enforcement

law. They aim is to determine whether the law is being implemented properly. They certainly have interest in the matter. I see no prejudice to the defendants in adopting the procedure of originating summons to establish the proper procedure for granting of trading licences and issuance of entry permits to foreign traders. In many respects there is no need to try questions of fact in interpreting the statutory provision and obtaining declarations as to what the law is.

The originating summons is therefore issued accordingly and will be fixed for hearing in chambers.

Dated at Kampala the 9th of March 2011

Christopher Madrama

Judge