THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT – 00 – CC- ME – 0108 – 2012

ARISING FR0M HCT – 00 – CV – CS – 0917 - 1997

1 GOODMAN AGENCIES LTD }
2 EMMANUEL HATANGI MABAZI}
3 FELESI LEONIDAS }
4 JANXIER BUSOGI} .....APPLICANTS/JUDGMENT CREDITORS

VERSUS

1. **ATTORNEY GENERAL}**
2. **TREASURY OFFICER OF ACCOUNTS}**

MINISTRY OF FINANCE} .....RESPONDENT/JUDGMENT CREDITORS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

RULING

The Applicants brought this application under the Judicature (Judicial Review) Rules, 2009 for an order that the Applicants/plaintiffs be granted an order of mandamus to compel the Attorney General and Treasury officer of Accounts Ministry of Finance to carry out their statutory duty to pay **Uganda shillings 14,485,547,842/=** and costs of the High Court and taxed costs of the proceedings to the Applicants. The Applicants seek an order for the Respondent to appear before the court to show cause why they should not pay the above sums and costs of the application. Finally the Applicants in the alternative seek orders that the Respondent execute a bank guarantee to secure the decreed amount with costs.

The grounds of the application are that the Applicants are decree holders entitled to **Uganda shillings 14, 485,547,842/=** together with taxed costs of the proceedings/application for judicial review. Judgment was entered against the Respondent's in constitutional petition No. 03 of 2008 arising from High Court civil suit No. 719 of 1997 wherein the judgment confirmed the consent judgment entered by the High Court which judgment debt is due for payment. The Applicant's lawyers made several written demands to the Respondent for payment no avail. The application for mandamus/judicial review was made without undue delay. As a result of the various proceedings in the matter the Applicants having incurred costs and the Respondent has not made any payments towards the said costs and interest on the decreed sum. The Applicants contend that the Respondents have no lawful or plausible excuse not to pay the sums decreed as no appeal lies from a consent judgment. The Attorney General appealed from the judgment of the Constitutional Court against the award of interest by that court only. The Applicant extracted a decree and certificate of order against government but the Solicitor General failed and/neglected to countersign the order of the Registrar Execution and Bailiffs. It is contended that the Applicant's business operations have been stifled for a period of over 14 years contrary to the rules of natural justice.

The application is supported by the affidavits of Mr. Hakeem Muwonge, Mr. David Bagorogoza and Mr. Nicholas Were. The summary of the averments in the affidavits are that the Applicants executed a consent judgment in High Court civil suit No. 719 of 1997 with the Attorney General granting the Applicants a sum of Uganda shillings 14,485,527,842/= on 2 September 2005 as the Attorney General. Subsequently on the 20th of October 2010 the Constitutional Court of Uganda in Constitutional Petition No. 3 of 2008 delivered judgment in favour of the Applicants. The petition had challenged the order of the trial judge in adding Hassa Agencies Ltd to the consent judgment. The addition of Hassa Agencies Ltd was set aside as unconstitutional null and void *ab initio* and proceedings of the trial judge were expunged from the court record. The Constitutional Court also ruled that the petitioner is at liberty to undertake execution process in respect of the consent judgment executed on the 2nd of September 2005 in HCCS No. 719 of

1997. The Constitutional Court ordered the Respondent's pay interest at the rate of 24% per annum from the date of judgment till payment in full. Costs were awarded against the Attorney General with a certificate for two Counsels.

Despite several notices of demand and service of the certificate of order for payment against the government, the Respondent have failed and/or neglected to pay. Furthermore they aver that in miscellaneous application number 34 of 2011 arising from High Court civil suit number 719 of 1997, in an application for judicial review by the Applicants/judgment creditors against the Attorney General and the Treasury officer of accounts Ministry of finance, the court ruled that there was non-compliance with section 19 of the Government Proceedings Act because the Applicant's application lacked a specific decree and certificate of order to pay only the amounts in the consent decree which is not appealable. Consequently the court ruled that the application for mandamus was premature and the Applicant's application was struck out with no order as to costs.

Thereafter the Applicant made several efforts to have the certificate of order and decree signed by the Solicitor General but she refused and/or neglected to do so. The deputy registrar executions and bailiffs summoned all the parties involved to settle the decree and on 16 September 2011 ordered that the decree extracted conformed to the consent judgment and required all the parties to the consent judgment to sign the decree. As a result of the numerous proceedings the Applicants have incurred costs and the Respondent's has omitted to make any payment to defray the said costs and interest on the decreed sum. The Applicants further filed a certificate of order against the government.

The affidavit in reply is sworn by Elison Karuhanga a State Attorney in the Attorney General's Chambers. He agrees that a consent judgment was executed between the Applicants and the Attorney General on 2 September 2005 in full and final settlement of High Court Civil Suit No. 719 of 1997. On 12 September 2005 another party Messrs Hassa Agencies Ltd applied to the High Court to be made a party to the consent judgment and on 14 November 2005 the High Court granted an order adding Hassa Agencies Ltd to the consent judgment as a judgment creditor. The first Applicant was dissatisfied with the decision of the

court and petitioned the Constitutional Court in Constitutional Petition No. 03 of 2008 challenging the addition of Hassa Agencies Ltd as a party to the consent judgment. The Constitutional Court allowed the petition of the first Applicant on the 20th day of October 2010. Subsequently the Applicant filed HCMA No. 34 of 2011 for mandamus to issue against the Respondent and the application was dismissed as being prematurely brought. The Attorney General contends that the Applicant's application is defective, misconceived and lacks merit. Consequently prays that is just and equitable for the application to be denied in the interest of justice. Subsequently the Attorney General filed a deposition by Permanent Secretary Ministry of Finance/Secretary to the Treasury Mr C.M. Kassami in which the following averments are made. In each financial year the government of Uganda puts aside money for satisfaction of court awards issued against the government. Money is released in instalments by Ministry of Finance to Ministry of Justice and Constitutional Affairs to settle court awards on a first-come first-serve basis. The government of Uganda does not have sufficient funds to clear all court awards and there are many other judgment debtors who are lined up for payment. An order to pay the Applicants ahead of the already existing claimants would be unjust in the circumstances. He further avers that the second Respondent's has no authority to withdraw any monies from the consolidated fund except to meet expenditure charged on the fund by the Constitution, or by an Act of Parliament. The Permanent Secretary further contends that no monies can be withdrawn from the consolidated fund unless the withdrawal has been approved by the Auditor General and in a manner approved by Parliament. Mr Nicholas Were the managing director of the first Applicant in his deposition in rejoinder reiterated the earlier facts deposed to by the other deponents. He avers that the Applicant has already extracted and filed its certificate of order against the government. This was only frustrated by the Solicitor General who despite all correspondences refused, neglected or ignored to endorse the certificate of order against government and should be held in "serious contempt of court".

At the hearing of the application Counsels James Okuku and Justin Semuyaba represented the Applicants while Kosia Kasibayo State Attorney represented the

Respondent. By consent of the parties section 37 of the Judicature Act was added on as one of the provisions under which the application had been brought.

Learned Counsel for the Applicant Mr Justin Semuyaba reiterated the facts in the affidavits in support of the application as set out above. He submitted that the Applicants requested the registrar by letter dated 17th January 2012 to summon all parties to sign a decree. There are a series of letters including letter dated 16th August 2011, summoning parties to appear before her worship the registrar of the Commercial Court. The Attorney Generals representative wrote a letter that they could not appear on 22 August 2011. The registrar then referred the matter to the execution Department on 25 August 2011 the registrar summoned the parties to appear on 16 September 2011. On 16 September 2011 the Solicitor General wrote that they could not appear. However learned Counsel for the Attorney General Mr Kasibayo who appeared verbally agreed with the contents of the decree. Subsequently letters were written to the Solicitor General to endorse the same but she refused to sign. Thereafter miscellaneous application number 12 of 2012 came up and the ruling of the court is attached and relied on to support the application.

The Applicant filed this application on the 28th of June, 2012 and raised the issue of the refusal of the Solicitor General to sign. The registrar signed the Decree and a certificate of order has been served on the Attorney General. Counsel submitted that the Attorney General has refused to pay. Counsel further submitted that in HCMA No. 34 of 2011, the court ruled that an application for judicial review was time bound or has limitation periods. Secondly section 37 of the Judicature Act gives the court wide powers to make orders as appropriate in the circumstances. Counsel further contended that the Solicitor General has acted in contempt of court by refusing to sign the court papers. For principles applicable to contempt proceedings he relied on the case of **Stanbic Bank and others vs. Commissioner General Uganda Revenue Authority**.

Counsel Okuku agreed with his colleague and submitted that that the explanation in the affidavit of the Secretary to the Treasury should be disregarded. This is because the Applicants were deprived of property. Under article 26 of the

Constitution of the Republic of Uganda one cannot take property and dictate how to pay for it. Counsel referred Court to article 126 of the Constitution to consider the circumstances of the case. He wondered whether government has a right to say that they do not have 14 billion to pay the Applicants. He submitted that the Applicants have taken 17 years pursuing this case and that it was unjust to delay payment any further. He referred to **Constitutional Petition No. 1 of 1986 Frederick Ssempebwa verses Attorney General** for the proposition that the government cannot say they cannot pay after taking the property and that a judgment credit is property.

In reply learned Counsel Kasibayo submitted that in HCMA No. 34 of 2011 the court held that the application was premature. The court ordered the Applicant to comply with the requirements of the Government Proceedings Act. Even if the Solicitor General had refused to sign the decree, he submitted that rule 14 sets out the procedure. An application ought to have been made to the registrar for a certificate of order. This was only done on the 28th of June when the Applicant had filed an application without the certificate. Consequently the application was filed before a certificate of order had been obtained contrary to the rules and it was incompetent. It was only on the 11th of July when the matter came up that the Applicant hurried to follow the procedure to extract a Decree and certificate of order against the government. After extracting the Decree and certificate of order they served the Attorney General. The certificate of order was served on the Attorney General on the 12th July the day before the hearing and the application had been filed on the 28th of June 2012. The belated certificate cannot cure the application. In HCMA No. 34 of 2011 the court ruled that there must be a demand and a refusal to pay. Consequently the application is premature and this is a preliminary point of law.

Counsel contended that if the court finds that the Government Proceedings Act was complied with, judicial review orders are discretionary. The affidavit in opposition clearly shows that the government does not have the money to pay. He prayed that the court considers the circumstances.

As far as article 26 of the Constitution is concerned, even though it provides for prompt compensation article 153 and 154 provides that money cannot be spent without appropriation by Parliament. Counsel further submitted that the certificate of order was only served on the 12th of July, 2012. The affidavit of the Secretary to the Treasury avers that there is no money to pay. The court should consider the circumstances before determining the application as to whether the Secretary to the Treasury should be held personally liable for failure to pay the Applicants. The Judicature (Judicial Review) rules address time limits but in miscellaneous application No. 34 of 2012 the court doubted whether such time limits could apply to execution proceedings. The three months limit cannot be used to circumvent the law. There must be a demand, and a refusal to pay and this has not occurred. He prayed that the application is dismissed with costs.

Learned Counsel further submitted that the first Applicant Goodman Agencies Ltd is acting without instructions because Mr. Nicholas Were is not a director according to the decision of the high court in miscellaneous company cause number 44 of 2012 at page 10 last paragraph. Consequently there was no company resolution. Because he is not the proper party to bring the application, the application should be struck out with costs against him for wasting courts time. As far as the other Applicants are concerned the other objections should be sustained against them.

In rejoinder Counsel Justin Semuyaba submitted that any defiance of the registrar's orders is contempt of court because the registrar is a civil court under order 50 of the Civil Procedure Rules. He reiterated that the Solicitor General was in contempt of court by refusing to sign the decree. Secondly he contended that there are several decisions which showed that the court has the jurisdiction to compel the Secretary to the Treasury by mandamus. These are **Rwomushana vs. Attorney General civil suit number 8 of 2006; Shah Vs. Attorney General (1970) EA CA; Oil Seeds vs. Chris Kasaami** HCMA No. 136 of 2008. In **Attorney General vs. Osotraco Ltd** CA No. 32 of 2002 where it was held that the government should be treated like every other individual before the law. He contended that if the affidavit of the Secretary to the Treasury is considered, the Applicant will be out

of time under the Judicature (Judicial Review) Rules. As far as the question of directorship is concerned, it is an internal matter which is still under litigation.

In further rejoinder learned Counsel Okuku submitted that any matter which does not arise from the pleadings should not be considered. Secondly it was not proper to compare article 26 which deals with fundamental rights and freedoms with article 153 of the Constitution on the management of government bodies. The submission of learned Counsel for the Attorney General never addressed the issue raised by article 26 of the Constitution. The Applicants were deprived of property without prompt, adequate and prior compensation.

Ruling

I have carefully considered the above submissions and the pleadings and authorities submitted in support and opposition of the Applicant's application.

After the parties had addressed the court through their respective Counsels my attention was drawn a few weeks later to a circular in which judges from other divisions of the High Court were advised not to handle applications for judicial review and refer applications for judicial review to the Civil Division of the High Court. However these proceedings had already reached an advanced stage in that final submissions had been made and it was pending my ruling. Secondly it is an application for execution as opposed to an application for judicial review in the traditional sense of review of administrative action. It is doubtful whether applications to enforce the statutory duty to pay a judgment creditor cannot be handled by other divisions of the High Court. In the circumstances my task is to deliver the ruling on the application to avoid protracting the proceedings.

Secondly, the Applicant's case since my decision in **HCMA No. 12 of 2012 Eleko Balume, Kagabo Jean Claude and Joseph Simbizi vs. Goodman Agencies Ltd, Hassa Agencies Ltd and Attorney General** attracted press coverage. Particularly the New Vision published a series of articles for about a week in which it made comments about investigations being conducted by the Criminal Investigation Department about the consent judgment the subject of this application. It was reported inter alia that the directive to investigate the consent judgment, the

subject matter of this application was made sometime in the year 2011. None of this information featured in the affidavit of the Attorney General in reply to the Applicant's application and there is no application whatsoever to stay proceedings pending investigations or raising any of the allegations reported in the press. For instance it is reported that several officials from the Attorney Generals Chambers were interviewed by the CID. Among other things the press reported the "big players" in which I was included as the judge who ruled in MA 12 of 2012 quoted above. In for far as press freedom is a cherished fundamental right, they should endeavour to read the ruling to ensure accuracy of reporting and avoid comments on matters sub judice. Inasmuch as comments were being made about matters which were *sub judice*, and I read Newspapers, I have warned myself not to consider the press reports and for purposes of this ruling the press reporting has no bearing on my decision.

At the commencement of the proceedings I raised concerns about whether the Applicant had complied with the preliminary steps necessary for the grant of an order of mandamus against the government as stipulated in the ruling of this court in miscellaneous application number 34 of 2011 between the same parties and on the same subject matter which ruling was delivered on the 14th day of June 2011. In that ruling I stated as follows at page s16-17 thereof:

> It is therefore a prerequisite that the Applicant must show that it enjoyed a right. This right is specified by the decree of the court. Secondly, the Applicant has to show that a certificate of order against government has been extracted and duly served on the Respondents. Thirdly it must be shown that the Respondent's refused to honour the certificate of order against government by refusing to pay the amount decreed or specified in the certificate of order. In this case the certificate of order against government attached to the Applicant's application was issued by the registrar of the Court of Appeal on 15 November 2010. The certificate seeks to enforce the order of the Constitutional Court dated 28 October 2010 in Constitutional Petition No. 03 of 2008. It commands the Government to pay **Uganda shillings 14, 485, 547, 842/=** pursuant to the consent judgment of

2 September 2005 in High Court Civil Suit No. 719 of 1997 and interest at 24% per annum from the date of judgment till payment in full which amount altogether to grand total of **Uganda shillings 31, 868, 205, 252/=** the certificate of order against government reads:

> "I hereby certify that the above-mentioned sums only include the decretal sums without the taxed costs and any further interest that may accrue from time to payment from September until all payments are made in full. Enclosed is the calculation. How the amounts are developing from time to time in accordance with the orders of the constitutional court."

The calculations on the certificate of order show that the total interest amount to **Uganda shillings 17, 382, 657, 410/=.** There is no certificate of order specifically to enforce the consent judgment of the High Court as agreed in the scheduling conference. It is essential that the specific amount that is sought to be paid should be stated in the decree and certificate of order against the government. Secondly this has to be served on the Attorney General or Treasury officer of Accounts as provided for under section 19 of the Government Proceedings Act."

By the time of filing this application on the 28th of June, 2012, the Applicant had not complied with the requirement of obtaining a certificate of order against the government as spelt out in the previous ruling in miscellaneous application number 34 of 2011 quoted above. What the Applicant avers in the application and submissions of Counsel is that the Solicitor General refused to endorse the Decree. I do not agree with this submission because it was a consent judgment whose terms are specific and duly endorsed by the Attorney Generals chambers under the hand of the Solicitor General. Learned Counsel for the Applicant sought to rely on order 21 rules 7 of the Civil Procedure Rules. Order 21 rules 7 (2) of the Civil Procedure Rules requires a successful party in the High Court to prepare a draft Decree and submit it for approval to the opposite side who shall approve, or amended or reject it without undue delay. Where the draft is approved it is submitted to the registrar who on being satisfied that the Decree is drawn in

accordance with the judgment shall sign and seal the Decree accordingly. In case the parties do not agree with the terms of the Decree, the issue shall be settled by the judge who passed the judgment after hearing the parties if they opt to be heard. In my humble judgment order 21 rules 7 CPR applies to judgment delivered by a judge and not to a consent agreement endorsed by the court as a judgment of the court. The consent is a contract between the parties and the terms thereof are already approved by the written signature of the parties who endorsed the consent. The terms of the consent judgment are not in dispute and there was no requirement to revert back to the parties to approve a Decree arising from their written consent whose terms are spelt out in the consent. All that the registrar needed to do was to endorse the decree and ensure that it had agreed with the terms of the written consent agreement. Secondly a party is entitled to refuse to consent to a Decree so long as they dispute its terms. However, in this case there was no need for approval since the parties were supposed to extract a Decree from their own consent agreement. The Solicitor General cannot therefore be held in contempt of court. Thirdly, the Applicant has not complied with the requirements of section 19 of the Government Proceedings Act cap 77 which requires a successful party to extract a certificate of order against the government and serve it. They only belatedly tried to extract this order and as submitted by the State Attorney only belatedly served it on the 12th of July 2012 long after the current application had been filed. The application was heard on the 13th of July, 2012. It is therefore evident that the Applicant did not comply with the provisions of section 19 of the Government Proceedings Act as held in HCMA 34 of 2011 between the same parties. The court cannot reverse itself on the issue of the right procedure to be followed.

However, a critical analysis of the facts of the case and the consideration of the affidavit of the Secretary to the Treasury Mr. Chris Kasaami, makes it evident, in his affidavit in reply paragraphs 3, 4, 5, 6, 7, 8, and 9 that the government of Uganda does not have sufficient funds to clear all court awards. Secondly that he has no authority to withdraw any monies from the consolidated fund except to meet expenditure charged on the fund by the Constitution or by an Act of Parliament. Thirdly no money can be withdrawn from the consolidated fund

without approval by the Auditor General, in a manner approved by Parliament. In other words the Respondent has expressly made it clear that even if the certificate of order was served on the Secretary to the Treasury, they would have refused to pay on the grounds mentioned in the affidavit of the Permanent Secretary/Secretary to the Treasury. In those circumstances, it would be a technicality to insist on the requirement of service of the certificate of order against the government and a clear refusal to pay since in substance the Permanent Secretary has clearly expressed the Government position that it is unable to pay. In this case, the certificate of order against government was belatedly served one day before the hearing of the application. However in view of the affidavit in reply of the Permanent Secretary/Secretary to the Treasury, it is evident that the government was not ready to comply with the certificate of order against government anyway. Consequently, it is unnecessary to wait for a definite refusal to pay before the court can be moved again by dismissing this application for non compliance with section 19 of the Government Proceedings Act. The application in the circumstances and for further reasons that I will advance herein below can be addressed on its merits.

Secondly, learned Counsel for the Attorney General submitted that Mr. Were a director of the first Applicant Messrs Goodman Agencies Ltd was not a director according to the decision of the High Court. Consequently he contended that there was no proper application with regard to instructions to commence proceedings as far as the first Applicant is concerned. The Applicant's Counsels opposed this submission on the ground that it was not part of the pleadings and secondly that the question of whether Mr. Were was a director or not is an internal matter which cannot be raised by the Attorney General.

I have carefully considered the Attorney General's submission and it's my humble conclusion that the submission amounts to a preliminary point that would lead to no possible good. This is because there are four Applicants all seeking the same remedy with respect to the same amount of money against the Attorney General. These other Applicants further filed affidavits in support of the same application. The decreed amount has not been apportioned amongst the Applicants and is a

lump sum. The application has been made jointly for the same remedies. In those circumstances, it is unnecessary for me to consider the Attorney General's submission. Whichever way this decision goes, it would still affect the first Applicant even if argued by the other Applicants. The submission in objection if ruled upon would not render the application incompetent.

On the basis of the procedural requirements, I would have dismissed this application but for the submission of learned Counsel Okuku that the application of the Applicants raises questions of fundamental rights and freedoms in as far as the property rights of the Applicants were affected as stipulated in article 26 of the Constitution of the Republic of Uganda. This is countered by the submission of the State Attorney that money cannot be spent without appropriation by Parliament. It is therefore on the basis of these two points that this application would be decided.

Starting with the issue of fundamental rights under article 26 of the Constitution of the Republic of Uganda, I would start with the background of this matter contained in the judgment of the Constitutional Court in Constitutional Petition No. 3 of 2008 arising from High Court Civil Suit No. 719 of 1997 between Goodman Agencies Ltd as Petitioner against the Attorney General and Hassa Agencies (K) LTD as Respondent. The Constitutional Court held at page 14 of their judgment on the issue of whether joining HASSA Agencies to the consent judgment deprived Goodman Agencies of its proprietary rights in the judgment as follows:

> "… benefits of a judgment is property and an act to deprive a person of it, if without compensation is unconstitutional and void."

The court held that there were two exceptions where Goodman's possessory rights in the consent judgment may have been compulsorily taken under the Constitution and are if there was a public necessity or where the provision of the law catered for it. They went on to hold at page 20 that the trial judge should have respected the agreement between the parties. Finally the Constitutional Court held that the Petitioner who is the first Applicant in this proceeding is at

liberty to undertake execution process in respect of the consent judgment of the 2nd of September, 2005 in High Court civil suit number 719 of 1997 the subject matter of the petition with interest at the rate of 24% per annum from the date of that judgment till payment in full. The consent judgment did not have interest but interest was awarded on it by the Constitutional Court in their judgment dated 28th of October, 2010. In Miscellaneous Application No. 34 of 2011 this court noted that the Attorney General had appealed from the order awarding interest at 24% per annum to the Supreme Court, however the Attorney General could not appeal against the consent judgment under the provisions of section 67 (2) of the Civil Procedure Act and in had not appealed. On the other hand, the Constitutional Court had ordered that the Applicant be at liberty to execute the judgment as embodied in the consent decree. Last but not least the Constitutional Court noted that the background of the consent decree was the taking of 10 trucks by state agencies which formed the basis of the consent to compensate the affected persons. The property was taken without the consent of the owners thereof. Goodman Agencies Ltd inter alia had a right to sue under certain agreements referred to by the Constitutional Court. Therefore in the submission of learned Counsel for the Applicant article 26 of the Constitution was applicable.

The question of deprivation of property arose in the context of the submission of learned Counsel for the Attorney General that Government did not have money to pay and secondly that the Applicants did not comply with the provisions of the Government Proceedings Act. Specifically the contention of the Applicants Counsel is that under article 26 (2) (b) the compulsory taking of possession or acquisition of property is supposed to be made under a law which makes provision for prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property and secondly a right of access to a court of law by any person who has interest over the property. The contention of learned Counsel for the Applicant is that it is a constitutional requirement that before property of any person is taken over or compulsorily acquired, there has to be prompt payment of fair and adequate compensation prior to the taking of possession or acquisition thereof. Consequently the argument that the government does not have money to pay for other the

judgment creditors waiting to be paid is in breach of article 26 of the Constitution in so far as the requirement for prompt payment prior to the taking of possession of property is concerned.

Before reaching a conclusion on the above question, I have already held that the Applicants did not comply with the requirements of section 19 of the Government Proceedings Act cap 77. The Applicant's application was brought by way of an application for judicial review under the Judicature (Judicial Review) Rules 2009. The Judicature (Judicial Review) Rules provide additional remedies to the traditional prerogative writs of certiorari, prohibition and mandamus. These remedies include injunctions, declarations and damages. The traditional remedy of judicial review refers to a court's power to review the actions of other branches of government and the power to invalidate legislative and executive actions that are unconstitutional.

The right to apply to a court of law in respect of any administrative decision has been entrenched by the article 42 of the Constitution of the Republic of Uganda. Article 42 provides as follows:

> "Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her."

The article confers a right to be treated justly and fairly to any person appearing before an administrative official or body. This incorporates the traditional grounds for judicial review embodied in the principles of fair hearing. The right to be treated justly further incorporates the right to be treated in accordance with the law. Justice Geoffrey Kiryabwire in **Kasibo Joshua v Commissioner of Customs** H.C.M.A. 44 of 2004 considered the purpose of judicial review when he held that:

> "… judicial review is concerned not with the decision, but the decision-making process. Essentially judicial review involves an assessment of the manner in which the 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 principles of legality, fairness and rationality"

The principles of legality, fairness and rationality are by necessary implication incorporated in the right to be treated justly and fairly enshrined in article 42 of the Constitution. Article 42 further confers a right to any person appearing before any administrative official or body to apply to a court of law in respect of any administrative decision taken against him or her. The right to apply to the court of law in the said article may be read together with a similar right under article 50 of the Constitution which deals with the enforcement of fundamental rights and freedoms. Unjust or unfair treatment in the context of article 42 of the Constitution is a breach or infringement of a fundamental right or freedom. Article 50 gives the right to any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been *infringed or threatened* to apply to a competent court for redress which may include compensation. Article 50 (4) of the Constitution provides for:

> "Parliament to make laws for the enforcement of the rights and freedoms under this chapter."

The Judicature (Fundamental Rights & Freedoms) (Enforcement Procedure Rules) S1 No 55 of 2008 provided the procedure for enforcement of fundamental rights and freedoms. An application for enforcement of fundamental rights and

freedoms was by notice of motion. This has however been challenged in the case of **Bukenya Church Ambrose v Attorney-General, Constitutional petition No.26 of 2010** wherein the Constitutional Court struck out the Judicature (Fundamental Rights And Freedoms) (Enforcement Procedure Rules) because they had not been prescribed by Parliament. In other words, Parliament has not yet prescribed rules or the procedure for enforcement of fundamental rights and freedoms under article 50 of the Constitution of the Republic of Uganda. The Constitutional Court said:

> "our duty is to interpret article 50 (4) of the constitution…….in so doing, we must bear in mind the guiding constitutional interpretation principles…..that the constitution is to be read as a whole…with no one particular provision destroying another but supporting each other. Under article 50(4) by the use of the word "shall", the framers of the constitution made it mandatory that its only Parliament that is empowered by the Constitution to make laws for the enforcement of rights and freedoms….it isn't the role of any other body to do it except under delegated authority under article 79, which isn't the case here."

In the absence of a specific law prescribed by Parliament, the question is whether the Judicature (Judicial Review) Rules 2009 cannot be used in the enforcement of articles 26, 42 and 50 of the Constitution. A similar lacunae in the law was considered in the case of **Attorney General vs. Alli and Others (1989) LRC 474** at pages 525 – 526 The Court of Appeal of Guyana held per Harper J.A on procedures to approach court where there is a lacunae that:

> "In my view a citizen whose constitutional rights are allegedly being trampled upon must not be turned away from court by procedural hiccups. Once his complaint is arguable, a way must be found to accommodate him so that other citizens become knowledgeable of their rights …"

Furthermore in **Jaundoo vs. Attorney General of Guyana (1971) AC 972 at 982 – 983** Paragraphs F – H the Supreme Court of Guyana considered a constitutional provision similar to our article 50 and the words "apply to the High Court for redress". They held:

> "To "apply to the High court for redress" was not a term of art at the time the Constitution was made. It was an expression which was first used in the constitution of 1961 … These words in their Lordships views are wide enough to cover the use by an Applicant of any form of procedure by which the High Court can be approached to invoke the exercise of its powers. They are not confined to the procedure appropriate to an ordinary civil action, although they would include that procedure until other provision was made under article 19 (6). The clear intention of the constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of Parliament or the rule-making authority to make specific provision as to how that access should be gained…"

I am therefore persuaded by the above authorities that the Applicant's application and particularly the submission of learned Counsel James Okuku can be accommodated in the context of the Applicant's application. The Applicants further relied on section 37 of the Judicature Act which permits the High Court to grant an order of mandamus or injunction or appoint a receiver by interlocutory order in all cases in which it appears to the High Court to be just or convenient to do so. The provision confers jurisdiction on the High Court where it appears to be just or convenient to make the necessary order. It is therefore my holding that the High Court has jurisdiction to entertain the Applicant's application particularly

in light of section 33 of the Judicature Act. Section 33 of the Judicature Act provides as follows:

> "The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.

Consequently the only remaining question for determination emanates from articles 154 and 156 of the Constitution. Article 154 of the Constitution provides that no monies shall be withdrawn from the consolidated fund except to meet expenditure charged on the fund by the Constitution or an Act of Parliament or where the issue of the money has been authorised by an Appropriation Act, a Supplementary Appropriation Act or authorised by article 154 (4) of the Constitution. Secondly the State Attorney submitted that under article 154 (2) no monies are to be withdrawn from any public fund of Uganda other than the Consolidated Fund unless the issuance of those monies has been authorised by law. The word "law" has not been defined by article 257 of the Constitution. Article 257 defines "Act of Parliament" to mean a law made by Parliament. Consequently an issue may arise as to the meaning of the word "law" as used in article 154 (2) in the words "authorised by law". The question is whether the term "authorised by law" may include an order of the court. I will however not hazard an interpretation of the Constitution and will leave the question open. It can be seen that the words "authorised by law" is capable of the meaning that it includes an order made by a court of law authorised to made an order. This is because the words "Act of Parliament" is specifically defined possibly thereby ascribing a more general meaning to the words "authorised by law". Secondly article 154 specifically refers to "Acts of Parliament" thereby possibly giving a wider meaning to the words "authorised by law". I will however not conclude as it raises

questions as to interpretation of the Constitution which should be reserved for the Constitutional Court. Furthermore article 154 (3) provides that no monies shall be withdrawn from the consolidated fund unless the withdrawal has been approved by the Auditor General in a manner prescribed by Parliament. The question as to interpretation of the Constitution is not relevant to my decision as shall be demonstrated hereunder.

Another aspect is that the President may before an Appropriation Act in respect of any financial year is passed authorise the issuance of monies from the consolidated fund account for purposes of meeting expenditure necessary to carry out services of the Government. The issue that arises from the State Attorneys submission is therefore whether an order of mandamus would be in breach of article 154 of the Constitution in so far as the procedure for withdrawal of funds from the consolidated fund not authorised by an Appropriation Act or approved by the Auditor General as prescribed by Parliament would not have been complied with.

It is however apparent save for the meaning of the words "authorised by law" in article 154, whose meaning it is not necessary to determine in this application, that the Secretary to the Treasury would require authority of Parliament to withdraw funds from the consolidated fund permitting the Applicants application for payment.

In HCMA No. 34 of 2011 the court considered the nature of the prerogative writ of mandamus. H.W.R Wade in Administrative Law 5th Edition at page 630 examines the nature of the remedy of mandamus and writes that mandamus has provided the normal means of enforcing the performance of public duties by public authorities of all kinds and is normally granted on the application of a private litigant:

> "The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him. ...it is issued in the name of the crown from the court of King's Bench ordering the performance of a public legal duty. It is a discretionary remedy, and the court has full discretion to withhold it in unsuitable cases.

In the matter before court, the Attorney General has so far opposed two applications for an order of mandamus. Additionally the Attorney General supported a third application to set aside the consent judgment **MA No. 12 of 2012 Eleko Balume and Other**s (Supra) which application was dismissed for reasons given in that ruling and none of the parties appealed. Furthermore and as noted above, no appeal lies from a consent judgment. Secondly, the Attorney General only appealed against the award of interest at 24% by the Constitutional Court in Constitutional Petition No. 3 of 2008. Thirdly Hassa Agencies Ltd appealed against the order of the Constitutional Court striking it out as a party to the consent judgment. Hassa Agencies in theory cannot be averse to payment of money under the consent from which it seeks to benefit. The Constitutional Court however ordered that the Applicants are at liberty to enforce the consent judgment. The consent judgment can be enforced inter alia through an application to compel the Secretary to the Treasury to pay the decreed sum. In as much as the matter is pending in the Supreme Court as far as interest awarded on the consent judgment is concerned, and the issue of addition of Hassa Agencies Ltd to the consent judgment remains to be resolved, none of the parties have sought a stay of the order of the Constitutional Court that the Applicant be at liberty to enforce the judgment. **The order of the Constitutional Court is binding on the High Court**. Possibly having no right to appeal from a consent judgment the Attorney General could not pursue an application for stay of execution either in the Court of Appeal or the Supreme Court. The Attorney General has instead sought to oppose the application on the grounds discussed above.

The Applicants have raised a serious question of infringement of fundamental rights and freedoms in terms of article 26 of the Constitution of the Republic of

Uganda. The property the subject matter of the compensation awarded in the consent decree has not been paid for over 10 years from the alleged taking over of the property. It is in these circumstances that an application for mandamus in context of article 154 of the constitution seems inappropriate. The High Court has discretion whether to decline or issue an order of mandamus. In the final address the Applicants counsel referred me to a series of authorities were mandamus has been issued against the Secretary to the Treasury by the High Court of Uganda. **In Bennon Turyamureeba and 132 Others vs. Attorney General of Uganda and the Treasury Officer of Accounts/Secretary to the Treasury**, Ag. Justice Remmy Kasuleas he then was in miscellaneous application number 440 of 2005 held at page 4 of his ruling that the court was satisfied that the period of two years and eight months is more than sufficient time for the Respondent/judgment debtor's to satisfy the decree in full by paying **635,580,000/= Uganda shillings**. In the case of **Oil Seeds Uganda Limited versus Secretary to the Treasury** miscellaneous application no 126 of 2008 honourable Lady Justice Stella Arach, ruled at page 6 of the judgment that a clear legal right existed in the plaintiff who had a certificate of order against Government which the Government was under a duty to satisfy under section 19 of the Government Proceedings Act Cap 77. She issued the writ of mandamus against the Secretary to the Treasury to perform his statutory duty and effect payment in respect of the balance of **Uganda shillings 2,950,002,000/=**. Last but not least in the case of **Shah versus Attorney General (No.3) [1970] EA 543** it was held that a mandamus could issue against the Treasury Officer of Accounts to compel him to carry out a statutory duty cast upon him by section 19 (3) of the Government Proceedings Act.

This duty is cast by a certificate of order against the government issued and served upon the Secretary to the Treasury under the Government Proceedings Act. Such a certificate of order has now been served upon the Secretary to the Treasury and he clearly specifies that the government is unable to pay due to the requirements under article 154 of the Constitution the Republic of Uganda. I do not agree that a statutory duty to pay can be carried out in breach of article 154 of the Constitution. The court may order that the process of payment stipulated in the Constitution be commenced and complied with to enforce the consent

judgment. The secretary to the Treasury is under obligation to commence the process in order to comply with the Constitutional Provisions.

The High Court is further empowered to grant other kinds of remedies by section 33 of the Judicature Act.

In the premises, the Secretary to the Treasury is under obligation to commence the process of payment as embodied in the judgment of the court albeit a consent judgment. The process of payment is begun by laying a budget before the appropriate Constitutional Authority and obtaining the requisite approvals as stipulated in the Constitution. Additionally it is not sufficient for the Attorney General to oppose an application for mandamus in light of the fact that it endorsed the consent judgment. By endorsing the consent judgment the government had agreed to pay. The litigants cannot wait indefinitely while the duty to pay prompt and adequate compensation enshrined in article 26 of the constitution has clearly not been complied with by the state. Consequently the statutory duty of the Secretary to the Treasury include compliance with the duty to compensate the loss of trucks as represented in the consent judgment and consequential damages stipulated in the judgment by agreement of the Government. This duty is imposed by the certificate of order against the government which was served during the pendency of these proceedings and under the valid order of the Constitutional Court which has not been stayed. I must add that article 50 of the Constitution permits competent Courts to enforce fundamental rights and freedoms which are threatened as much as those violated or infringed. Can it be said that the rights represented in this application have not been violated by non payment for property taken over for over 7 years?

If the State had any serious misgivings to implement the consent they ought to have applied to the court to either stay proceedings or execution or even set aside the consent judgment on any valid grounds. I agree with Counsel James Okuku that under article 126 (2) (b) of the Constitution this court applies the principle embodied therein that “Justice shall not be delayed”. For now the Applicant’s application succeeds to the extent embodied in this ruling. In light of

the discretionary nature of the remedy sought the following declarations will issue in lieu of an order of mandamus.

1. The Applicants are entitled to be paid in accordance with the decree of the court executed by consent of the parties save for matters which are pending in the Supreme Court i.e. the award of interest at 24% per annum. The Secretary to the Treasury shall accordingly commence the process of payment as held in this ruling in accordance with law.

2. The consent decree represents property interests protected by article 26 of the Constitution of the Republic of Uganda as held by the Constitutional Court in Constitutional petition number 03 of 2008.

3. Each party will bear its own costs of the application.

Ruling delivered this 31st day of August 2012

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Justin Semuyaba for applicant

Kosia Kasibayo SA for Respondent

Charles Okuni: Court Clerk

Hon. Mr. Justice Christopher Madrama

31st of August 2012