

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0811 OF 2021

(Arising from Civil Suit Nos. 0657 of 2003 and 0939 of 2004)

COMBINED SERVICES LIMITED APPLICANT

VERSUS

**1. THE ATTORNEY GENERAL }
2. THE PERMANENT SECRETARY, MINISTRY OF FINANCE } RESPONDENTS
AND ECONOMIC DEVELOPMENT / SECRETARY TO THE TREASURY**

Before: Hon Justice Stephen Mubiru.

RULING

15a. Background.

Judgment was entered in favour of the applicant against the 1st respondent in two different suits; the first one on 14th February, 2008 in the sum of US \$ 34,569 with interest thereon at the rate 4% per annum, and the second one on 2nd September, 2009 in the sum of shs. 640,260,743.53 with interest thereon at the rate 24% per annum, and general damages of shs. 70,000,7400/= with interest thereon at the rate 28% per annum, respectively until payment in full. In respect of the second suit, payments were to be made in proportions of US \$ 70%:30% U shs. The applicant's bills of costs in the two suits and applications that arose therefrom were taxed and allowed at a total of shs. 57,111,607/=

Subsequently, two separate certificates of order were issued; the first one on 26th February, 2010 in the sum of shs. 2,594,961,209/= plus US \$ 375,868.21 and shs. 72,800,000/=; and the second one on 4th March, 2010 in the sum of US \$ 55,666.42 with accrued interest thereon as at 20th February, 2010. The respondents made part payment in the sum of shs. 2,000,000,000/= out of the entire sum on 2nd January, 2014. The applicant claims that as of 30th April, 2021 the total principal sum outstanding due from the 1st respondent is shs. 26,414,833,498.72 plus US \$ 725,637.16, and shs. 57,111,607/= as costs, less shs. 41,306,428/= decreed to the 1st respondent in the latter suit. The 1st respondent has since neglected or failed to pay the sum decreed to the applicant, hence this

application. By a supplementary affidavit filed on 24th November, 2021 the applicant has since revised its calculation of the outstanding amount on basis of simple interest and now claims; in respect of the first suit, US \$ 188,174.33 and costs of shs. 39,993,107/= while in respect of the second suit, the outstanding sum is US \$ 71,068.62 and costs of shs. 7,953,500/=

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b. The application.

The application is made under the provisions of section 38 of *The Judicature Act*, section 19 (3) of *The Government Proceedings Act* and Rule 3 of *The Judicature (Judicial Review) Rules*. The applicant seeks an order of mandamus against the 2nd respondent compelling the 2nd respondent to pay the applicant amounts outstanding in the sum of US \$ 188,174.33 and costs of shs. 39,993,107/= decreed in Civil Suit No. 657 of 2003 and US \$ 71,068.62 and costs of shs. 7,953,500/= decreed in Civil Suit No. 939 of 2004. The ground is that despite the 2nd respondent having been served with a certificate of order in respect of each of the two suit, only part payment was made leaving the said sums due and outstanding, hence this application to compel the respondents to meet their financial obligations.

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c. Affidavits in reply

In the respondents' affidavits in reply, it is contended that by the 2nd respondent's own computation, the sum outstanding due in respect of the two suits is shs. 13,679,309.28 and not the amount claimed by the applicant. It is due to the discrepancy in calculation that the certificates of order could not be honoured since the amount stated therein as being due is grossly exaggerated. If the application is allowed, it will occasion an inequitable loss of public funds.

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d. Submissions of counsel for the applicant.

M/s Ortus Advocates on behalf of the applicant submitted that the 2nd respondent has the statutory duty of handling the finances of government and effecting payment on behalf of government whenever government is legally obliged to make such payments. Despite several engagements by the applicant with the 2nd respondent, the latter has failed or refused to perform that duty. There

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are no alternative means available for the applicant to cause the 2nd respondent to perform that duty. The applicant has a clear right to be paid and the 2nd respondent a corresponding duty to pay, hence the prayers ought to be granted.

5e. Submissions of counsel for the respondents.

The Attorney General's Chambers on behalf of the respondents submitted that the supplementary affidavit ought to be struck out for having been filed without leave of court and in violation of the rules of procedure. A supplementary affidavit filed after one in rejoinder is incompetent. Alternatively, the applicant applied compound interest in its computation of the sums claimed in the two certificates of order, yet the court did not order compound interest. Out of the shs. 2,130,506,873/= outstanding as at 2nd February, 2014 the respondents paid shs. 2,000,000,000/= on 6th February, 2014. After applying the deductions awarded to the 1st respondent, the balance outstanding is shs. 13,679,327.77 The applicant was invited to receive the amount but the applicant did not respond. Interest ceases to accrue once the decretal sum is paid. The decretal sum having been paid in full on 6th February, 2014 it is erroneous of the applicant to include interest in its subsequent computations. An order of mandamus cannot issue in respect of doubtful rights or those over which there is a dispute. In the alternative, if the court is inclined to issue an order of mandamus, it should be in respect of shs. 13,679,327.77

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f. The decision.

Mandamus is a command issuing from a court of law of competent jurisdiction, directed to some inferior court, tribunal, or board, or to some corporation or person, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law. The High Court may make an order of mandamus requiring any act to be done (see section 36 (1) (a) of *The Judicature Act*). Mandamus is directed at ordering a public body or officer to properly fulfil their official duties or correct an abuse of discretion. The order of mandamus is the classical means of compelling the performance by a public body or public officer of a duty imposed on them by law. While the duty must be a public one, it may be either of common law or statutory origin. It is an extraordinary remedy designed to

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compel official performance of a ministerial act or mandatory duty where there exists a clear legal right in the applicant and a corresponding duty in the respondent and where there is no other adequate remedy at law (see *R. v. Barnstaple Justices Ex p. Carder* [1938] 1 K.B. 385).

5 In order to obtain a writ of mandamus, the applicant has to establish the following: - (i) a clear right vested in the applicant; (ii) a corresponding legal duty imposed the respondent, i.e. some specific act or thing which the law requires that particular officer to do, has been omitted to be done; (iii) the right and corresponding duty must not be doubtful; and (iv) lack of any alternative, or where the alternative remedy exists, that it is inconvenient, less beneficial or less effective or
10 totally ineffective (see *Nabuwati and two others v. The Secretary to the Treasury and another*, H.C. Misc. Application No. 2613 of 2016; *Benon Turyamureeba and 132 others v. Attorney General and Treasury Officer of Accounts / Secretary to Treasury* H.C. Misc. Application No. 440 of 2005 and *Southern Range Nyanza Ltd v. Attorney General and the Treasury Officer of Accounts and Secretary to Treasury* H. C. Misc. Application No. 2157 of 2016).

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i. A legal right vested in the applicant.

There must be a clear right to performance of a public duty, in particular (a) the applicant ought to have satisfied all conditions precedent giving rise to the duty; and (b) show that there was (i) a
20 prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay.

According to section 19 (1) of *The Government Proceedings Act*, where in any civil proceedings
25 against the Government, any order (including an order for costs) is made by any court in favour of any person against the Government, against a Government department or against an officer of the Government as such, the proper officer of the court is required, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be
30 taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order. In the instant case, the

applicant has adduced evidence showing that since the delivery of the two judgments, it has served upon the 1st respondent the respective certificates of order, demand letters and been involved in physical engagement of officers of both respondents, to no avail.

5 It is trite that unless the court has made a specific order that it should be paid by instalments or after a specified period, payment of a court award is due once the judgment is given (see Order 21 rule 11 of *The Civil Procedure Rules*). Should the judgment debtor default on payment the judgment creditor may choose to pursue enforcement options provided for under section 38 of *The Civil Procedure Act* and Order 22 of *The Civil Procedure Rules*. Therefore as a general principle,
10 the judgment- creditor has the right to recover under a decree of court, and the judgment-debtor a corresponding duty to pay up the decree passed against him or her.

However in light of article 154 (1) of *The Constitution of the Republic of Uganda, 1995* and section 32 (3) (a) of *The Public Finance Management Act, 3 of 2015* with regard to awards made against
15 government, the right to apply for enforcement of such decrees by way of a writ of mandamus does not accrue unless the applicant provides evidence to show that the amount sought to be recovered forms part of expenditure that is authorised for the financial year during which the enforcement is sought. It is up to those managing the affairs of Government to ensure that at any time, there is within the budgetary provisions of Government, funds to satisfy Court decisions so
20 that at no time is the Government made to appear as disobedient to such orders when Courts of law make them (see *Nampongo and another v. Attorney General Constitutional Petition No. 43 of 2012*). Payments in satisfaction of Court decisions must be in compliance with Articles 153 and 154 of the Constitution. A certificate of order ideally should form the basis of such budgeting. The sum has to be covered under the Government budget i.e. the Government plan of revenue and
25 expenditure for a financial year. The applicant has not furnished evidence to that effect.

ii. A corresponding legal duty imposed on the respondent.

It must be the duty of the respondent to perform the act because it is mandated by law. The act
30 must be clearly and peremptorily enjoined by law or by reason of the respondent's official station. The act to be performed must be ministerial, not discretionary. It must be the imperative duty of

the respondent to perform the act required. The respondent must have unlawfully neglected the performance of the duty enjoined by law or unlawfully excluded the applicant from the use or enjoyment of the right or office.

5 Court awards against government are met with funds sourced from the Consolidated Fund. All revenues received by the government as tax and non-tax revenue, loans raised by it and also its receipts from recoveries of loans granted by it together form the Consolidated Fund. Section 11 (2) of *The Public Finance Management Act, 3 of 2015* provides that the duties of the Secretary to the Treasury include the management of the Consolidated Fund and any other fund as may be
10 assigned by the Minister. According to section 19 (3) of *The Government Proceedings Act*, where the certificate of order provides for the payment of any money by way of damages or otherwise, or of any costs, it should state the amount so payable, and the treasury officer of accounts or such other Government accounting officer as may be appropriate has the obligation to pay to the person entitled or to his or her advocate the amount appearing by the certificate to be due to him or her
15 together with the interest, if any, lawfully due on that amount.

When the legislature proceeds to impose a duty on a public officer, i.e. when the public officer is directed peremptorily to perform certain acts, and the rights of individuals are dependent on the performance of those acts, such public officer is amenable to the courts for his or her conduct and
20 cannot at his or her discretion sport away the vested rights of others. “Compliance by the Government [with] decisions of Courts of law is fundamental to democratic governance based on the Rule of Law. A central tenet of the rule of law is that no person is above the law. Respect for the authority of the Court and their effectiveness to grant remedies are the basic components of the rule of law and democratic governance” (per Remmy Kasule, JA in *Nampongo and another v. Attorney General Constitutional Petition No. 43 of 2012*).
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However, the performance of that duty is guided by law and practice. The 2nd respondent must authorise each requisition request received by the Bank of Uganda from the Treasury, to ensure that the request is compliant with the amounts and purposes authorised by Parliament in statute.
30 According to Appendix G: GoU Chart of Accounts – Economic Classification, of *The Treasury Instructions, 2017*, court awards are classified as contingent liabilities. Contingent liabilities occur

when an outflow of economic benefits or service potential is probable but cannot be measured reliably. Contingent liabilities include court awards that have been appealed by the Attorney General. Part 12.12.4 of Chapter 12 of *The Treasury Instructions, 2017* under the heading “Management of public debt and other liabilities” too classifies court awards as contingent liabilities and specifies for accounting purposes, account 282105 as being charged with payments of by the merits of an adjudication and is equivalent to a judgement in the courts of law.

Parliament gives statutory authority for the government to draw funds from the Consolidated Fund by Acts of Parliament known as Appropriation Acts. According to article 154 (1) of *The Constitution of the Republic of Uganda, 1995* no monies may be withdrawn from the Consolidated Fund except; - (a) to meet expenditure charged on the fund by the Constitution or by an Act of Parliament; or (b) where the issue of those monies has been authorised by an Appropriation Act or a Supplementary Appropriation Act. Court awards are not statutory expenditure (expenditure charged on the Consolidated Fund by the Constitution or by an Act of Parliament). Court awards against government are not charged on the Consolidated Fund and therefore should form part of the estimates to be included in the Appropriation Bill as proposed expenditures by the 1st respondent and the appropriation of those sums by Parliament for the purposes specified, before the 2nd respondent’s duty to pay crystallises.

Furthermore, section 32 (3) (a) of *The Public Finance Management Act, 3 of 2015* provides that money contained in the Consolidated Fund cannot be withdrawn except upon the authority of a warrant issued by the Minister, to the Accountant-General. The Minister may not issue such a warrant except where a grant of credit is issued by the Auditor-General in respect of; (a) statutory expenditure, during a financial year; and (b) for services to be rendered during a financial year where the funds are; - (i) authorised by an Appropriation Act or Supplementary Appropriation Act; or (ii) required for investment. Therefore, except for statutory expenditure, the Minister may only issue a warrant for expenditure that is authorised for the financial year during which the withdrawal is to take place by an Appropriation Act or a Supplementary Appropriation Act. No money can be withdrawn from this fund without the Parliament’s approval.

Article 156 (1) of *The Constitution of the Republic of Uganda, 1995* provides that the heads of expenditure contained in the estimates, other than expenditure charged on the Consolidated Fund by the Constitution or any Act of Parliament, have to be included in a bill known as an Appropriation Bill which has to be introduced into Parliament to provide for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified in the bill. Consequently, each financial year the budget caters for court judgments and Ministry of Justice settlements of actual or imminent litigation against the government. The court takes judicial notice under section 113 of *The Evidence Act*, of the fact that all the annual National Budget Framework Papers under the Justice, Law and Order invariably have a provision for payment of Court awards and compensations, as a budget item (for example that for the 2020 / 2021 Financial Year wherein Vote 007: Ministry of Justice and Constitutional Affairs has such a provision). A judgment creditor may not seek for payment from the Consolidated Fund just because funds are not legally available to pay from the Ministry's own appropriations. Recourse cannot be had to the Consolidated Fund even if the Ministry of Justice and Constitutional Affairs does not have enough money. In that case, the Ministry of Justice and Constitutional Affairs must ask Parliament to appropriate more money for that purpose.

Certain expenditure is by law charged directly to the Consolidated Fund and is not subject to Parliament's annual budget process, ensuring a degree of independence of the government (such as article 55 (1) in respect of the Human Rights Commission; article 66 (3) in respect of the Electoral Commission; article 82 (9) in respect of the salaries, allowances and gratuities of the Speaker and Deputy Speaker; article 106 (3) in respect of the salary, allowances and other benefits granted to a President; article 128 (5) in respect of the administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary; article 168 (3) in respect of the salary and allowances payable to the Auditor General, etc.). Money recoverable as a result of a judgment, decree or an award of court is not charged on the Consolidated Fund.

Expenditure which under the Constitution is subject to the vote of Parliament has to be included in an Appropriation Bill which has to be introduced into Parliament in the annual accounts, separately from expenditure which is "charged" on the Consolidated Fund. The expression

“charged” or “voted” distinguishes the two categories of expenditure. As expenditure to be met from the Consolidated Fund but not charged thereon, sums of money recoverable as a result of a judgment, decree or an award of court, must have been included in an Appropriation Bill, providing for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified therein, before the duty to pay attaches.

The Treasury Instructions, 2017 define unauthorised or irregular expenditure as relating to payments that are not authorised under an Appropriation Act or are a direct charge on the UCF (Uganda Consolidated Fund) by statute or court orders or tender procedures. In absence of evidence to show that the funds sought to be recovered by the applicant are catered for under the Government plan of revenue and expenditure during this financial year, to grant the order sought would be to clothe unauthorised or irregular expenditure with the cloak of a court order. To the extent that it will require the 2nd respondent to act in violation of statute, the order sought will be of no practical value or effect.

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iii. The right and duty is not in dispute or doubtful.

Mandamus cannot issue where the rights of the party are doubtful or are being disputed (see *Shah v. The Attorney General [1970] HCB 99; Combined Services Ltd v. Attorney General and another, H.C. Misc. Application No. 648 of 2015* and *In The Matter of an Application for Judicial Review by Afro-Motors Ltd and another, H.C. Misc. Cause No. 693 of 2006*). Where, for any reasons, the specific legal right for which discharge of the duty is necessary, and / or duty to perform the act is doubtful, the obligation is not regarded as imperative, and the applicant will be left to his / her other remedies. The writ of mandamus will not issue to establish a right or to compel an official to give to the applicant anything to which he or she is not clearly entitled. Mandamus never issues in doubtful cases, or to enforce a right which is in substantial dispute or to which substantial doubt exists.

In the instant case, the applicant’s right is in substantial dispute; whereas the applicant claims to be entitled, in respect of the first suit, to US \$ 188,174.33 and costs of shs. 39,993,107/= while in respect of the second suit, to a sum of US \$ 71,068.62 and costs of shs. 7,953,500/= the respondent

contends that the applicant is entitled to a combined sum of shs. 13,679,327.77 only. Resolving the dispute requires judgment. The remedy of mandamus is employed to compel the performance of a ministerial duty after performance of the duty has been refused. As a rule, it cannot be used to direct the exercise of judgment or discretion; if at all, the obligated official carrying the duty can only be directed by mandamus to act, but not to act in a particular way. The courts can only interfere when the refusal to act already constitutes inaction amounting to grave abuse of discretion, manifest injustice, palpable excess of authority, or other causes affecting jurisdiction.

iv. No other adequate remedy at law.

Mandamus is an extraordinary remedy issued only in cases of extreme necessity where the ordinary course of procedure is powerless to afford an adequate and speedy relief to one who has a clear legal right to the performance of the act to be compelled. There should be no other plain, speedy, and adequate remedy in the ordinary course of law. As a peremptory writ, mandamus must be issued with utmost circumspection, and should always take into consideration existing laws, rules and jurisprudence on the matter.

When a decree has to be enforced, ordinarily the judgment creditor chooses which method or methods are most appropriate to their particular circumstances from among those specified by section 38 of *The Civil Procedure Act* and Order 22 of *The Civil Procedure Rules*. However, according to section 19 (4) of *The Government Proceedings Act* and Rule 15 of *The Government Proceedings (Civil Procedure) Rules*, save for issuance of a certificate of order, no execution or attachment or process in the nature of an execution or attachment may be issued out of any court for enforcing payment by the Government of any money or costs awarded by court. Although the applicant has satisfied this requirement, in light of the findings made with regard to the rest of the criteria, the application must fail. Therefore in conclusion, the application fails and it is dismissed with costs to the respondent.

Delivered electronically this 1st day of February, 2022

.....Stephen Mubiru.....
Stephen Mubiru
Judge,
1st February, 2022.