THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE No. 0084 OF 2021

MALE H. MABIRIZI KIWANUKA …… APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicant filed an application seeking judicial review of the respondent's administrative action. The applicant seeks a declaration that the decision by the respondent's Commissioner General to compromise High Court Civil Appeal No. 31 of 2020 by entering a consent withdrawal in which a sum of shs. 5,108,848,944/= was acknowledged as due from the taxpayer thereby vacating the total award of shs. 20,053,441,670/= that had been awarded by the Tax Appeals Tribunal to the respondent, was illegal, *ultra vires* the powers of the respondent, procedurally improper, irrational and unreasonable. The applicant further seeks a declaration that the respondent's Commissioner of Legal Services' decision rejecting the applicant's request for certified copies of proceedings, documents, and correspondences relating to the appointment and termination of the respondent's Commissioner General's services, that he intend to use in the East African Court of Justice, on grounds that they are confidential Board documents, whose contents cannot be divulged, was illegal, ultra vires the powers of the respondent, procedurally improper, irrational and unreasonable. Finally, the applicant seeks an order of certiorari quashing both decisions, an order of mandamus compelling the respondent to avail him the documents requested for, a permanent injunction restraining the respondent from denying that request, general and exemplary damages and the costs of the application.

In the respondent's affidavit in reply, it is contended that the application is misconceived. The consent judgment is not amenable to judicial review. The applicant has not exhausted the remedies

available to him under the law and the application is bad in law for misjoinder of claims. The applicant seeks orders that will affect third parties adversely, yet they are not party to the proceedings. The Tax Appeals Tribunal had ruled that the respondent should apply the "Standard Alternative Method" of tax assessment which decision the taxpayer appealed. Before the appeal could be heard, the parties negotiated, applied the method of assessment decreed by the Tax Appeals Tribunal and struck a compromise which necessitated and resulted in the filing of a consent withdrawal order in court. One of the concessions made by the respondent was waiver of accumulated interest, in exercise of powers conferred by section 40C of *The Tax Procedures Code (Amendment) Act*. The outcome was not an alteration of the decision of the Tax Appeals Tribunal. All decisions taken by the respondent were within its powers, procedurally proper, rational and reasonable. Therefore the application ought to be dismissed.

b. <u>The objection</u>.

Before the hearing of the application, the court drew to the parties' attention the fact that the application, *prima facie*, was time barred. This apparently had escaped both counsel's attention. Both made brief oral submissions and then sought an adjournment to file more detailed written submissions.

c. <u>Submissions of counsel for the respondent</u>.

The Legal Services and Board Affairs Department of the respondent on behalf of the respondent submitted that an application for judicial review must be filed within three months from the date the grounds of the application first arose. The decision to consent to the withdrawal was made on 20th January, 2021 being the date the Commissioner signed the impugned consent order. The consent withdraw order was then filed on 1st February, 2021 yet the application was filed on 15th November, 2021 more than nine months from the date the grounds of the application first arose. The applicant ought to have sought leave to file the application out of time but did not. Ignorance of the decision is not a good reason for extension of time. Once the order was signed and sealed by the court it became a decision of the High Court. Judicial review is a power exercised by the High Court over subordinate courts, tribunals and public bodies. It cannot subject its own decision

to judicial review. The applicant lacks "sufficient interest" in the subject matter of the decisions sought to be reviewed. The applicant has not suffered any special damage nor does he enjoy any genuine private interest in the subject matter of the impugned decisions. The applicant is a mere busybody raising trivial arguments. The applicant has not exhausted the available remedies including remedies under *The Access to Information Act* and *The East African Community Court of Justice Rules of Procedure, 2019*. The order sought to be reviewed concerned the tax liability of a corporation not party to these proceedings. The court cannot grant a remedy adversely affecting third party unheard. The decision sought to be reviewed did not arise out of the same transaction or series of transactions. There are no common questions of law or fact between them. These were two distinct decisions that arose on different dates and in different circumstances. They cannot be joined in one application. The application ought to be dismissed.

d. Submissions of the applicant.

At the hearing of 7th February, 2022 the applicant appeared *pro se* and submitted that it was a misconception of the law that the application was time barred, Rule 5 (1) of *The Judicature (Judicial Review) Rules, SI No. 11 of 2009* is subject to general principles of interpretation and it must be applied depending on the nature of the cause of faction. When the matter is an administrative decision which the person is not made aware of then the cause of action for the application does not arise until someone gets to know it. Rule 5 starts to apply only when the facts of the administrative decision are communicated or have come to the notice of the person. In paragraph 7 of his affidavit in support he revealed that the facts came to his knowledge on 9th November, 2021. He then sought an adjournment in order to file additional written submissions. He was given up to 28th February, 2022 to have filed and served the same on counsel for the applicant. To-date he has not done so.

In a broad sense, the right to a fair trial in civil proceedings is interpreted as the right to be treated fairly, efficiently and effectively by the court in the course of its administration of justice. In observing the right to be heard, it is the duty of the court to create and notify the parties of the time available to them to take the necessary step. There must be an equal and reasonable opportunity for all parties to present their respective cases. It means that each party must be afforded a

reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party. The Court having done so, it is not its duty to ensure that a party takes advantage of the opportunity so created. I am of the considered view in the instant case that the respondent was afforded a reasonable opportunity to present his submissions, but for some unexplained reason has failed to do so to-date. The court therefore proceeds to deliver the ruling without the respondent's submissions.

e. The decision.

A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. In any preliminary objection therefore, there is no room for ascertainment of facts through affidavit or oral evidence. A party wishing to rely on points of law as a preliminary issue is required to set out such points of law in the pleading before the preliminary issue is regarded as properly raised (see Order 6 rule 28 of *The Civil Procedure Rules*)

A point of law that is pleaded which when so raised is capable of disposing of the suit, may then by consent of the parties, or by order of the court on the application of either party, be set down for hearing and disposed of at any time before the hearing. A party seeking to raise a point of law based on disputed facts which, if properly presented and supported by some form of affidavit evidence, may dispose the suit, and is obligated to move the court by way of a formal application raising the point of law. The formal application should be duly supported by an appropriate affidavit containing the necessary evidence in support of the point of law. Be that as it may, whether raised by way of formal application or informally at the commencement of the hearing, the Court has discretion to dispose of the preliminary objection immediately or defer its ruling until after hearing the whole case Such a deferment may be made where it is necessary to hear some or the entire evidence to enable the Court to decide whether the objection raised is dispositive of the suit or not. There are multiple objections that have been raised in the respondent's written submissions, most of which were pleaded in the affidavit in reply, that the court will now proceed to consider.

i. The application is barred by limitation.

It is counsel for the respondent's contention that while the decision to consent to the withdrawal was made on 20th January, 2021, the current application was filed on 15th November, 2021 more than nine months from the date the grounds of the application first arose. The application is accordingly six months out of time. The applicant on his part contends that the period of limitation begins to run not from the date the grounds of the application first arose, but rather from the date when the facts of the administrative decision are first communicated or come to the notice of the applicant. In paragraph 7 of his affidavit in support, the applicant revealed that the facts came to his knowledge on 9th November, 2021, hence an application filed on 15th November, 2021 was not filed out of time.

Rule 5 (1) of *The Judicature (Judicial Review) Rules, SI No. 11 of 2009* provides that an application for judicial review should be made promptly, and in any event, within three months from the date when the grounds of the application first arose, unless the Court considers that there is good reason for extending the period within which the application shall be made. According to Order 7 rule 6 of *The Civil Procedure Rules*, where any suit is instituted after the expiration of the period prescribed by the law of limitation, the pleading should show the grounds upon which exemption from that law is claimed. There must be a good and sufficient reason for extending the time (see *Kuluo Joseph Andrew and two others v. The Attorney General and six others, H. C. Misc. Cause No. 106 of 2010*), and the court ought to be satisfied that the circumstances that resulted in the failure to make the application within the period provided for under the statute, were outside the control of the applicant. The onus is on the applicant to show good reason why time should be extended. This power may be exercised in an applicant's favour, provided the delay can be satisfactorily explained and there is no evidence of prejudice being caused to the respondent or to third parties as a result of it. In the absence of evidence explaining delay, there will be no basis on which the court can exercise its discretion to grant an extension of time for making the application. However, where the delay can be satisfactorily explained and there is no evidence that the respondent has been prejudiced by it, it may be overlooked.

What the applicant has to show is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. When analysing the facts of a case to determine whether there is good reason to extend time, the following factors may be taken into account, although this list is not exclusive.(i) the nature of the order or actions the subject of the application; (ii) the conduct of the applicant; (iii) the conduct of the respondent(s); (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished; (vii) the merits of the substantive case and not simply the merits of the application to extend time. In some cases, the issues involved may be far too important to allow the judicial review application to be determined on a time point alone unless some serious prejudice was going to be caused, such that the application ought to be dealt with on its merits. However, lack of knowledge of the legal significance of facts of which the applicant is aware will not usually be a good reason for extending time (see *Jobsin Co UK Plc (T/a Internet Recruitment Solutions) v. Department of Health [2001] EWCA Civ 1241; [2002] 1 CMLR 44*). Mere tardiness or incompetence of legal or other advisors is normally not a good ground for the grant of leave to bring a case out of time, the remedy of the client being to sue those advisors (see *Regina v. Secretary of State for Health ex parte Furneaux [1994] 2 All ER 652*).

A balance has to be struck between two competing interests: the need to allow challenges to be made to an unlawful administrative process, and the need to ensure that any such challenges are made expeditiously. It is an important principle in respect of good public administration that there should be certainty about the validity of administrative decisions (see *O'Reilly v. Mackman [1983] 2 AC 237*). A time limit contributes to such certainty. Public authorities may, after the expiry of the time limit without a judicial review application having been made, proceed on the basis that the decision is a valid one. A third party who has an interest in the subject matter of the decision may also proceed on that basis. Prompt action is necessary so that the parties, and the public generally, know whether they are able to proceed on the basis that a decision is valid and can be relied on and so that they can plan and make business decisions accordingly. In the context of a challenge to a decision affecting tax obligations, the wider public interest, as well as the interest

of the tax payer, provide a real need to ensure that any challenge which may affect liability to tax is resolved quickly.

The limitation period is intended to ensure that judicial review proceedings cause as little disruption and delay as possible in the management of public affairs. Delays in making applications for judicial review may be explained, but it is clear that not every explanation provides an acceptable reason for granting an extension of time (see *R v. Secretary of State for Health; Ex parte Furneaux [1994] 2 All ER 652 at 658*). Whether an extension should be granted will depend on not only the applicant's personal circumstances but also on the nature of the action or decision in respect of which review is sought. Even when the court considers that there is such good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship, or prejudice, or would be detrimental to good administration (*see Regina v. Dairy Produce Quota Tribunal for England and Wales, Ex parte Caswell [1990] 2 WLR 1320; [1990] 2 AC 738; [1990] 2 All ER 434*). Apart from the length of time itself, would be the extent of the effect of the relevant decision and the impact which would be felt if it were to be reopened. The question whether the delay amounts to acquiescence or would give rise to prejudice such as to bar the remedy is inevitably one of fact and degree.

Public interest demands that Courts insist on applicants identifying the real substance of their complaint and then acting promptly, so as to ensure that the proper business of government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage. Failure to bring the application in the prescribed time, and in those case where it is belated, failure to seek and obtain court's order extending the time, renders the application time barred and therefore not amenable to judicial review (see *Dawson Kadope v. Uganda Revenue Authority, Consolidated Misc. Cause No. 40 of 2019*).

A judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the

risk of being put out of court for being too late (see *Regina v. Secretary of State for Trade and Industry, ex parte Greenpeace Ltd [1998] Env LR 415*). Time begins to run on the date when the grounds of challenge first arose, usually the date on which the decision under challenge was taken (see *Sustainable Development Capital Llp, Regina (on The Application of) v. Secretary of State for Business, Energy and Industrial Strategy and Another [2017] EWHC 771 (Admin)* and *Regina v. London Borough of Hammersmith and Fulham and others, ex parte Burkett and another [2002] 1 WLR 1593, [2002] 3 All ER 97*).

Time runs from the date when the grounds first arose not on the date when the claimant learned of the decision or from the date when the claimant considered that they had adequate information to bring the claim (see *R v. Secretary of State for Transport ex parte Presvac [1992] 4 Admin LR 121 at 133;* Alistair Lindsay, *"Delay in Judicial Review Cases: A Conundrum Solved?' [1995] Public Law 417 at 421* and *Galina Heaney v. an Bord Pleanála [2021] IEHC 201*). Where a claim is brought promptly upon a Claimant becoming aware of grounds for challenge, but outside three months, it is out of time. But lack of knowledge of decision can be relevant to whether an extension of time for bringing the claim should be granted (see *R. (on the application of Crompton) v. South Yorkshire Police and Crime Commissioner [2018] 1 W.L.R. 131*). The starting of the calculation of the time limit from the date of the decision contributes towards certainty. There may be difficulty in proving the date on which the particular applicant became aware of the decision, whereas the date of the decision will usually be non-contentious and will not require proof.

The starting of the time limit period at some later date upon which the applicant has become aware of the decision is not conducive to certainty. The public authority and any third party relying on the decision are unlikely to have any knowledge about when the applicant has become aware of the decision and therefore will be unable to proceed with certainty after the passing of three months. If ignorance of the grounds of the application when they first arose is routinely to be regarded as a good reason for extending the time for starting proceedings, the clear intent of Rule 5 (1) of *The Judicature (Judicial Review) Rules, SI No. 11 of 2009*, that proceedings should normally be started promptly and in any event not later than three months after the right of action first arose, would be frustrated.

In order to determine when the grounds first arose it is necessary to identify what is sought to be judicially reviewed in the present case. The decision to consent to the withdrawal was made on 20th January, 2021. Time begins to run from the date on which the grounds for judicial review first arose, irrespective of whether the applicant was aware at that time of the decision or action sought to be reviewed. In calculating the period that has elapsed after the occurrence of the specified event, the day on which the event occurs is excluded from the reckoning (see section 34 (1) (a) of *The Interpretation Act* and *Zoan v. Rouamba [2000] 1 W.L.R. 1509*). It is equally well established that when the relevant period is a month or specified number of months after the specified event, the general rule is that the period ends upon the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given (see *Dodds v. Walker [1981] 1 WLR 1027; [1980] 2 All ER 507*). Except in a small minority of cases, of which the instant case is not an example, all that the applicant has to do is to mark in his or her diary the corresponding date in the appropriate subsequent month.

Any application brought by way of judicial review cannot be entertained if presented after the lapse of a period fixed by any statute of limitation (see *Simon Sembaga v. Uganda Revenue Authority, H. C. Misc. Cause No. 301 of 2019*). The current application having been filed on 15th November, 2021, which is more than nine months from the date the grounds of the application first arose, and the applicant not having sought extension of time within which to file it, the application is accordingly time barred for being six months out of time. This ground of objection is thus sustained.

ii. <u>The orders sought to be reviewed are not amenable to judicial review</u>.

The concept of justiciability takes account of this limitation on judicial review. The conclusion that judicial review power is not engaged may arise either: (i) because the issue is not one capable of resolution by legal criteria or ascertainably objective standards; or (ii) because the issue is committed exclusively to a non-judicial agency; or (iii) because the issue is "essentially political" in character or is "policy-driven," (see *R v. Secretary of State for the Environment; ex parte*

Hammersmith & Fulham LBC [1991] 1 AC 52 at 97); or (iv) the issue is committed exclusively to a superior court.

Judicial review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies, including those of Ministers, local authorities, and those exercising public functions, to ensure that they are lawful. Decisions of public bodies and bodies exercising administrative powers with a significant public law element may be subject to judicial review. Judicial review provides corrective measures against the unlawful use of public law powers by public bodies. As such judicial review is only available against a body exercising public functions in a public law matter (see *Mrs. Anny Katabaazi-Bwengye v. Uganda Christian University, H. C. Misc. Cause No. 268 of 2017*). Two things must be established for judicial review to be available; (i) the body under challenge must be a public body whose activities can be controlled by judicial review; and (ii) the subject matter of the challenge must involve claims based on public law principles, not the enforcement of private law rights. The courts will examine the nature of the act or decision in question to determine whether it involves a body exercising powers with a sufficient "public element" (see *R v. Panel on Takeovers and Mergers, ex parte Datafin plc [1987] QB 815*). Consequently judicial review is not confined to reviewing the decisions of public bodies; any person or body exercising a public function may be subject to judicial review proceedings.

Judicial review is divided into two broad categories. The first is the process by which, apart from appeal, the proceedings of lower courts are brought before a superior court in respect of grave irregularities or illegalities occurring in the course of the proceedings. The second category is the review of the proceedings of quasi-judicial bodies; that is, where a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty. While judicial review concerns the regularity and validity of the proceedings under review, an appeal concerns the correctness or otherwise of the decision being assailed on appeal. An appeal is based upon the matters contained in the record, and the appellant is bound by the four corners of the record. In judicial review proceedings the applicant may travel beyond the record and may rely on grounds which are not

apparent from the record. Where a ground for review is apparent from the record, the unsuccessful litigant may seek relief by way of appeal.

By virtue of rule 3 (2) and 10 of *The Judicature (Judicial Review) Rules, 2009* and at common law, the power of judicial review is exclusive to the High Court. According to rule 10 (4) of the Rules, where the relief sought is an order of certiorari and the High Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing the decision, remit the matter to the lower Court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the High Court. "Lower Court" is defined to include any subordinate court established by law; the Industrial Court; tribunals established by law, and any other similar bodies (see section 2 thereof).

The High Court therefore has statutory powers to review the proceedings of inferior courts, tribunals and authorities within its jurisdiction (see *Dr. Julliane Sansa Otim v. Makerere University High Court Misc. Cause No. 258 of 2016* and *Dr. Elizabeth Kaase Bwanga v Makerere University and three others, H.C. Misc. Cause No. 205 of 2018*). It follows that the proceedings of the High Court, as a superior court, are not so subject to Judicial Review (see *Gentiruco AG v. Firestone SA (Pty) Ltd (1972) 1 SA 589 (A) 601E; Vereniging van Bo-Grondse Mynamptenare van SA v. President of the Industrial Court, (1983) 1 SA 1143 (T) 1146D-F; Ex parte Scott (1909) 26 SC 520 52* and *SA Technical Officials' Association v. President of the Industrial Court 1985 1 SA 597 (A) 611D*). Judicial review is a specialised remedy in public law by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies (see Richard Gordon Q. C., "*Judicial Review: Law and Procedure*," 2nd Ed. (Sweet & Maxwell, 1996) p. 1).

In the instant case, the applicant seeks to cause a review of the respondent's decision to compromise an appeal. It was argued by counsel for the respondent that once the agreement was reduced to writing and a consent order was signed and sealed by the court it became a decision of the High Court. Judicial review is a power exercised by the High Court over subordinate courts, tribunals and public bodies. It cannot subject its own decision to judicial review. Indeed it is a fact that the decision of the respondent is now embodied in a consent order, sealed and issued by the High Court, a fact that cannot be ignored by the court.

It is trite that a consent judgment is a judgment of the court in terms which have been contractually entered into by parties to the litigation, validated by Court under O.50 rule 2 and Order 25 Rule 6 of *The Civil Procedure Rules* (see *Brooke Bond Liebeg (T) Ltd v. Mallya [1975] E.A 266*). A consent judgment once recorded or endorsed by the Court, becomes the judgment of the Court and binding upon the parties. It is however unique in that it is not a judgment of the Court delivered after hearing the parties. It is an agreement or contract between the parties. As such it can only be set aside for a reason which would enable the court to set aside or rescind on an agreement. in *Babigumira John and others v. Hoima Council [2001 – 2005] HCB* 116, it was held inter alia that a consent order can be set aside if it was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside such an agreement. In *Pavement Civil Works Ltd v. Andrew Kirungi, High Court Misc. Application No. 292 of 2002,* it was held that a consent Judgment and decree cannot be set aside by appeal but rather by a suit, or by an application for a review of the Judgment sought to be set aside. But that the more appropriate mode is by an application for review. The reasons that would enable court to set aside a consent judgment are fraud, mistake, misapprehension or contravention of court policy.

A consent judgment cannot be varied or discharged unless obtained by fraud, collusion, or by an agreement contrary to the policy of court, or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for any reason which would enable the Court set aside an agreement (see *Hirani v. Kassam (1952) 19 EACA 131* and *Ken Group of Companies Ltd. v. Standard Chartered Bank and two others, H.C. Misc. Application No. 116 of 2012*). While judicial review as a branch of public law is primarily concerned with the decision-making process rather than with the substance of the decision, setting aside consent judgments is governed by private law. The grounds that trigger the exercise of judicial, review i.e., illegality, irrationality and unreasonableness are not grounds such as would enable the Court set aside an agreement. It follows therefore that a consent judgment or order when entered by a superior court, cannot be quashed or set aside by way of judicial review, since judicial review is a specialised remedy in public law by which the High Court exercises a supervisory jurisdiction over only inferior courts, tribunals or other public bodies, and not itself. This ground of objection too is accordingly sustained.

iii. The applicant has not exhausted the available remedies.

The doctrine of exhaustion of administrative remedies is to the effect that a person challenging an agency decision must first pursue the agency's available remedies before seeking judicial review. It was created by courts in order to promote an efficient justice system and autonomous administrative mechanisms. Therefore a Court before which an application for judicial review is placed often satisfies itself, before seizing jurisdiction, that the parties seeking its intervention have first exhausted the prescribed statutory mechanisms for redress.

The public law remedies are all discretionary in nature and although an applicant may succeed in proving his or her case, he or she may nevertheless be refused relief on discretionary grounds. They are often described as remedies of last resort: the courts will normally expect parties to have exhausted all other avenues where they are available, including a right of appeal, internal grievance procedure or where appropriate a complaint to the Inspectorate of Government. Where an appeal can deal only with the merits of a case and not with its legality or jurisdictional aspects, judicial review will be the appropriate means of redress open to a person and the existence of a right of appeal should not per se be a ground for refusing relief. Conversely, where judicial review would appear to be a singularly inappropriate remedy as compared to an appeal, the remedy of review should be refused. The general principle though is that the prerogative remedies are discretionary and will be granted cautiously where there is an adequate alternative remedy which has been inadequately prosecuted.

The court ought to take into account all the circumstances of the case, including the purpose for which the prerogative order has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. Even in the face of an alternative remedy, the discretion lies with the High Court to entertain the application for judicial review (see *Water and Environment Network (U) Limited and two others v. National Environmental Management Authority and another, Consolidated Misc. Cause No. 239 of 2020*). Thus, where an internal remedy would not be effective and / or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which

renders exhaustion futile. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.

In order to address unique and peculiar circumstances, or if the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground of refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with error in the application of the code in question. In such cases, while retaining always the power to quash, the court should be slow to do so, unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate.

The true question appears to be which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind. There may be cases though where such an alternative remedy will not preclude the granting of relief by way of judicial review.

It was argued by counsel for the respondent that the applicant has not exhausted the available remedies including remedies under *The Access to Information Act* and *The East African Community Court of Justice Rules of Procedure, 2019*. In his application, the applicant seeks a declaration that the respondent's Commissioner of Legal Services' decision rejecting the applicant's request for certified copies of proceedings, documents, and correspondences relating to the appointment and termination of the respondent's Commissioner General's services, that he intends to use in the East African Court of Justice, on grounds that they are confidential Board documents, whose contents cannot be divulged, was illegal, ultra vires the powers of the respondent, procedurally improper, irrational and unreasonable. The applicant seeks an order of certiorari quashing both decisions, an order of mandamus compelling the respondent to avail him

the documents requested for, a permanent injunction restraining the respondent from denying that request, general and exemplary damages and the costs of the application.

According to section 37 of *The Access to Information Act, 6 of 2005* a person may lodge a complaint with the Chief Magistrate, against the decision of an information officer; (a) to refuse a request for access; or one who fails to grant access as soon as reasonably possible after the request is received, in any event within twenty one days, but opts to extend that period; or where access is denied on grounds that to grant the applicant access would; (i) interfere unreasonably with the effective administration of the public body concerned; (ii) be detrimental to the preservation of the record; or (iii) amount to an infringement of copyright not owned by the State or the public body concerned. Similarly, rule 66 (1) of *The East African Community Court of Justice Rules of Procedure, 2019* provides that any party in a claim or reference may apply to the Court for summons to any person whose attendance is required to give evidence or to produce documents. Where a person summoned to give evidence or produce a document fails to appear or refuses to give evidence or to produce the document the Court may in its discretion impose upon the witness a pecuniary penalty not exceeding US $ 2000.

I therefore find that the legislation cited provides adequate machinery which is particularly suitable for dealing with the issues raised by the applicant in this regard. The mechanism established under both enactments in question, is competent, on the facts of the case. to serve the interests of justice. There is nothing unique or peculiar in the circumstances and it has not been demonstrated that the pursuit of either relief under the said enactments would be futile or ineffective. Circumstances do not exist on the facts of this case such as would require the immediate intervention of the court rather than to resort to the applicable administrative machinery. The court is reluctant to invoke its discretionary powers where alternative and effective statutory remedies exist and have not been exhausted by the applicant. This ground of objection too therefore is accordingly sustained.

iv. <u>The applicant has no *locus standi*</u>.

Not everyone is entitled to invoke the court's jurisdiction to review allegedly illegal administrative action. Regulation 3A of *The Judicature (Judicial Review) Rules, 2009* as amended by rule 4 of SI

32 of 2019 provides that "any person who has a direct or sufficient interest in a matter may apply for judicial review." Important to the exercise of the Court's discretion are the questions whether the applicant seeking relief is directly affected by the act or omission in question or whether the applicant has a real stake in the validity of such act or omission, and whether there is any other practical way to subject the challenged act or omission to judicial review. The need for sufficient interest prevents "abuse by busybodies, cranks and other mischief makers" (see *Regina v. Inland Revenue Commissioners, ex parte the National Federation of Self-Employed and Small Businesses [1982] AC 617; [1981] 2 All ER 93; [1981] 2 WLR 722; [1981] 1 WLR 793*).

a. *Direct interest*.

To apply for judicial review, a claimant must have a "sufficient interest" in the matter to which the claim relates. The considerations include factors such as; (i) the importance of vindicating the rule of law; (ii) the importance of the issue raised; (iii) the likely absence of any other responsible challenger; (iv) the nature of the breach of duty against which relief is sought; (v) the prominent role of the applicant in giving advice, guidance and assistance with regard to the subject matter against which relief is sought (see *Regina v. Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd [1995] 1 W.L.R 386*). "Direct interest" focuses on the relationship between the applicant and the potential outcome. It must be demonstrated that the action will affect interests such as personal liberty, money or property or benefits or legitimate expectation of benefits; circumstances which make the applicant, as opposed to others, individually concerned. One must justify such right by showing that one has a direct and substantial interest in the outcome of the litigation. Such an interest is a legal in the subject-matter of the action which could be prejudicially affected by the judgment of the court.

There is a difference between feeling aggrieved and being aggrieved. A person adversely affected is always assumed to have sufficient interest has to show that he is or would be a victim of the alleged unlawful act. A "person with direct interest" must be one who has suffered a legal grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him or her something, or wrongfully affected his or her title to something. Another approach is by way of determination whether or not the relief sought

is capable of conferring a direct benefit to the applicant (see *JS v. Secretary of State [2021] EWHC 234 Admin*). An applicant who is able to demonstrate that a genuine public interest will be furthered if he or he is granted standing, would be regarded as having a sufficient interest to proceed (see *R (Feakins) v. Secretary of State for the Environment, Food and Rural Affairs [2003] EWCA Civ 1546*). However, where a public interest challenge was brought for an improper motive, the existence of a public interest would not prevent the application being seen as an abuse of process and dealt with accordingly. There will, for example, be clear indication of sufficient interest if a person's property or livelihood will be affected.

To meet this requirement, the applicant should be one affected in a way which is peculiar to him or her as against others similarly situated. Sufficient interest" is the one which is over and above the general interest (see *The President of Malawi and Another v. Kachere and others, Malawi S.C. Civil Appeal No. 20 of 1995*). This is the stricter test which requires the applicant to be "affected in some identifiable way." Lord Denning in *Re Liverpool Taxi Owners' Association, [1972] 2 All E.R. 589 at 595* offered the following statement on the question of standing:

> The writs of prohibition and certiorari lie on behalf of any person who is a "person aggrieved," and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him.

When a claimant has a direct financial or legal interest in the outcome of the application it is easier to show "direct interest" since it is one of the means of demonstrating a personal connection with the decision concerned. Alternatively, an impairment of rights can be demonstrated. Rights which may be impaired include procedural rights of the individual stemming from administrative law (e.g. public participation rights) as well as substantive rights conferred on the individual (e.g. protection of human health, property rights). By this the applicant demonstrates that by reason of the particular circumstances, the impugned measure, act, omission or decision has, or is liable to have, a substantial adverse effect on his or her interests or rights. A person is to be considered individually concerned if the impugned measure, act, omission or decision has, or is liable to affect

his or her legal position in a manner which is both definite and immediate, regardless of the number of other persons affected.

Courts are dispute-resolving organs established to determine contested rights or claims between or against persons. If the primary aim of the judicial system is to protect individual rights, the courts' concern with lawful administration arguably is limited to the extent that individual rights or interests are infringed. The primary role of judicial review is the protection of interests specially affected by alleged illegal official action; its articulation for this purpose has been highly developed by the courts." Presumably the stricter "direct interest" test is relevant only where the ground of challenge alleges a breach of human rights and there are no other grounds for judicial review. A person seeking judicial review, therefore, must demonstrate some personal interest before invoking the supervisory jurisdiction of the courts.

The stricter "direct interest" test is relevant when the remedy sought is an injunction, declaration or mandamus. The injunction is historically a private law equitable remedy, developed to restrain unlawful or unauthorised interference with private rights. Similarly, the declaratory judgment arose in the Court of Chancery as a private law remedy. While both now serve important roles in administrative law, their origins may account to some degree for the relatively strict *locus standi* requirements which accompanied their adoption in the public law field. Only in special circumstances do private individuals have standing to institute declaratory or injunctive proceedings with respect to public rights.

For declarations and injunctions, (a) the applicant can establish interference with a private right of his or special damage peculiar to himself from the interference with the public right, or (b) the applicant is challenging the legality of administrative action, and the court in its discretion grants the applicant standing, having regard to the following factors: (i) the justiciability of the issue, (ii) the nature of the legislation governing the impugned administrative act, (iii) the existence of another reasonable and effective way to bring the matter before the courts for review, (iv) the degree to which the applicant is directly affected by, or has a genuine interest as a citizen in, the subject matter.

The rules of standing for mandamus are more stringent than those for the other prerogative remedies of certiorari and prohibition. In cases of mandamus the test may well be stricter than in certiorari (see *R v. Russell [1968] 3 All ER 695 at 697, [1969] 1 QB 342 at 348* and *R v. Customs and Excise Comrs, ex parte Cooke and Stevenson [1970] 1 All ER 1068 at 1072; [1970] 1 WLR 450 at 455* "on a very strict basis"). Mandamus is not granted unless the applicant can show that he or she has a clear legal specific right to ask for the intervention of the Court. The Court never exercises a general power to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus shall have a legal specific right to enforce the performance of those duties (see *The Queen v. Guardians of the Lewisham Union, [1897] 1 Q.B. 498*). Mandamus will lie to secure the enforcement of a legal duty on the application of one who is recognised by law as being entitled to apply for its enforcement by this remedy.

It would seem obvious enough that the interest of a person seeking to compel an authority to carry out a duty is different from that of a person complaining that a judicial or administrative body has, to his detriment, exceeded its powers. The applicant has not shown that he has a direct interest in the underlying subject matter.

b. <u>Sufficient interest</u>;

What constitutes "sufficient interest" will essentially depend on the co-relation between the matter brought before the Court and the person who is bringing it. It is not possible to lay down any strait-jacket formula for determining sufficient interest which may be applicable in all cases. Of necessity the question has to be decided in the facts of each case. This point was eloquently summed up by the Indian Supreme Court in the case of S *S.P. Gupta v. President of India and others, AIR 1982 SC 149* as follows:

> What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting "sufficient interest." It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about

> transformation of its social and economic structure and trying to reach social justice to the vulnerable section of the people by creating new social, collective "diffuse" rights and interests imposing new public duties on the State and other public authorities infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the Court in a particular case has sufficient interest to initiate the action.

The Court will have to decide in each case, particularly when objection is taken, not only the extent of sufficiency of interest but also the fitness of the person for invoking the jurisdiction under article 50 of *The Constitution of the Republic of Uganda, 1995*. Ordinarily, it is the affected party who comes to the Court for a remedy. The Court in considering the question of standing in a particular case, if the affected party is not before it, will enquire as to why the affected party is not coming before it and if it finds no satisfactory reason for non-appearance of the affected party, if may refuse to entertain the suit. Public interest litigation is not adversary litigation, but rather a challenge and incentive for the government and its officers to make basic human rights meaningful to the poor and vulnerable (see *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and others, 1981 AIR 298; 1981 SCR (2) 185; AIR 1981 SC 298*). However, if a fundamental right is involved, the impugned matter need not affect a purely personal right of the applicant touching him or her alone. It is enough if he or she shares that right in common with others.

The requirement for a "sufficient interest" has been applied liberally, particularly in cases where non-governmental organisations and others representing the public interest have challenged decisions by which they cannot claim to be personally affected, generally in the absence of other better placed actual or potential challengers (see *R (McCourt) v. Parole Board [2020] EWHC 2320 (Admin), [31]-[32]* and *R v. (1) Leicestershire County Council (2) Hepworth Building Projects Ltd (3) Onyx (UK) Ltd ex p. Blackfordby & Boothorpe Action Group Ltd [2001] Env LR 2*). For example in *R v. Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd [1982] AC 617* a pressure group challenged the legality of a tax amnesty arrangement entered into between the Inland Revenue and casual print-workers: provided that the

print-workers registered for tax purposes, no investigations would be made as to tax lost in certain previous years. Although the challenge ultimately failed, Lord Diplock famously said that:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group … or even a single public-spirited taxpayer … were prevented by outdated technical rules of [standing] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

This broader approach emphasises the court's function of upholding the rule of law and preserving legal order by confining the legislative and executive branches of government to a lawful exercise of their powers. The belief is that restrictive rules about standing are in general inimical to a healthy system of administrative law. If an applicant with a good case is turned away merely because he or she is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest (see Schwartz and Wade, *Legal Control of Government* (1972) at 291).

The primary object of the remedies under judicial review is not to assert private rights, but to have illegal public actions and orders controlled by the court. The only legal protection available to the private citizen against arbitrary, oppressive or misguided use of governmental power lies in his ability to enlist the aid of the courts to compel administrators to comply with the restrictions imposed by Parliament to limit the scope of their discretions. To the extent that restrictive rules of *locus standi* reduce the opportunities for judicial enforcement of legislative checks upon administrative discretion, they insulate the administration from judicial supervision and increase its effective power. To the extent that liberal standing requirements increase the likelihood of unlawful governmental action being successfully challenged in court, they operate as a deterrent against administrative illegality and enhance the prospects of lawful and accountable government.

Administrative law is fundamentally not about individual rights: it is about public wrongs, the existence of which are identified by applying the standards of fairness and reasonableness which lie at the heart of judicial review. It is therefore argued from this perspective that in some situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might

disable the court from performing its function to protect the rule of law. I say "might", because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.

However, the liberal approach must not be tip the balance too far, as to allow judicial review to be used to seek publicity or otherwise to hinder the process of proper decision-making. Plainly, a balance must be struck between the public interest in; (i) keeping vexatious litigants and non-justiciable issues out of the courts; and (ii) ensuring legal certainty while enabling an individual who happens to be best placed to bring a matter of public importance to the attention of the courts to do so. A complex and restrictive approach to standing does little to achieve this. The courts have either supported relaxed standing rules (by emphasising the public law purpose) or imposed strict standing requirements (by emphasizing its role to protect private interests). In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he or she has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. The applicant should demonstrate that he or she has both a genuine interest in the matter at issue and that he or she has sufficient knowledge to be able act on behalf of the public interest. This could be demonstrated by, for example, membership of a society, participation in an activity, experience of working in a particular field or suitable academic qualifications. This approach reflects the general principle that those bringing a judicial review should have a strong interest in the outcome.

The courts in exercising the power to grant prerogative writs, or since 1938 prerogative orders, have always reserved the right to be satisfied that the applicant had some genuine *locus standi* to appear before it. This they expressed in different ways. Sometimes it was said, usually in relation to certiorari, that the applicant must be a person aggrieved, or have a particular grievance (see *R v.*

Thames Magistrates' Court, ex parte Greenbaum (1957) 55 LGR 129); usually in relation to mandamus, that he or she must have a specific legal right (see *R v. Guardians of Lewisham Union [1897] 1 QB 498, R v. Russell [1968] 3 All ER 695, [1969] 1 QB 342*); sometimes that he or she must have a sufficient interest (see *R v. Cotham [1898] 1 QB 802* (mandamus), *Ex parte Stott [1916] 1 KB 7* (certiorari).In *R v. Russell* Lord Parker CJ had tentatively adhered to the test of legal "specific right," but in *R v. Customs and Excise Comrs, ex parte Cooke and Stevenson [1970] 1 All ER 1068, [1970] 1 WLR 450* he had moved to "sufficient interest."

The principal role of judicial review is to ensure that those exercising executive powers of government do not exceed their powers and attempt ultra vires actions. The legal standards upheld via judicial review ultimately constitute not rights enjoyed by individuals, but duties owed by government to the public. It does not necessarily follow that the law should recognise an *action popularis*, such that anyone can institute judicial review proceedings against the government irrespective of whether they have any connection with the subject-matter of the claim. But the fact that a direct interest should sometimes be required does not mean that it should always be required. This point was recognized by Lord Reed in his judgment in *AXA General Insurance Ltd v. Lord Advocate [2011] UKSC* 46, thus;

> The constitutional function of the courts in the field of public law is to ensure, so far as they can, that public authorities respect the rule of law. The courts therefore have the responsibility of ensuring that the public authority in question does not misuse its powers or exceed their limits. The extent of the courts' responsibility in relation to a particular exercise of power by a public authority necessarily depends upon the particular circumstances, including the nature of the public authority in question, the type of power being exercised, the process by which it is exercised, and the extent to which the powers of the authority have limits or purposes which the courts can identify and adjudicate upon.'

For certiorari and prohibition, the applicant is in the liberal sense a person whose interests may be prejudicially affected. While dicta suggest that a mere "stranger" may apply for these remedies, it is unlikely that relief would be granted to a person with no interest whatsoever in the subject matter of the proceedings. For mandamus, the applicant can establish a legal right to insist on performance of the duty. However, recent decisions suggest that it is sufficient if the applicant establishes a

substantial interest in the performance of the duty, or demonstrates that his or her interests will be adversely affected, making the test virtually indistinguishable from the "sufficient interest" test applied in almost all prerogative remedies.

In *R v. HM Inspectorate of Pollution, ex parte Greenpeace (No 2) [1994] 4 All ER 329*, the notion of "associational standing" was embraced, when a pressure group was allowed to issue a claim, in effect, on behalf of local members who might be affected by the commissioning a new nuclear reprocessing facility. The courts have gone further still, holding that standing can be generated purely by considerations of public interest. In *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd [1995] 1 WLR 386*, for example, a highly-respected pressure group successfully challenged a government decision to commit very large amounts of money to an economically-flawed overseas development scheme. Rose LJ observed that in the absence of a challenge by the pressure group, it was hard to see who else would question the decision, and cited the "importance of vindicating the rule of law" as a key argument in favour of acknowledging standing in such circumstances.

From the above decisions it emerges that in what courts regard as deserving cases, the "sufficient interest" test is wide enough to allow pressure groups, nominal claimants and third parties to bring judicial review proceedings. What is "sufficient interest" will essentially depend on the co-relation between the matter brought before the Court and the person who is bringing it. Applicants for judicial review are generally of four types: (i) individuals whose personal rights and interests are affected by a decision; (ii) individuals concerned that a decision has affected the interests of society as a whole; (iii) pressure or interest groups who believe a decision affects the rights or interests of their members or society as a whole; and; (iv) individuals claiming for judicial review for a breach of human rights. A group persons possessed of pertinent, bonafide and well-recognised attributes and purposes in the area that forms the subject matter of the application, and having a provable, sincere, dedicated and established status may apply for judicial review, Similarly, any person other than an officious intervener or a wayfarer without any interest or concern beyond what belongs to any of citizens or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to maintain an action for judicial review.

The writs of certiorari and prohibition originally served the role of supervising the activities of lower courts to ensure they did not over-extend their jurisdiction. Their focus lay upon protecting the royal prerogative, rather than protecting individual rights. For largely historical reasons therefore, having regard to the original purposes of the remedies, the rules of locus standi developed in a more liberal manner for certiorari and prohibition than for the remedies of declaration and injunction. The rules of standing for mandamus are more stringent than those for the other prerogative remedies of certiorari and prohibition.

It is not possible to lay down any strait-jacket formula for determining sufficient interest which may be applicable in all cases. Whether the applicant has established a sufficient interest is a question of both fact and law, having regard to all the circumstances of the case (see *R v. Inland Revenue Commissioners Ex p National Federation of Self Employed and Small Businesses Ltd [1982] AC 617*). In order to be regarded as a person having sufficient interest, party must show a real interest in getting the relief sought. It will be judged in the light of the court's view of the merits and degree of importance of the challenge, the likely absence of any other responsible challenger, the nature of the alleged breach and any role played by the person or group in question (see *R v. Secretary of State fort eh Foreign and Commonwealth Affairs Ex p World Development Movement Ltd [1995] 1 WLR 386*). This has been eloquently summed up by the Indian Supreme Court in the case of *S.P. Gupta v. President of India and others, AIR 1982 SC 149*, thus:

> What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting `sufficient interest`. It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable section of the people by creating new social, collective `diffuse` rights and interests imposing new public duties on the State and other public authorities infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a Procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the Court in a particular case has sufficient interest to initiate the action.

The concept of "sufficient interest" is elastic and depends upon context. The standing required should be such interest as the Court considers sufficient in the matter to which the application relates. It is to be examined in light of the nature and scope of the powers and duties in question and the character of the alleged illegality. a "busybody" will not have standing, but a claimant need not demonstrate a personal interest if acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent. Whether there is a danger of an infringement of a public right going unchallenged where individuals lack standing.

A public-spirited citizen without any direct legal interest in the outcome of the case, unlike a "meddlesome busybody," may be allowed to seek judicial review in cases which present a serious issue of public importance (see *R v. Secretary of State for Foreign and Commonwealth Affairs ex p. Lord Rees-Mogg [1994] QB 552*). In such cases, Court is likely to take a more generous view to standing and regard a complainant as individually concerned even if the complainant is affected by the measure in the same way as other members of an open category. A meddlesome busybody is one who, whilst legitimately and perhaps passionately interested in obtaining the relief sought, relies as grounds for seeking that relief on matters in which he or she has no personal interest in contrast to a person who has no interest in the outcome (see *Regina (on the Application of Kides) v South Cambridgeshire District Council Ltd [2002] EWCA Civ 1370, [2003] JPL 431 at 132*). The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to the subject matter of the application.

Public interest litigation envisages a person or organisation representing a weaker section of the society, coming to court to complain about a breach of any fundamental right of any citizen or any public wrong done to the members of the public generally in breach of any fundamental right. If socially or economically vulnerable people are unable to protect themselves, a public-spirited individual may litigate on their behalf. Public interest litigation does not mean that which is interesting as gratifying curiosity or a love of information or amusement (see *Stroud's Judicial Dictionary*, Vol. 4 (4th Edn.) but rather relates to causes in which the public, a class of the community or the community at large, as opposed to particular localities, has some pecuniary

interest or some interest by which their legal rights or liabilities are affected (see *Black's Law Dictionary*, 8th Edn). For that reason, the public spirited litigant need not be personally aggrieved in order to file a suit; one needs only to be socially and spiritually motivated and to have sufficient, bonafide interest in the proceeding, acting not for personal gain or private profit or political motivation but seeking redress for a public wrong or public injury.

The subject matter must be one that; (i) affects a significant number of people not just the individual; or raises matters of broad public concern; or impacts on disadvantaged or marginalised groups, and; (ii) it must be a legal matter which requires addressing *pro bono publico* [for the common good] (see *Aboneka Michael and another v. Attorney General, H.C. Misc. Cause No. 386 of 2018*). The suit is brought for and in the interest of the public, initiated only for redress of a public injury, enforcement of a public duty or vindicating interest of public nature (see *Muwanga Kivumbi v. Attorney General, S. C. Constitutional Appeal No. 06 of 2011*).

The issue at hand must be a serious, justiciable issue, where "serious" refers to a "substantial constitutional issue" or an "important issue." The public spirited litigant must have a real stake in the proceedings at hand or be ordinarily engaged in the issues raised by the proceedings and the court should consider any other interrelated matters which may be useful to take into account such as; the applicant's capacity to bring the matter before a court, whether the issues in the case transcend the rights of those most directly impacted by the decision at hand, whether the issues in the case at hand have the potential to provide access to justice to those who may otherwise be disadvantaged yet could be impacted by the decision, whether there are better or more efficient alternatives to granting standing to the party to bring the matter before a court, how the outcome of the case might impact those who are equally or more directly affected by the issues at hand, and whether there is potential for a conflict between private and public interests (see Canada (*Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 SCR 524* and *Attorney General of British Columbia v. Council of Canadians with Disabilities, 2020 BCCA 241*).

In addition, the pleading should demonstrate that the public spirited litigant has a "genuine interest" in the subject matter if the litigation. The party does not have to establish that it has a

direct personal, proprietary or pecuniary interest in the litigation, but should demonstrate that it is acting in good faith for the genuine purpose of having a point of law of general public interest resolved. This is usually established by disclosure in the pleadings of the a real stake the party has in the proceedings at hand or that it is ordinarily engaged in activates relating to the issues raised by the proceedings.

Public interest litigation is instituted to address or curb social menaces and institutionalised injustice that affects people on a large scale, for the benefit of the public who may be aware of the rights but lack financial ability to enforce those rights as well as for those who may not be aware at all about their infringed rights. The mere fact that a decision of court in a case brought by an individual will benefit the public does not place the suit in the category of public interest litigation. Where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of a violation of any legal or constitutional right or in case of breach of any fundamental rights of such person or persons, any member of the public can maintain a suit in the High Court, seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.

Since the primary goal of public interest litigation is to ensure that the provisions of the Constitution or the law are followed to the fullest extent possible, to ensure that unlawful acts and omissions do not go unchallenged, in order to advance the cause of the public, disadvantaged groups and individuals who experience high levels of marginalisation and oppression, or the public interest, the strict rule of *locus standi* applicable to private litigation is relaxed.

It is clear that the Uganda Revenue Authority is not immune from the process of judicial review. It is an administrative body with statutory duties, which the courts, in principle, can supervise. They have indeed done so in other jurisdictions (see *R v. Income Tax Special Comrs (1888) 21 QB 313, [1886-90] All ER Rep 1139* (mandamus) and cf. *Income Tax Special Comrs v. Linsleys (Established 1894) Ltd [1958] 1 All ER 343; [1958] AC 569*), where it was not doubted that a mandamus could be issued if the facts had been right. It must follow from these cases and from principle that a taxpayer would not be excluded from seeking judicial review if he or she could show that the Uganda Revenue Authority had either failed in its statutory duty toward him or her

or had been guilty of some action which was an abuse of its powers or outside their powers altogether.

The position of other taxpayers, other than the taxpayers whose assessment is in question, and their right to challenge administrative action of the Uganda Revenue Authority, must be judged according to whether they can be considered as having sufficient interest to complain of what has been done or omitted. In *Regina v. Inland Revenue Commissioners, ex parte the National Federation of Self-Employed and Small Businesses [1982] AC 617; [1981] 2 All ER 93; [1981] 2 WLR 722; [1981] 1 WLR 793*) The Commissioners had been concerned at tax evasion of up to one million pounds a year by casual workers employed in Fleet Street. They agreed with the employers and unions to collect tax in the future, but that they would not pursue those who had evaded taxes in the past. The Federation challenged the concession. The Revenue said it did not have standing to make the challenge. It was held that;

> It was relevant to consider the strength of the case that the Commissioners were acting beyond their powers. The Board are charged by statute with the care, management and collection on behalf of the Crown of income tax, corporation tax and capital gains tax. It has a wide discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection. The board is under a statutory duty of confidentiality with respect to information about individual taxpayers' affairs that has been obtained in the course of their duties in making assessments and collecting the taxes; and this imposes a limitation on their managerial discretion. If it were established that the board were proposing to exercise or to refrain from exercising its powers not for reasons of 'good management' but for some extraneous or ulterior reason, that action or inaction of the board would be ultra vires and would be a proper matter for judicial review if it were brought to the attention of the court by an applicant with 'a sufficient interest' in having the board compelled to observe the law. In the daily discharge of their duties inspectors are constantly required to balance the duty to collect 'every part' of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected.

In the same decision, Lord Diplock justified the modern approach to judicial review:

> 'It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by

> outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.' Section 1 of the 1970 Act gave the Commissioners 'a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection.' 'If on quick perusal of the material available the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the relief sought it ought, in the exercise of a judicial discretion, to give leave.'

Lord Wilberforce said that "the whole system . . involves that . . matters relating to income tax are between the commissioners and the taxpayer concerned," and that the "total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system." In *Inland Revenue Commissioners v. Nuttall [1990] STC 194*, the Revenue and the taxpayer had agreed that the latter should pay £ 15,000 in consideration of the Revenue taking no proceedings against him for tax penalties or interest. The taxpayer paid only £ 5,000 and the Revenue sought summary judgment for the rest. The taxpayer, who claimed that the agreement made was ultra vires the Revenue, was granted leave to defend by the Master, a decision upheld by French J. The Revenue appealed to the Court of Appeal. The appeal succeeded, and summary judgment was given for the sum which the Revenue had claimed. It was held that;

> What happens in practice is that taxpayers who have, in the opinion of the Board's officers, rendered themselves liable to the imposition of interest and penalties are invited to make a settlement. The procedure is that the taxpayer makes a voluntary offer to pay a sum of money in consideration of the Board agreeing not to take formal proceedings for any tax underpaid and the interest and penalties. If such an offer is made and is accepted, a contract binding upon both the Inland Revenue and the taxpayer is brought into being….. it is an incidental power to enable them to enter into an agreement to compromise an overall situation consisting partly in outstanding tax,

> partly in a potential liability to culpable interest and partly in potential liability to pay penalties if by that means they consider they can best recover and manage the tax which is committed to their care…… It is not open to this court, having regard to the long established practice of the Revenue, and to the legislative history, to say now that the commissioners do not have the lawful power which they exercised by making this agreement with the taxpayer…… It would seem to me extraordinary, and also regrettable, if the Revenue could not achieve by agreement that which it could undoubtedly achieve by coercion. The submission that it could not, as counsel for the taxpayer acknowledges, runs counter to the habitual practice of the Revenue recognised by the recent Royal Commission without query or criticism. But counsel fairly points to the fact that although the legislation expressly authorises the Revenue to mitigate and compound claims for penalties and default interest, it does not expressly authorise the Revenue to compromise claims for back duty save where an assessment has been made and appealed against…… The power to make agreements with taxpayers for the payment of back duty, even in the absence of assessment and appeal, is in my view a power necessary for carrying into execution the legislation relating to Revenue…… It is, of course, a power to be exercised with circumspection and due regard to the Revenue's statutory duty to collect the public revenue. But if in an appropriate case the Revenue reasonably considers that the public interest in collecting taxes will be better served by informal compromise with the taxpayer than by exercising the full rigour of its coercive powers, such compromise seems to me to fall well within the wide managerial discretion of the body to whose care and management the collection of tax is committed. Such informal compromise deprives the taxpayer of the *locus poenitentiae*…. I have no hesitation in holding such an agreement, properly made, to be binding. There is accordingly, in my opinion, no arguable defence to the present claim.

This is achieved by, in effect, requiring those unaffected by decisions to compensate for their lack of "direct interest" by establishing either that they speak for those with such an interest, or that they speak for a public interest that deserves to be considered by the court, and that they are capable of litigating the case effectively. The "sufficient interest" test thus facilitates an accommodation of constitution principle and pragmatic considerations in a way that a "direct interest" test, taken at face value, likely would not.

The position is that Commissioners of the Uganda Revenue Authority must assess each individual taxpayer in relation to his or her circumstances. Such assessments and all information regarding taxpayers' affairs are not public documents. There is no list or record of assessments which can be

inspected by other taxpayers. Nor is there any common fund of the produce of income tax in which income taxpayers as a whole can be said to have any interest. The produce of income tax, together with that of other domestic taxes, is paid into the Consolidated Fund which is at the disposal of Parliament for any purposes that Parliament thinks fit. Matters relating to income tax are between the commissioners and the taxpayer concerned.

The position of taxpayers is therefore very different from that of ratepayers. As explained in *Arsenal Football Club Ltd v. Ende [1977] 2 All ER 267, [1979] AC 1*, the amount of rates assessed on ratepayers is ascertainable by the public through the valuation list. The produce of rates goes into a common fund applicable for the benefit of the ratepayers. Thus any ratepayer has an interest, direct and sufficient, in the rates levied on other ratepayers; for this reason, his right as a 'person aggrieved' to challenge assessments on them has long been recognised. It was held in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93,* that;

> The total confidentiality of assessments and of negotiations between individuals and the Revenue is a vital element in the working of the system. As a matter of general principle I would hold that one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been under-assessed or over-assessed; indeed there is a strong public interest that he should not. And this principle applies equally to groups of taxpayers: an aggregate of individuals each of whom has no interest cannot of itself have an interest.

This is not such a case where the court ought, at the instance of a taxpayer, to intervene. To do so would involve permitting a taxpayer or a group of taxpayers to call in question the exercise of management powers and involve the court itself in a management exercise. Judicial review under any of its headings does not extend into this area. I am persuaded in this by the dictum of lord Fraser of Tullybelton in *Inland Revenue Commissioners and National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93*, when he said;

> If the class of persons with a sufficient interest is to include all taxpayers it must include practically every individual in the country who has his own income, because there must be few individuals, however frugal their requirements, who do not pay some

> indirect taxes including value added tax. It would, I think, be extravagant to suggest that every taxpayer who believes that the Inland Revenue or the Commissioners of Customs and Excise are giving an unlawful preference to another taxpayer, and who feels aggrieved thereby, has a sufficient interest to obtain judicial review …….. It may be that, if he was relying on some exceptionally grave or widespread illegality, he could succeed in establishing a sufficient interest, but such cases would be very rare indeed and this is not one of them.

The public spirited litigant may have a "genuine interest" in the subject matter if the litigation where interference with a public right involves interference with some private right of the applicant, and where no private right of the applicant is interfered with but he, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. In the area of tax, the peculiar damage sustained may arise out of the increased tax which the applicant will have to pay by reason of unjustified waivers of tax. While the applicant may not be an aggrieved person in any strict sense, he or she may have an interest that is genuine and that is peculiar to them.

However in the instant case, the applicant does not claim to represent any interest other than his own. Moreover, it is not and could not be said that there are no challengers directly affected by the policy who could realistically be expected to litigate. In a case such as this, where the applicant does not purport to represent any interests but his own, the court is required to focus on the relief sought and to consider, in light of the applicant's position whether that relief is capable of conferring a benefit (not necessarily a pecuniary one) on him. The answer to that question is currently "No". It follows that, as matters presently stand, the applicant lacks standing to challenge the decision of the respondent.

Although the strict rule of *locus standi* applicable to private litigation is relaxed in public interest litigation, the applicant is not espousing a cause of the downtrodden and the poor who have no access to justice. The applicant instead seeks to pursue the cause of persons who are able to seek redress on their own. He therefore cannot, in a representative capacity as a public spirited citizen, be a person aggrieved, when his or her own interests are not in issue. He intends to question something with which he has no legitimate concern at all, and worse still, the basis for the application is suspicion only. He has also not shown that he is capable of litigating the case

effectively. I therefore find that the applicant neither has direct nor sufficient interest in the subject matter of the decision he seeks to impeach. This ground of objection too therefore is accordingly sustained. All the grounds of objection having been sustained, the result is the application fails and it is accordingly dismissed with cots to the respondent.

Delivered electronically this 10th day of June, 2022 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
10th June, 2022.