THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-MA-0459-2009

(CIVIL DIVISION)

PROLINE SOCCER ACADEMY LTD ::::::::::::::::::::::::::APPLICANT

VERSUS

1. **LAWRENCE MULINDWA**
2. **OKANYA PATRICK**
3. **MOSES MAGOGO** **:::::::RESPONDENTS**
4. **EDGAR WATSON SUUBI**
5. **FEDERATION OF UGANDA FOOTBALL ASSOCIATIONS, FUFA**

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This application by Chamber Summons was brought under the Judicature (Judicial Review) Rules, 2009 SI No. 11 of 2009, O.41 rr.2 (1), (2) and (9) of the Civil Procedure Rules, SI 71 – 1 and all enabling laws. It seeks that:

1. A Temporary order issues against the 1st, 3rd, 4th and 5th respondents jointly and/or severally, along with their agents and servants restraining them from organizing, holding or running the National Super League Division, 2009/2010 that excludes the applicant until the disposal of the main cause.

2. A further Temporary injunctive order doth issue against the 1st, 2nd, 4th and 5th respondents, their agents and/or servants restraining them from going ahead with the electoral processes for FUFA elective offices until the main cause is heard and disposed of.
3. Provision be made for costs of this suit.

The grounds of the application are contained in the affidavit of Mr. Mujib Kasule, the applicant's director. Briefly, they are:

a). The applicant has filed in this court a Miscellaneous Cause which is pending hearing and determination.

b). In the said action, the applicant, among others, seeks orders of Certiorari against the decision(s) of the respondents, jointly and/or severally, made expelling Nalubaale Football Club from participation in the National Football Super League Division 2009/2010 and declarations touching the respondent's legal mandate and non-compliance with FUFA Constitution.

c). The said action is well founded and has good chances of success.

d). Meanwhile, the respondents are organizing the National Super League Division, 2009/2010 and the League is scheduled to kick off on the 19th September, 2009 without the applicant, who is the assignee of the soccer rights and interests of Nalubaale Football Club after a take-over arrangement that was duly executed.

e). The applicant is ready and prepared to participate in the said league once included by the respondents.

f). The applicant will be imperiled if the orders sought are not granted and the main action rendered nugatory.

g). It is in the interest of justice and fairness that the orders sought are granted.

The application was taken out by M/s Kaggwa Sempala Mukasa Obonyo (KSMO) Advocates on behalf of the applicants.

The respondents filed an application in opposition through one Luganda Alex, the Secretary of the legal committee of the 5th respondent. Mr. Luganda raises a number of legal issues in his affidavit. Briefly, they are that:

1. FUFA is an unincorporated association without capacity to sue or be sued.

2. The 1st, 2nd, 3rd and 4th respondents are only officers of an unincorporated association.

3. Nalubaale Football Club Ltd registered and participated in the National Super League.

4. Nalubaale Football Club Ltd is still existent (according to search in the Companies Registry).

5. The decision of FUFA was made against Nalubaale Football Club Ltd.

6. Nalubaale Football Club Ltd has not appealed against and/or challenged the said decision.

7. No decision has been made against the applicant for which an order of certiorari can be made.

8. The applicant is neither a member of FUFA nor a member of the National Super League.

9. There has never been any resolution to dissolve the Executive (FUFA).

The long and short of the respondents' opposition to the application for Judicial Review is that the applicant has no locus standi to bring the application.

M/s Kiwanuka & Karugire Advocates represented the respondents in this matter.

From the pleadings, Nalubaale Football Club failed to pay the contracted coaches and players, according to a letter from FUFA dated 17/08/2009 (annexture 'F' to the main application) for a period of 8 months totaling to Shs.38,560,000/= and the liability was not assigned to the applicant. Hence the respondents' refusal to recognize the purported assignment, among other reasons.

When the application came up for hearing on 17/09/2009, Mr. Kiryowa-Kiwanuka raised a number of preliminary objections. The objections relate to the competence of the application. They relate to: Locus standi, capacity to sue or be sued, procedure adopted by the applicant, cause of action and service of summons.

I have already said that according to the pleadings, the respondents are organizing a National Super League Division 2009/2010. The League is said to be scheduled to kick off on 19/09/2009, just tomorrow. The applicant is desirous of participating in the same. However, the respondents have blocked them. Hence the application for Judicial Review to quash the decision blocking them. Time is clearly of essence to them. I have no doubt had to work under extreme pressure to come up with this decision. I will do the best I can in the unique circumstances of the case.

Now before I resolve the points of law raised by the parties one by one, I consider it necessary to comment, very briefly, on two broad aspects: the remedy of Judicial Review and technicalities in dispensation of justice.

As regards the remedy of Judicial Review, it is a principle, fairly notorious in my view, that the prerogative order of certiorari is designed to prevent abuse of, or the outright abuse of, power or jurisdiction by public authorities. The legal authorities show that the primary object of the prerogative orders of certiorari and prohibition is to make the machinery of government operate properly and in the public interest. Judicial Review is concerned not with the decision per se but the decision making process. Essentially, it involves an assessment of the manner in which a decision is made. It is not an appeal and

the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, for instance in the instant matter that the applicant is or is not entitled to participate in the National Super League being organized by the respondents, but to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality.

I stated that much in ***Kyamanywa Andrew K. Tumusiime*** vs ***The IGG HCT-00-CV-MA-0243-2008*** (unreported) and the point requires no further elaboration. Suffice it to say, however, that the power extends to the acts and orders of a competent statutory public authority, which has power to impose a liability or give a decision, which determines the rights or property of the affected parties. Bodies which are bound to explain and defend in any forum the decisions they take in the performance of their duties are amenable to judicial review.

I should hasten to add that certiorari is a discretionary remedy. A court of law would exercise its discretion to grant it only in fitting circumstances. Accordingly, the discretion to grant it must be exercised judicially and not as a matter of course. I may have occasion to say more on this point in the main Cause for Judicial Review, if circumstances so warrant. Today is for the application for a temporary injunction arising out of the said main cause.

As regards technicalities in dispensation of justice, the Supreme law of the land, the constitution is very categorical in Article 126 (2) (e) thereof that in adjucating cases of both a civil and criminal nature, the courts shall, subject to the law, administer justice without un due regard to technicalities. The catch phrase in the said Article is "***subject to the law."*** Time and again courts have held that Article 126 (2) (e) is not a magic wand in the hands of a defaulting litigant, but a person who relies on it must satisfy court that in the circumstances of the particular case, it is not desirable to pay un due regard to a relevant technicality. Indeed in ***Utex Industries vs Attorney General SCCA No. 52/1995*** the Supreme Court observed that by enacting Article 126 (2) (e), the Constituent Assembly did not intend to wipe out rules of procedure. Much as an individual is entitled

to pursue his/her rights, he/she must do so in accordance with the specific procedural law. Having said so, court is mindful of the holding in ***Nanjibhai Prabhudas & Co. Ltd vs Standard Bank Ltd [1968] EA 670*** that:

> ***"The court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature."***

I now turn to the specific arguments advanced at the hearing.

1. **LOCUS STANDI**

Learned Counsel for the respondents submitted that the application seeks to quash a decision of the 5th respondent to exclude Nalubaale Football Club from the National League; that a person aggrieved for purposes of an application of this nature must be a man/person who has suffered a legal grievance, a man/person against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something. He has cited to me ***Attorney General of the Gambia vs Njie [1961] 2 ALL ER 504*** in support of his argument. Counsel's argument is that the applicant herein is not any such aggrieved person.

I have addressed my mind to the able arguments of both counsel.

The issue that I have been asked to decide herein is that of locus standi; or a place of standing, which is the question of whether a person has a cause of action. The rule is that there must exist '***a sufficient interest in the matter to which the application relates.'*** This essentially means that the matter must directly affect the applicant in some way, however small.

From the applicant's pleadings, it took over rights and interests of Nalubaale Football Club in FUFA organized and sanctioned football competitions, including Uganda Super League 2009/2010 upon reaching a Memorandum of Understanding (MOU) with Nalubaale Football Club dated 30/06/2009. The respondents were accordingly notified.

It is the applicant's case that the 4th respondent, acting on behalf of the purported FUFA executive and FUFA, later made a decision excluding or ejecting Nalubaale Football Club from participating in the Super League, 2009/2010 without affording a hearing to any of the parties involved including the applicant. It is the applicant's case further that the said investigations by the purported FUFA Executive and the decisions made by them lacked legal mandate, jurisdiction and locus standi and they are nullities in law.

From decided cases, applications for review may be made on grounds such as:

(i). Want or excess jurisdiction (as when a statutory authority exceeds its jurisdiction); or

(ii). Where there is an error of law on the face of the record; or

(iii) Failure to comply with rules of natural justice.

It is important to remember in every case that the purpose of remedies under judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The function of the court is to see that lawful authority is not abused by unfair treatment and not attempt itself the task entrusted to that authority by the law.

Assuming that the facts as deponed to by Mr. Mujib Kasule in his affidavit in support of the application are true, that is, that the applicant took over the rights and interests of Nalubaale Football Club in FUFA organized and sanctioned competitions, which is a matter for the main application, then clearly if it be true that FUFA has made a decision excluding the said Nalubaale Football Club from the forthcoming competition after the alleged assignment, without affording a hearing to the assignees of those rights, they (the

assignees) would in my view be ***'an aggrieved party'*** in the context of the law relating to Judicial review entitled to seek protection of the court. This is because the said decision, though made against Nalubaale Football Club would affect the applicant's rights in some way, however small, by reason of the said assignment.
Subject to court's decision on the issue of cause of action, which to some extent is closely linked with the issue of locus standi, I would overrule this objection.

2. CAPACITY TO SUE OR BE SUED

Mr. Kiryowa Kiwanuka's argument on this point is that FUFA is an unincorporated association without capacity to sue and/or be sued. Mr. Mulema Mukasa for the applicants does not agree.

The jurisdiction of this court to issue prerogative orders is derived from the Statute, namely, the Judicature Act, Cap. 13, Sections 33, 36, 37 and 38.

There is no requirement in those provisions that such orders shall only issue to public bodies and offices that have corporate personality. My brother Kasule Ag. J. (as he then was) faced with the same issue in ***John Jet Tumwebaze vs Makerere University Council & Others H.C Civil Application No. 353 of 2005*** (un reported) observed:

> ***"If the legislature desired that these orders issue only against bodies clothed with corporate personality, the legislature would have expressly stated so. It did not. The wide jurisdiction given to court as to the public bodies and officers at which prerogative orders can be directed must not be narrowed down by restricting their issuance to only those bodies clothed with corporate personality."***

I agree with the view expressed by the learned Judge and I need not add anything to it. I therefore adopt it as the correct legal position in as far as remedies of Judicial Review are concerned.

I would also overrule this objection and I do so.

3. PROCEDURE

Mr. Kiryowa Kiwanuka's argument on this point is that the method of application is by Notice of Motion and yet the current one is by Chamber Summons. His view is that the procedure adopted by the applicant is wrong.

Mr. Mulema Mukasa does not agree.

The Judicature (Judicial Review) Rules, 2009 govern this application. Rule 3 (1) (a) thereof provides that an application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with these Rules. Under Rule 3 (2), an application for a declaration or an injunction (not being an injunction under Section 38 (2) of the Judicature Act restraining a person form acting in any office in which the person is not entitled to act) may be made by way of an application for judicial review. Under Rule 6, an application for judicial review is made by notice of motion in the form specified in the schedule to these Rules.

It is noteworthy that the applicant's main application (No. 142 of 2009) contains a prayer for an injunctive order restraining the respondents from carrying on with the Super League, 2009/2010 without the participation of the applicant, ***"the assignor (sic) of the rights of Nalubaale Football Club."***

The said application has been cause listed for hearing on 12/10/2009 at 12.30 p.m.

Pending that hearing, the applicant is moving court vide this application for a temporary order. The application has been made under O.41 rr.2 (1), (2) and (9) of the Civil Procedure Rules. The Order governs injunctions to restrain breach of contract or other injury. The Judicature (Judicial Review) Rules, 2009 do not provide for the procedure of filing applications for temporary and/or interim reliefs.

Under O.41 rule 2 (1), in any suit for restraining the defendant from committing a breach of contract or ***other injury of any kind***, whether compensation is claimed in the suit or not, the plaintiff may, any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of alike kind arising out of the same contract or relating to the same property or right. The procedure under this Order is by Chamber Summons.

It would appear to me that Mr. Kiryowa Kiwanuka's argument is premised on his interpretation of Rule 3 (2) of the Judicature (Judicial Review) Rules, 2009 that an application of this kind must also be made by notice of motion like the main application.

He has not provided any authority to support that view. I'm of the opinion that his view is erroneous. I'm saying so because the Rules themselves do not state so. In my view, whereas it can be said that applications for Judicial Review must be instituted in accordance with The Judicature (Judicial Review) Rules, 2009 (SI 2009 No. 11) that is, by Notice of Motion, it is not correct to say that this is the only mode to be employed when a party is seeking an order to restrain commission of the injury complained of pending determination of the main application.

I'm therefore unable to fault the procedure adopted by the applicant herein.

This objection must also be overruled and it is overruled.

4. **SERVICE OF SUMMONS**

Mr. Kiryowa Kiwanuka's argument on this point is that service was not effected upon the respondents, but on one Sharon Nalunga, the Personal Secretary to FUFA President Lawrence Mulindwa, the first respondent herein.

I think the point was well made by Mr. Kiryowa – Kiwanuka. Service should have been on the respondents themselves. However, as I said earlier on, courts should not treat any

incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature and rules as to service of summons are matters of procedure. The beauty of it here is that Sharon Nalunga did what was expected of her and the respondents are in court. Spry J. A., (as he then was) in ***Boyes vs Gathure [1969] E. A. 385*** enunciated a very sound principle which appears to apply to a situation such as the one pertaining in the instant application with regard to service. That principle is that mere adoption of a wrong procedure would not invalidate the proceedings where:

a). it did not go to the question of jurisdiction or;

b). no prejudice was caused to the opposite party.

None of these two essential elements pertain in the instant application in as far as I'm able to ascertain. Nor does learned counsel for the respondents allege that they do.

Lastly, it appears to me that even Article 126 (2) (e) of the Constitution would be appropriately invoked in a situation of this kind. Substantive justice must be administered without undue regard to technicalities, more particularly procedural ones.

This objection also fails.

5. **CAUSE OF ACTION**

It is settled law that the question as to whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone (in the instant matter the Notice of Motion), together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true: ***Jeraj Shariff & Co. vs Chotai Fancy Stores [1960] EA 374*** at p. 375.

In the instant matter, the applicant's purported right is based on a purported Memorandum of Understanding between Nalubaale Football Club and the applicant, annexture C to the application. This is all there is between Nalubaale Football Club and Proline Soccer Academy Ltd as evidence that the latter took over the rights and interests

of the former and is therefore legally entitled to a hearing by the respondents in a matter that would ordinarily be between Nalubaale Football Club and FUFA. As fate would have it, the Memorandum of Understanding, a document chargeable with stamp duty, is not a registered instrument.

Mr. Kiryowa – Kiwanuka has contended that this document cannot be admitted in evidence in a court of law.

Mr. Mulema Mukasa does not agree.

I consider this to be the most pertinent issue in this case, the legality of a document which cannot be relied on in evidence because it has not been embossed with stamp duty.

My understanding of the law is that the registration or non-registration of a document has no bearing on its validity or invalidity. However, Section 42 of the Stamps Act, Cap. 342 of the Laws of Uganda is very clear on this point:

> ***"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of the parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person, or by any public officer, unless the instrument is duly stamped."***

Some exceptions are stated in the Section none of which is applicable to this matter.

In ***Yokoyada Kagwa vs Mary Kiwanuka & Anor [1979] HCB 23*** court held that generally under Section 38 (as it then was) of the Stamps Act, any instrument on which a duty is chargeable is inadmissible in evidence unless that instrument is duly stamped as an instrument on which the duty chargeable thereon has been paid.

From the authorities, therefore, such unstamped instruments can be rendered admissible in evidence on payment of the duty with which the instrument is chargeable in addition to any penalty that may be prescribed.

The applicant herein has not sought leave of court that the deed of assignment be rendered admissible as by law established. In these circumstances, I would accept the argument of learned counsel for the respondents that the applicant cannot rely on the unstamped instrument as evidence of the Nalubaale Football Club's transfer of rights and interests in FUFA to the applicant. See also: ***Kafeero vs Turyagyenda [1980] HCB 122***.

I would hasten to add that the impugned Memorandum of Understanding is enforceable as between the parties hereto. It does not bind a third party herein, the respondents. Accordingly, I do accept the argument of learned counsel for the respondents that for as long as the impugned deed of assignment is unregistered, it cannot be used in this case to found a cause of action against the respondents. The reason for the law's refusal to uphold such an instrument is commonly put in the Latin Maxim ex turpi causa non oritur actio (no claim arises from a base cause). In other words, no court will lend its aid to a person who founds his claim upon an illegal act. If the cause of action appears to arise ex turpi causa, and the instant one appears so on account of non-compliance with statutory law, the court says he has no right to be assisted. There is therefore merit in Mr. Kiryowa – Kiwanuka's objection. The effect of non-registration of documents is a matter of substantive law, not procedure. For the plaint to be said to disclose a cause of action, it must show that the plaintiff enjoyed a right, that the right has been violated, and that the defendant is liable: ***Auto Garage & Others vs Motokov (No.3) [1971] EA 514***.

I should add that by a right I mean a legally protected interest. In the instant case, in the absence of a duly registered deed of assignment/Memorandum of Understanding, or even either Company's resolution to that effect duly executed, it appears to me that the applicant is at the wrong end of the law. It has not demonstrated any such legally protected interest in the respondent's affairs and therefore lacks a cause of action against them. In the result, I find that the applicant's application is fundamentally flawed on

account of being non-compliant with the relevant laws. Although it has demonstrated a sufficient interest in the affairs of Nalubaale Football Club, the application must fail on account of non-disclosure of a sufficient or at all cause of action against the respondents jointly or severally. After all, the impugned decision was for Nalubaale Football Clubs consumption, not the applicant's. Under O.7 r.11 (a) of the Civil Procedure Rules, a pleading which does not disclose a cause of action must be rejected. I notice that the main application, No. 142 of 2009, is also founded on the same unregistered instrument. It too is bad in law and therefore unmaintainable against the respondents. Accordingly, this application together ***HCMA No. 142 of 2009*** shall be struck out on account of non-disclosure of a cause of action against the respondents. In view of the respondents' unchallenged evidence as per the affidavit of Alex Luganda, that is, that there has never been any resolution to dissolve FUFA executive, I take that to be the true position. I am unable to fault their decision in that regard. As regards costs, the respondents have not sought any against the applicant. Each party shall therefore bear its own costs.

For the avoidance of doubts, HCMA No.0460 – 2009 for an interim injunctive order shall suffer the same fate, now that the same has been overtaken by events.

Orders accordingly.

Yorokamu Bamwine
JUDGE
18/09/2009

18/09/09

Mr. Sempala
Mr. Mukasa } for applicants

Mr. Kiryowa Kiwanuka for respondents

Court:

Ruling delivered

Mr. Mukasa:

Our instructions are to seek leave to appeal.

Court:

If any is required, it is granted.

Yorokamu Bamwine

JUDGE

18/09/09