THE REPUBLIC OF UGANDA

IN THE HIGH OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO.53 OF 2010

1. **WAKISO TRANSPORTERS TOURS & TRAVEL LTD.**
2. **HOPE IMPRESSIONS LTD.**
3. **DADA GENERAL ENTERPRISES**
4. **JANET KASHOZI MAKWABIRIZO**
5. **AKANKWATSA SAM**
6. **TUMWINE RONALD==========] APPLICANTS**

VERSUS

1. **INSPECTOR GENERAL OF GOVERNMENT**
2. **WAKISO DISTRICT COUNCIL**
3. **MUKWAYA JOSEPH**
4. **OKELLO SILVER==========] RESPONDENTS**

BEFORE: HON. MR. JUSTICE YOROKAMU BAMWINE

RULING:

This is an application for Judicial review. It is premised on the grounds that the respondents have taken unjust, unfair and illegal decisions/actions. The applicants' basis for saying so is that no reason whatsoever was given for the decision taken against the applicants; that there was no hearing nor did the respondents follow the law; that it is just and equitable that this honourable court issues orders directing and prohibiting the respondents from continuing to act illegally.

When the suit came up for hearing on 20/9/2010, Mr. Simon Tendo Kabenge, Counsel for the applicants, raised a preliminary objection to the affidavit in reply filed by the 1st respondent.

The objection is based on Rule 7(3) of the Judicature (Judicial Review) Rules, 2009. Under this rule, any respondent who intends to use any affidavit at the hearing shall file it with the Registrar of the High Court as soon as practicable and any event, unless the court otherwise directs, within fifty six days after service upon the respondent of the documents required to be served by sub rule (1).

Learned counsel's contention is that the rule is mandatory and that any service outside the stated period is bad in law. Since the affidavit in the instant case was filed outside the 56 days period, counsel has invited me to order it struck out so that the application proceeds ex parte as against the 1st respondent and the 4th respondent who filed none.

Learned counsel for the 1st respondent, Mr. Hosea Lwanga, does not agree. According to him, the law does not give time limit in which to file a reply in matters of judicial review. In his view, rule 7 which counsel for the applicants relies on applies where the application has been amended. The 56 days are given to the respondent to file a reply.

He stated that on 8/9/10 the 1st respondent filed its affidavit in reply, having been served on 20/6/10 (sic) They took it to counsel for the applicant's chambers, tried to serve them, but they declined service. He invited court to allow them to proceed with the hearing of the case in accordance with Section 98 of the Civil Procedure Act and Articles 126(2) (e) of the Constitution.

In the same application, Mr. Nerima, learned counsel for the 2nd and 3rd respondents invited court to strike out the case against them with costs. According to him, the 3rd respondent, Mr. Mukwaya, holds office of CAO, Wakiso District. The impugned report of the IGG was addressed to the CAO and not to Mr. Mukwaya personally. So the applicants have no cause of action against Mr. Mukwaya personally.

As regards the 2nd respondent, learned counsel submitted that the grounds and prayer in the motion attack the IGG's report. There is no suggestion in the motion that the report was made by Wakiso District Council or its CAO. He therefore invited me to order the suit against the 2nd respondent struck out as well.

Turning now to the preliminary objection raised by Mr. Tendo Kabenge, I have already set out in detail the rule said to have been infringed. Rule 6 thereof spells out the mode of applying for judicial review. It is by notice of motion in the form specified in the schedule to the Rules. In the motion, the applicant must alert the respondent to take notice that on the hearing of this motion, the applicant will use the affidavit and exhibits, copies of which accompany the motion.

Under Rule 6(3), unless the court has otherwise directed, there shall be at least ten days between the service of the notice of motion and the hearing, implying that if any reply is to be filed by the respondent, it should be within that period of 10 days. And under Rule 6(4), the motion shall be fixed for hearing within fourteen days after service of the notice of motion, implying that whether or not the respondent files a reply, as long as there is evidence of service on record, the applicant is entitled to apply for a hearing date and court entitled to fix a hearing date, 14 days after service.

From my reading of the Rules, they do not expressly stipulate the time limit within which to file a reply, if the respondent is inclined to do so. The element of time is indirectly expressed in terms of when hearing should commence so that a party who wishes to file a reply to the notice of motion does so before hearing commences or else participates in the proceedings without doing so.

From my reading of the Rules also, Rule 7(3) applies where the court, pursuant to Rule 7(1), on the hearing of the application, allows the applicant to amend his/her motion. Where the applicant exercises that option, and the respondent is inclined to file a reply, he/she does so as soon as practicable. In the absence of direction by court to the contrary, this should be done within 56 days after service upon the respondent of the documents required to be served in accordance with Rule 7(1).

For this reason alone I would disallow the objection.

In the event that I am wrong, however, I would note, from the pleadings, that the applicants have not indicated to court what prejudice would be occasioned to them by the omission to file a reply within 56 days. From my reading of the Rules, the 56 days period is more intended to ensure expeditious determination of the application for judicial review than to

oust the jurisdiction of court to hear the parties after the prescribed period. I am saying so because the Rules do not state the legal consequences of failure of the respondent to file a reply within the prescribed period. If the law maker intended it to be so strictly construed, it would have stated so in express terms.

Courts have time and again observed 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. In **Nanjibhai Prabohusdas & Co. Ltd. vs Standard Bank Ltd [1968]E.A. 670,** the court observed, and I agree, that matters of procedure are not normally of a fundamental nature.

The Supreme Court itself did emphasize the point in **Re Christine Namatovu Tebajjukira [1992-93] HCB 85** thus:

"The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights"

In **Marion Tukahirwa vs Wakiso District Council & Anor HC Misc. Cause No.278 of 2003 (unreported) (per Lady Justice C.A. Okello,**
Court observed, and I also agree with that observation, that Regulations made under a statute are rules of procedure whereby failure to strictly comply with them need not necessarily be fatal to a party's case, if the other party to the same proceedings is not prejudiced.

As I have already stated, the applicants herein are not likely to be prejudiced in any way by the failure of the 1st respondent to comply with the 56 days rule. The reply will if anything assist court to get to the root of the matter. The irregularities learned counsel for applicants has pointed out in my view wouldn't invalidate the reply where:

(a) It did not go to the question of Court's jurisdiction to entertain the application, or
(b) No prejudice was caused to the opposite party.

Moreover, it appears to me that even Article 126(2) (e) of the Constitution would be appropriately invoked in a situation such as this. For this reason I am inclined not to follow the authority cited to me by learned counsel for the applicants, namely **Prisca Katatumba vs**

Attorney General Misc. Application No.208 of 2009. Court may not have had the time in that case as herein to analyze the authorities.

For this reason also I would disallow the preliminary objection and I do so.

As regards the objection raised by Mr. Nerima, learned counsel for the 2nd and 3rd respondents, I would note his argument that judicial review cannot lie against Joseph Mukwaya in his private capacity; that it is trite law that judicial review lies against inferior courts, tribunals and other bodies or persons who carry out judicial or quasi judicial functions, or who are engaged in the performance of public acts and duties, e.g. administrative authorities.

I am unable to give such a restrictive scope to the remedy of judicial review. I have indicated in many authorities, especially **John Teira & Anor vs Makerere University Council HCMC No. 0049 of 2010** (unreported) that any person, natural or artificial, bound to explain and defend in any forum the decision he/she makes in the performance of his/her duties is answerable to judicial review. The decision maker must of course understand correctly the law that regulates his decision – making power and give effect to it. This involves identifying the parameters set by the empowering statute and having regard to whether the decision-maker has exercised a power for an improper purpose; made any mistake of fact; or applied the law inconsistently.
Learned counsel has raised a point of law. It is trite that a point of law such as the instant one, if it is to succeed, must be one which can be decided fairly and squarely one way or the other, on facts agreed or not in issue on the pleadings and not one which will not arise if some fact of facts in issue should be proved.

True, whether or not the pleadings herein raise a cause of action against the 2nd and 3rd respondent must be determined upon the notice of motion, the accompanying affidavits and the annextures thereto. However, from the arguments of both counsel, to determine the said point of law fairly and squarely one way or the other, it is necessary that the parties do agree at the conferencing or otherwise of acts agreed or not in issue on the pleadings. We are yet to get to that stage. The parties are for instance yet to agree whether the pleadings are closed or not; or whether any side intends that deponents of affidavits be called for cross examination, for some fact or facts in issue to be proved. Until that is done, I am of the

considered view that the point of law raised by Mr. Nerima cannot be decided fairly and squarely one way or the other.

For now the applicants have decided to proceed against the respondents as decision-makers in the matter under review. They have pleaded the reasons for doing so. The reasons may or may not be sustained at the hearing. The law as I understand it is that the plaintiff (in this case the applicants) is at liberty to sue any body he/she thinks he/she has claim against. If he/she sues a wrong party, the remedy lies in an order for costs. I made such an order in **Nestor Machumbi Gasasira vs Inspector General of Government and Attorney General HCCA No.0062/2009** when the applicant failed to prove its claim against the Attorney General. I would adopt the same view. Accordingly whether the respondents or any of them is liable or not is in my view a matter to be determined after all the relevant evidence has been put before the court and not at this stage. As my brother Akiiki-Kiiza Ag. J. (as he then was) observed in **Maximor Oleg Petrovich vs Premchandra Shenoi & Anor HCCS No. 802 of 1997** (reproduced) in **[1998] V KALR 119),** Courts should be slow in up-holding preliminary objections with a result of killing the action in the bud, save in obvious and appropriate cases where the court process is sought to be abused. I am inclined to the view that this case is not in that category, subject of course to the over all outcome thereof.

For reasons stated above, learned counsel's objection is also over ruled. In the result, the objection raised by learned counsel for the applicants in as far it relates to the 1st respondent is disallowed.

The objection raised by learned counsel for the 2nd and 3rd respondents is also disallowed. The case shall proceed to the next level and the file shall be re-allocated for that purpose. Costs attendant to the two objections shall abide the final outcome of the application.

Orders accordingly.

Dated at Kampala, this 22nd day of October 2010.

Yorokamu Bamwine
JUDGE

ORDER: This ruling shall be signed and dated by the Deputy Registrar in my absence on the due date.

Yorakamu Bamwine
JUDGE