THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

MISCELLANEOUS APPLICATION NUMBER 003 OF 2020

(ARISING OUT OF MISCELLANEOUS APPLICATION NUMBER 39 OF 2018)

(ARISING FROM HCCS NUMBER 030 OF 2017)

KINYARA SUGAR LIMITED ..... APPLICANT

VERSUS

HAJJI KAZIMBIRAINE MAHMOOD

WILLIAM NDOZIREHO

WILSON RUJUMBA

KYOKUHAIRWE OLIVER

MOHAMAD KASUMBA..... RESPONDENTS

RULING

BEFORE HON. JUSTICE GADENYA PAUL WOLIMBWA

1.0 Introduction

This application is brought under sections 98 and 82 of the Judicature Act and Order 46 Rules 1(b), 2, 6 and 8 of the Civil Procedure Rules. The application seeks orders that:

- The ruling and orders of this Honourable court in High Court Miscellaneous Application No. 39 of 2018; Kinyara Sugar Limited vs. Hajji Kazimbiraine Mahmood and four others be reviewed and accordingly set aside.
- The costs of the application be provided for.

The grounds of the application are that:

- On 8th June 2018, the applicant filed HCMA 39 of 2018; Kinyara Sugar Limited vs. Hajji Kazimbiraine Mahmoud and 4 others in this court seeking for orders that High Court Civil Suit No. 030 of 2017; Hajji Kazimbiraine Mahmood and 4 Others vs. Kinyara Sugar Works Limited be summarily struck out or dismissed with costs on account of a judgment / ruling in rem having been passed over the same subject matter and account of the suit being res judicata and costs of the application.

- That on 23rd January 2020, by a ruling dated 11th November 2019 by Justice Albert Rugadya Atwooki (Rtd), HCMA 39 of 2018; Kinyara Sugar Limited vs. Hajji Kazimbiraine Mahmoud and 4 others was dismissed with costs to the Respondents following a finding that High Court Civil Suit No. 030 of 2017; Hajji Kazimbiraine Mahmoud and 4 others vs. Kinyara Sugar Works Limited was not res judicata.
- The court also found that the issue of whether the Respondents (Sugar Cane Out Growers) are entitled to compensation for the byproducts of the sugarcane they supply to the Applicants shall be made when the merits of the case High Court Civil Suit No. 030 of 2017; Hajji Kazimbiraine Mahmoud & 4 Others vs. Kinyara Sugar Limited has been heard by Court.
- The Company Secretary of the Applicant subsequently discovered new and important evidence which was not within its knowledge at the time the Order was made. The fresh evidence is that the Learned Retired Justice Albert Rugadya Atwooki is also a sugarcane out grower like the Respondents and a decision in Civil Suit No. 39 of 2018 is aimed at unjustly benefiting all out growers of the Applicant, inclusive of the retired judge.
- The discovery of the said evidence made the retired Honourable Judge an adjudicator in his own cause pointing to his actual / or apparent bias while determining HCMA 39 of 2018; Kinyara Sugar Limited vs. Hajji Kazimbiraine Mahmoud and 4 others. The Applicant's counsel would have moved the Honourable Judge to recuse himself from hearing the matter had it been known then that he was an out grower just like the respondents.
- In the alternative it was also incumbent upon the retired judge to excuse himself from the case since he knew the fact of being an out grower and had apparent interest in it.

The Application is supported by the affidavit of Russell Moro, the Company Secretary of the Applicant Company. The affidavit of the Russell Moro restates most of the matters in the grounds of motion set above and it is not therefore necessary to restate them. I will however, make reference to the relevant paragraphs of the affidavit as I deal with the application.

The application was opposed by the Respondents. In an affidavit sworn by Hajji Kazimbiraine Mahmoud, the first Respondent, he deponed that:

- That I am advised by my advocates, M/s Tumwesigye Baingana & Co Advocates that the application is misconceived with no relevance in law and fact and ought to be dismissed.
- That the application before the Learned Trial Judge was to declare Civil Suit No. 030 of 2017 res judicata.
- That I am advised by my advocate ….that the ruling by the Trial Judge was based on material that was presented before the Judge and the decision was judiciously made.
- That the Applicant never at any one time raised the issue of recusal or even bias against the judge.
- That at all times, the Applicant was the sole person who had actual knowledge that the Learned Trial Judge was their own sugar cane out grower.
- That I, all the Respondents and sugar cane outgrows, individually executed a standard form contract commonly referred to as Cane Production Contract (CPC).

- That the said contracts are prepared, executed and kept by the Company Secretary in the Legal Department of which he is the head.
- That it is dishonesty on the part of the Applicant to not have disclosed that the Learned Judge was its sugarcane out grower.
- That the said trial judge handled various matters as a judge involving the applicant and other parties which were not even appealed.
- That the parties to the arbitration were clearly stated in the Arbitration award and the said judge was not party....
- That the Learned Judge is not a party to my case whose parties are fully disclosed and it is not a representative suit, as such, paragraph 15 and 16 are false.

2.0 Arguments of the Parties

2.1. Arguments of the Applicant

Mr. Nangwala, counsel for the applicant, submitted that they had brought the application for review to set aside the decision of Hon. Justice Albert Rugadya in HCMA 39 of 2018, because the judge, who is a sugarcane out grower, was conflicted in the matter as he stood to benefit from the outcome of the decision like the Respondents, who are sugar cane out growers of the Applicant. He submitted that the Applicant had expected the judge to recuse himself from the matter as he knew that he would be conflicted or accused of apparent bias.

Mr. Nangwala, who gave a background to the application in his opening statement, told court that the 1st, 2nd, 3rd and 5th Respondents filed arbitration Cause Number 2 of 2016, against the Applicant, for among other orders, that the Cane Production Contract should be reviewed to compensate out growers for sugar milling products such as bagasse and molasses, beyond the standard practice of paying them price of raw cane. That the arbitrator found in favor of the Respondents. That the Applicant being dissatisfied with the award challenged it in the High Court and that Justice Wangutusi, who heard the matter partially set aside the award. That the Respondents, instead of abandoning the matter, however, filed HCCS No. 30 of 2017, which is on the same facts like those that had been determined in the arbitration cause and proceedings before Justice Wangutusi. That the applicant then filed HCMA 39 of 2018, to strike out HCCS 30 of 2017, for being res judicata; the suit, having been decided by Justice Wangutusi and a judgment in rem obtained. That Justice Albert Rugadya, now retired, heard the matter and declined to strike out the suit for being res judicata.

Mr. Nangwala then told the court that after the decision of Justice Rugadya, the Applicant's Company Secretary, later learnt through one of his departmental heads, as they were discussing the implications of the ruling, that the judge, was a sugar cane out grower, like the Respondents, who ought not to have heard MA 39 of 2018, as he had an interest in the outcome of the case involving the parties. He submitted that the Applicant is aggrieved by the actions of the judge as they were robbed of the right to an impartial trial. He submitted that it was because of this reason that the Applicant filed this application to set aside the decision of Justice Rugadya, under section 82 of the Civil Procedure Act and the Civil Procedure Rules.

He submitted that the grounds for review under section 82 of the Civil Procedure Act, are wider than grounds under Order 46 rule 1. (b)(2) and 6 of the Civil Procedure Rules, which are restrictive. He relied on **Sadam Muhammed vs. Chanani Singh, 1959 EA**... which in essence held that section 82 of the Civil Procedure Act does not restrict the grounds for review.

He then submitted that the applicant's case was based on the discovery of new and important evidence that was not available to the applicant when Miscellaneous Application Number 39 of 2018, was argued before Justice Rugadya. He submitted that the Applicant discovered after Justice Rugadya had given the said ruling that he was at all material times, an out grower with the Applicant Company, who should have recused himself from entertaining the case in question. He referred to the affidavit of Russel Moro, the Applicant's Company Secretary, in paragraphs 14 to 17, which are to the effect that the applicant, only learnt of the judge's involvement as a sugar cane out grower after delivery of his ruling, when he and other departmental heads were discussing the implications of the Judge's ruling.

He submitted that the likelihood of the judge being biased was great since the judge as an out grower, and stood to benefit from a positive outcome of the suit, like the Respondents, who had brought the action in court as out growers seeking a better price for their produce.

He submitted that there was documentary evidence to show that the Judge was an out grower and that the record of proceedings of the arbitration was being conducted for the benefit of out growers who were presented to be up to 6,000.

He blamed the judge for not disclosing to the parties that he was an out grower. He submitted that based on this evidence the judge was not impartial in handling the application.

He submitted that in order for a judge to be found biased, the Applicant must bring reasonable evidence against the judge to satisfy the court that there was a real likelihood of bias in the judge handling the matter. He relied on **GM Combined (U) Limited vs. AK Detergents 1999 Volume 1 EA page 84** but specifically at page 109.

He submitted that when the courts is dealing with the issue of bias, it does not look at the mind of the concerned judge but looks at the impression which is given to other people and that the test is whether there is a real likelihood of bias i.e. that a reasonable man should think it more probable than not, that the judge would favor one side against the other as justice must not only be done but undoubtedly it should appear to be done.

He submitted that Mr. Russel Moro, the Company Secretary of the Applicant, did not know that the judge was an out grower at the time of hearing the application because he is not the custodian of records relating to out growers of the Applicant. He submitted that the data base on out growers, is kept by the head of the Agricultural Managers Department, who indeed, notified Mr. Russel Moro about the judge's interest in the matter when the ruling was shared out with him and other departmental heads in the applicants company.

In conclusion, counsel for the Applicant, invited the court to review and set aside the ruling of the judge in Miscellaneous Application No. 39 of 2018.

2.2. Arguments for the Respondents

Mr. John Paul Baingana, counsel for the Respondents opposed the application.

He submitted that the application was bad in law because it was a recusal application disguised as an application for review, which should have been brought at the time the judge was hearing the application being complained against.

He submitted that the issue of sugar cane by products has never been handled at any one stage. To drive his point home, he quoted Justice Wangutusi, who when dealing with the appeal challenging the arbitration award, at page 16, observed that:

> *Having done so, they did not contemplate any other matter not even the byproducts except the sugar cane in its raw form arising from the dispute.*

He submitted that the arbitrator erred in adding a consideration of sugar cane byproducts because it was not contemplated and was therefore not capable of settlement in a dealership agreement namely the cane production contract. He submitted that the judge did not say that this matter of the by product is not a matter for arbitration and is not a matter of the contract. He submitted that they disagreed with the applicants and have filed an application for leave to appeal.

He submitted that the Applicant had not brought anything new upon which the court can base itself to review and ultimately set aside the ruling of the judge. He argued that for review to succeed the Applicant must prove that there is new and important evidence that was not available at the trial but that in this case, there was nothing new to merit a review.

He submitted that Mr. Russel Moro, the Applicant's Company secretary, who is the custodian of all legal documents including the Cane Production Contracts, should have known that the judge was an out grower but selfishly kept this information, only to later use it in this application.

He submitted that the Applicant had not adduced evidence to show that the judge was an out grower. He submitted that according to the affidavit of Mr. Kazimbiraine, all individual out growers individually execute standard form Cane Production Contracts (CPC) with the Company Secretary in the Legal Department and that the Applicant had not brought any contract to show that the judge was an out grower.

He submitted that it was even doubtful whether the person who signed annexture D was the judge or not as opposed to annexture E where the transaction was signed by Rugadya Atwoki Albert Frank.

He submitted that the judge could have been a one off seller of cane to the Applicant as opposed to an out grower who is governed by a CPC.

He submitted that the judge was not a party to the arbitration proceedings. He submitted that the issue before the judge was never about the rights of the parties but it was whether the suit was res judicta or not.

He relied on the case of **Meera Investments Limited vs. Commissioner URA Civil Appeal No. 15 of 2017**, where the late Justice Twinomujuni recused himself after giving reasons for the recusal.

He submitted that the issue of Mr. Russel Morro being the custodian of all the records of the Applicant Company had not been rebutted by an affidavit in reply and must therefore be taken to be true. He also submitted that the issues raised in the affidavit of Kazimbiraine had not been rebutted by an affidavit in reply and should therefore be taken to be true.

Finally, Mr. Baingana, submitted that the application before the court was one for recusal and not review and therefore asked the court to dismiss it with costs.

2.3 The Rejoinder

Mr. Nangwala, in rejoinder submitted the application was not a recusal application as stated by the Respondents' counsel. He submitted that the application before the court was one for review.

He submitted that although the respondents were saying that there was nothing new in the application, .there was something new and that is perceived bias of the judge that was not canvassed in M.A 39 of 2018. He submitted that the only person who could have denied that he was not an out grower was the judge, who unfortunately had not sworn an affidavit on the record.

He submitted that annextures 'D' and 'E' are described as out grower cane purchase invoices and so, the judge who is named therein is an out grower and that though the names are used interchangeably in the invoices he is the same person i.e. retired justice Rugadya.

NOTE: At the end of the trial, I asked the parties whether the judge's signature on the invoices was in dispute and they all said it was not. The court will therefore take it as established that that the person who signed annextures D and E is the judge.

3.0 Consideration of the Application

The remedy of review is provided for in section 82 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules. Section 82 of the Civil Procedure Act provides that:

Any person considering himself or herself aggrieved –

(a) By a decree or order from which an appeal is allowed by this act but from which no appeal has been preferred ; or
(b) By a decree or order from which no appeal by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such orders on the decree or order as it thinks fit.

While Order 46 Rule 1 of the Civil Procedure Rules, provides that:

Any person considering himself aggrieved

(a) By a decree or order from which an appeal is allowed , but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed

and who from the discovery of new and important matter or evidence which after due diligence , was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made , or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason , desires to obtain a review of the decree passed or order made against him or her , may apply for e review of judgment to the court which passed the decree or made the order.

The Applicant, submitted that section 82 of the Civil Procedure Act is wider than Order 46 of the Civil Procedure Rules. The Respondents did not directly respond to this argument though they submitted that one can only apply for review within the scope of Order 46 of the Civil Procedure Rules- in other words, the Respondents took the restrictive approach to powers of the court when dealing with review.

By way of introduction, there is no doubt that the Civil Procedure Rules cannot diminish the effect or scope of the Civil Procedure Act under which it is made. Subsidiary legislation adds meat to the principal legislation and that is the reason why when there is doubt regarding the meaning of the subsidiary legislation, the court has to examine the scope of the legislation within the microscope of the principal legislation. With regard to the relationship between section 82 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules, Justice Madrama (J) as he then was, in **Miter Investments Limited vs. East African Portland Cement Company Limited (HCMA 534 of 2012- Commercial Court)** observed that :

> Generally speaking section 82 of the Civil Procedure Act, has been held by the Supreme Court to be of wider import than Order 46 rule 1 and 2 of the Civil Procedure Rules and restrictions imposed by Order 46 rule 1 and 2 of the rules do not apply to section 82 of the Act (See UCB vs. Mokone Agencies (1982) HCB). A similar decision can be found in that Kenyan case of Sadar Mohamed vs. Charan Singh (1959) 1 EA 792 where Farrell J held that section 80 of the Civil Procedure Act which is in pari material with the Uganda section 82 of the Civil Procedure Act gave the court unfettered discretion and the applicant unfettered right to apply for review.

He said:

> In terms of this section confers an unfettered right to apply for review in circumstances specified and unfettered discretion in the court to make such orders as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate.

Section 82 of the Civil Procedure Act therefore, focuses more on a person who is aggrieved by either an order or decree and grants such person the right to apply for review where no appeal is allowed or where a right of appeal exists but where no appeal has been preferred to apply for review before the court that made the decision. On the other hand, an applicant who brings his or her application under Order 46 Rule 1 of the Civil Procedure Rules, must prove any of the following conditions: -

- Discovery of a new and important matter or factor that was not within his or her knowledge after due diligence;
- Mistake or error apparent or on the face of the record, or
- Any sufficient reason, which must be related to the two points above.

An analysis of the provisions of the Civil Procedure Act and Civil Procedure Rules on review shows that the court's powers of review under section 82 of the Civil Procedure Act are wider than those under Order 46 of the Civil Procedure Rules, but the court is exercising its powers under section 82, must, however, exercise its discretion judiciously to promote the overall good of justice. In view of this finding, I will consider the scope of the present application beyond the restrictive scope provided in Order 46 of the Civil Procedure Act.

The next question to consider is whether the Applicant is an aggrieved person within the meaning of section 82 of the Civil Procedure Act?

The Applicant submitted that it was an aggrieved person within the meaning of section 82 of the Civil Procedure Act because the judge, who heard HCMA 39 of 2018, should have recused himself from hearing the case due to conflict of interest and apparent bias, as he stood to benefit from the outcome of the case, as an out grower. The phrase who is 'an aggrieved person', was considered in **Tullow Uganda Limited & Tullow Uganda Operations Pty Limited vs. Jackson Wabyona & Uganda Revenue Authority HCMA 197 of 2017 – Commercial Court)** where Justice Madrama, as he then was, defined an aggrieved person as :

> a person who has been injuriously affected in his rights or has suffered a legal grievance in Re Nakivubo Chemist (1979) HCB 12. It was held that the term 'any person considering himself aggrieved 'under section 82 of the Civil Procedure Act meant a person who has suffered a 'legal grievance'. What then is a 'legal grievance '? Is it a grievance by the definition and standard of law? This expression was adopted from the case of Ex parte Side Bothan in re Side Botham (1880) 14 Ch. D 458 at 465 and the judgment of James L.J where he held that:
>
> 'the words 'person aggrieved 'do not really mean a man who is disappointed by a benefit which he must be have received if no other order had been made: A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something or wrongfully affected his title.'

> ...it would follow that the expression ' person aggrieved ' is not completely subjective but imports an objective test qualified by the use of the expression ' a person who has suffered a legal grievance' . It also suggest that it is a person against whom a decision has been pronounced which wrongfully deprived him of something or willfully affected his tittle.'

An aggrieved person must have a legal right or interest in the matters and that person must have suffered damage to the right or interest as a result of a court's order or decree. Has the applicant suffered any injury to its interest or right to property? Article 28(1) of the Constitution provides that:

> In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

In this case, the Applicant, like the Respondents, had a legitimate right to have its case heard by an impartial court or tribunal, given that it had a dispute with the Respondents surrounding the scope of the sugarcane production contracts in which, it was being asked to pay the Respondents for the byproducts of the raw cane over and above the price paid for the raw cane. The decision in this case had important ramifications for the parties. If the decision went in favor of the Applicant, it would make savings and maximize its profits. However, if the case was decided in favour of the Respondents, they would stand to get more money for the sugarcanes from the Applicant. Given the conflict at hand, it was important therefore that the matter should have been heard by an impartial judge, within the meaning of article 28(1) of the Constitution or in other words.

The case for the Applicant was that the retired judge as a sugarcane out grower like the Respondents, ought to have recused himself from the trial in HCMA 39 of 2018, as his presence as a judge in a matter in which out growers had an interest, would prejudice its interests. On the other hand, the case for the Respondent was that the retired judge was not a sugar cane out grower and was not therefore biased in the trial. Additionally, the respondents submitted that even if the judge was a sugar cane out grower, he was a one off out grower who did not qualify as an out grower. The Respondents also submitted that the Applicant had not presented a Cane Production Contract to establish that the judge was an out grower.

The evidence on record, which the parties accepted from a consideration of annextures 'D' and 'E', conclusively established that the retired judge was an out grower with the Applicant Company. There was evidence that the judge had supplied sugar cane to the Applicant and received valuable consideration on several occasions. Although, the Respondents said that there was no agreement to show that the retired judge was an out grower, the documents which he signed to receive payment for sugar cane delivered were clearly marked "out grower cane production invoices" and therefore made the judge an out grower like the Respondents, who are sugar cane growers and supply the Applicant with raw sugar cane.

It was the case for the Applicant that the retired judge as an out grower, ought to have informed the parties of his interest in the matter or in the least, told the parties that he was a customer of the Applicant. The Respondents on their part submitted that the complaint the Applicant was raising

against the judge should have been raised at the time of the trial in a recusal motion and not during review. The Respondents, accused the applicants of disguising a recusal application as an application for review.

I have considered the arguments of the parties. The application before me on the face of it raises matters that should have been raised in a recusal motion, if the Applicant knew that the judge was a sugar cane out grower. However, as the Applicant explained through its Company Secretary, it only became aware of the retired judge's participation as an out grower after, the ruling in MA 39 /2018 which is a subject of the review, had already been decided. The application before me is therefore not an application for recusal as submitted by the Respondents. This application is properly before me as an application for review to determine the issue of whether the judge could have been biased when hearing the parties in HCMA 39 of 2018.

Should the retired judge have recused himself from the trial? A judge in a matter can only recuse himself or herself, if there is a real likelihood of bias on his or her part. Principle 4 of the Uganda judicial Code of Conduct, which is part of our law, says that:

> Impartiality is essence of the judicial function and applies not only to the making of a decision but also to the process by which the decision is made. Justice must not merely be done but must be seen to be done.

Principle 2.4 which is instructive in this matter says that:

> A judicial officer shall refrain from participating in any proceedings in which the impartiality of the judicial officer might reasonably be cautioned.

The Uganda Code of Judicial Conduct, places an obligation on each judicial officer to use his or conscience to determine whether he or she should sit or continue to sit in judgment if his or her impartiality might be questioned or put in question. Under the Uganda Code of Judicial Conduct, every judicial officer has an obligation to disclose to the parties information that he or she is aware of that may bring their integrity into question. This is mandatory because the justice system is built on transparency and is rules based. Disclosures by judges of information that might have a bearing on the case to the parties should be taken seriously to ensure the integrity of the justice system. My brother judge, appears not to have taken this matter seriously as there is no evidence on the record that he ever told the parties that he was an out grower, like the Respondents. To this extent, therefore, I fault the judge for breaching principle 2 of the Uganda Judicial Code of Conduct.

I will now deal with the issue of whether there was actual or apparent bias on the part of the judge?

The test to determine whether a judge is guilty of actual or apparent bias has been a subject of litigation and decided cases. Lord Denning in **Rep vs, Barnsley Licensing Exparte Barnsley and District Licensed Victuallers Association (1960) 2 QBD 169** stated that:

> In considering whether there was a real likelihood of bias, the court does not look at the Justice himself or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood

that he would, or did, in fact favor one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias , then he should not sit, and if does sit, his decision cannot stand. Nevertheless, there must appear to be the real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which no reasonable man would think it likely or probable that the justice or chairman as the case may be, would or did favor one side unfairly at the expense of the other.'

In **GM Combined (U) Limited vs. A K Detergent Limited and Others (1999) 1 EA 84-** the Supreme Court observed that;

> As regards the evidence of bias, the authorities are clear that there must be reasonable evidence to satisfy the court that there was a real likelihood of bias. Objections cannot be taken at everything that might raise a suspicion in somebody's mind or anything which could make fools suspect. There must be something in the nature of a real bias, for instance evidence of proprietary interest in the subject matter before the court or likelihood of bias based on close association with one of the parties, as was the case in Tumaini v. Republic (supra) in Republic vs. Justice of Queen's Court (supra) cited in Republic v. Cambone Justice ex parte Peace (supra).

The gist of these decisions is that in determining whether a judicial officer is biased or not, you do not look at it from the perspective of the concerned judicial officer. Bias of an officer is seen from the perceptions of what a reasonable member of the public might draw from the involvement of the concerned judicial officer in a particular case. A reasonable member of the public should say with a degree of certainty that the judge is or will be impartial in handling the matters but if they think otherwise , then the judge must opt out of the trial, if the reasons put forward for the objection are reasonable. Such reasons may include having a proprietary interest, shared interest and or prejudices in the matter under contention.

In the matter before me, the issue at stake concerned the interest of the sugar cane out growers who were seeking a better deal from the Applicant who buys the cane from the Respondents. The retired judge in sitting in judgment did the best that he could to ensure that justice was rendered in MA 39 of 2018 in accordance with the judicial oath which he took at the time of assuming office of a judicial. Each judicial officer takes the following oath before the assumption of office:

> I ...., swear in the name of the Almighty God/solemnly affirm that I well and truly exercise the judicial function entrusted to me and I will do right to all manner of people in accordance with the Constitution of the Republic of Uganda as law established and in accordance with the laws and usage of the Republic of Uganda without fear or favour, affection or ill will...

I am not in any doubt that the retired judge remained true to the judicial oath when he sat in judgment in MA 39 of 2018. That said, the retired judicial officer, who knew that he had a business relationship with the Applicant, as a sugar cane out grower, should have told the parties at the beginning of the case that he was an out grower, to enable them address their minds to the issue of

whether he should sit in judgment or not. I am sure that if the judge had done so, the parties could have either asked him to recuse himself from the case or could have told him that they had confidence in him to render judgment in the matter. I was not in the least persuaded by the submissions of the Respondents that other judges who have worked in Masindi, have been sugar cane growers and have always traded with the Applicant and decided cases against the applicant and that the applicant has never raised issues about these judges or asked them to recuse themselves. The law is the law and any failures in the past, to deal with recusal matters, cannot legalize conduct that could have led to recusal of the affected judicial officers from different cases they handled in the past.

I will now deal with the sub issue of whether any reasonable person could have in the circumstances read a possibility of the retired judge being biased?

As I said at the beginning of this particular aspect, it is not the impartiality of the judge that is on trial. It is what reasonable people perceive of the concerned judge's partiality in the matter that has to be addressed when a court is dealing with cases of real or perceived bias against judicial officers. The matter before the court concerned the interest of our growers and the applicant who is the chief buyer of the respondents' sugar canes. The application had arisen out of arbitration proceedings in which the parties litigated about several issues but key among them, was the demand by the respondents, who represented the interests of the out growers to get a better bargain from the Applicant, by asking to partake in the share of the byproducts of processed cane beyond the price of raw sugar cane. If the Respondents, had succeeded in this endeavor, sugar cane growers, would definitely enjoy better incomes from cane growing. The retired judge, who on record has traded with the Applicant as a sugarcane out grower, would to a reasonable person, be deemed to be interested in better terms for out growers, which would therefore, make him a judge in his own cause.

Therefore, regardless of whether the judge respected his judicial oath, to which I have no cause to doubt, the judge's participation in handling MA 39 of 2018, without disclosing to the parties that he was a sugar cane out grower with the Applicant company coupled with the benefits, which the Respondents (sugar cane out growers) stood to benefit from any good deal with the Applicants, raised a real likelihood of bias or prejudices in the retired judge handling the case. Given the possibility of reasonable members of the public raising impartiality issues about the judge's participation in the matter, the judge should have declined to handle the application.

Last but not least, I must consider whether the Applicant did not know, after exercising due diligence, that the retired judge was an out grower, at the time he handled the case?

The Respondents strongly argued that the Applicant's Company Secretary who swore an affidavit in support of the application was the custodian of company records including Cane Production Contracts and should have therefore known that the retired judge was an out grower. The Applicant's secretary in his affidavit explained that the Cane Production Contracts are not kept by him but the Agriculture Manager, who, only came to know that the judge was an out grower, after the judge had rendered a decision in the matter. I had no reason to doubt his explanation for two reasons; firstly, he gave a credible explanation about the different roles different staff including

himself play in the company and secondly, it was not an open secret or public knowledge that the retired judge, was a sugar cane out grower, that would have prompted the applicant to profile the retired judge as a sugar cane out grower. I am therefore, satisfied that the reasons put forward for review by the applicant company has met the threshold set in the law of raising new and important evidence which was not within the knowledge of the applicant after due diligence.

4.0 What remedies are available to the Applicant?

The retired judge ought not to have sat in HCMA 39 of 2018 because there was evidence of real likelihood of apparent bias if he sat in the matter. For that reason, the decision that the retired judge reached in the matter cannot be allowed to stand. The decision in HCMA 39 of 2018 is therefore set aside. The Application succeeds and I award costs to the Applicant.

5.0 Decision

The Application is allowed with the following orders:

1) The orders in HCMA 39 of 2018, Kinyara Sugar Limited vs. Hajji Kazimbiraine Mahmood and 4 others, are hereby set aside.
2) The Applicant will have costs of the Application.

It is so ordered.

Gadenya Paul Wolimbwa
JUDGE
29th March 2020.

This ruling will be delivered by the Assistant Registrar on 31st March 2020. The Assistant Registrar is directed to give the parties a copy of this ruling.

Gadenya Paul Wolimbwa
JUDGE
29th March 2020.

Judgment Ruling read in the absence of the parties. Mr. Kafuko - Court Clerk.

30/4/2020.