

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE NO. 53 OF 2010

1. WAKISO TRANSPORTERS TOUR & TRAVEL LTD]
2. HOPE IMPRESSIONS LTD]
3. DADA GENERAL ENTERPRISES]
4. JANET KASHOZI MAKWABIRIZO]
5. AKANKWANSA SAM]
6. TUMWINE RONALD :::::::::::::::::::::::::::::::] APPLICANTS

VERSUS

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

BEFORE: HON. JUSTICE ELDAD MWANGUSYA

RULING

This is an application for judicial review brought by Notice of Motion under Articles 225, 128 (3), 92, 50, 28(1) & 42 of the Constitution; sections 3 & of the Judicature (Amendment) Act No. 2 of 2002; rules 3, 4, 6, 7 & 8 of the Judicature (judicial Review) Rules, SI No11 of 2009; section 19 of the Inspectorate of Government Act, 2002 for orders that;

- a) An order of mandamus requiring the IGG to avail the applicants with certified true copies of the proceedings and the report of the Inspectorate of Government into allegations of corruption in the tendering process by officials of Wakiso District Administration (both draft and final copies).
- b) A declaration that the Report submitted to the CAO, Wakiso District Local Government dated 9/03/2010 by the IGG is a nullity in law and/ or not a Report of the Inspectorate of Government.
- c) An order of certiorari removing the IGG report into the High Court for the purpose of it being quashed and expunged from the archives of public records of the Republic of Uganda.
- d) In the alternative to (c) above an order quashing parts of the proceedings in the IGG Report relating to the applicants.
- e) An order of prohibition prohibiting the CAO, Wakiso District Local Government or any other officer of government from implementing or otherwise taking action on the basis of the IGG Report.
- f) An order of prohibition, prohibiting the IGG or any other officer of government from implementing any recommendations made about the applicants or otherwise taking any action against the applicant on the basis of the IGG report.
- g) A declaration that the threatened removal of the applicants from their contractual roles and employment is illegal and contrary to the principles of natural justice and a denial of protection of the law.
- h) An order of certiorari quashing the 1st respondent's purported decision to subject the 1st- 3rd applicants existing contract to a surveillance and irregular valuation process.
- i) An order of a permanent injunction restraining the following from implementing or engaging in the threatened illegal actions.
 - a. The IGG.
 - b. The CAO of the 2nd respondent.
 - c. The Chairman of the 2nd respondent's council.
 - d. The 2nd respondent's head of Procurement and Disposal Unit.
 - e. All agents and servants of the respondents.
- j) A permanent injunction to issue against the respondents, their agents or employees restraining them from continuing to interfere with court orders and the judicial

process and illegally interfering with the 1st, 2nd and 3rd applicant's contracts and rights.

- k) General, special, aggravated and/ or exemplary damages.
- l) Costs.
- m) Interest on (k)-(m) above on court rate from date of breach till payment in full.

The application is supported by a number of affidavits
but the grounds as briefly stated in the motion are as follows;

- a) The IGG report was made in complete disregard and/ or breach of section 19 of the Inspectorate of Government Act, 2002; Articles 128 (3), 44 (c), 28(1), 92, 29 (1) (d) of the Constitution of Uganda and the Leadership Code Act, 2002.
- b) The IGG Report was made and submitted to the CAO, Wakiso District Local Government in utter contempt of court as it dwells on matters of HCMC No. 8 of 2010.
- c) The IGG Report was made in disobedience of the High Court order of temporary injunction issued against the respondents and the effects of the purported recommendations was an amendment of the ruling, decision and orders in HCMA No.46 of 2010 involving the 5th Applicant and the 2nd & 3rd respondents.
- d) The report bases itself on the purported interdiction of the 5th applicant dated 08/02/2010 which interdiction was never a subject of the investigation and which the High Court of Uganda had on 425/02/2010 declared null and void after finding that the 2nd respondent was high handed, vindictive and unreasonably interfered with judicial process in issuing it and granted the injunction.
- e) The IGG's findings against the tenders of the 1st, 2nd and 3rd applicants were unreasonable and tainted with bias and the report was unreasonably tainted with illegalities and procedural flaws.
- f) That the applicants were never given any hearing on the specific matters on which the biased decision as contained in the illegal report were based.
- g) The report contains unsubstantiated allegations against the applicants based on which findings were made by the IGG contrary to the principles of natural justice.
- h) The IGG report contains unsubstantiated materials which are greatly injurious to the credit, character and reputation of the applicants and the applicants have thereby been

greatly injured in their trade/professions, offices and occupation and have been brought into public scandal, hatred, ridicule and contempt.

- i) The persons named in prayer (i) above have either abetted or been engaged in the acts of victimising the applicants in total disobedience of the law and the lawful orders of the High Court of Uganda and therefore it is just and equitable that this court does issue an injunction to restrain them.
- j) That the applicants are entitled to fair and just treatment as conferred upon them by Articles 42 and 225(a) & (c) of the Constitution.
- k) That the applicants are entitled to enforce their Constitutional right to access information by Article 41 (1) of the Constitution.
- l) It is just and equitable that the orders sought are granted.

For the 1st respondent, Mr. Byakora Smith, a Principal Inspectorate Officer/ Investigator deponed as follows;

1. That the applicants' affidavits in support of the application are full of falsehoods and misrepresentations of facts and should not be relied upon by this court.
2. That on 20/08/2009, the 1st respondent received a complaint alleging abuse of office, conflict of interest and corruption in the award of tenders by the Head District Procurement & Disposal Unit and the District Councillor representing Mende sub county, Wakiso District; and the investigation into the aforementioned complaints were commenced by the 7th/09/2009.
3. That he was personally involved in the investigations which were lawfully carried out by the 1st respondent into the alleged corruption in the tendering process by the officials of Wakiso district administration and a report vide TS. 79.2009 was issued on 09/03/2010.
4. That the 1st respondent lawfully carried out investigations on the basis of its constitutional functions, power and mandate as stated in both the constitution of Uganda and the Inspectorate of Government Act.
5. That the 1st respondent is mandated and given powers by the law to carry out its investigations using a procedure it considers appropriate depending on each case and wherefore during the investigations the 1st respondent in strict observance of the rules of natural justice held oral discussions, interviews and recorded statements from all

the relevant stakeholders including the applicants who provided sufficient information and evidence for the investigations.

6. That the investigations were lawfully and strictly conducted in accordance with the procedure for carrying out investigation outlined in parts v and vi (sections 18 to 28) of the Inspectorate of Government Act, 2002 and the recommendations were made after giving the applicants an opportunity to be heard with due observance of the cardinal principles of natural justice and the same is lawful and justified.
7. That according to the finding of the 1st respondent's investigation it was established that the 1st applicant executed a tender contract under the name of Kira Transporters Ltd with Wakiso District Council to collect revenue from Wakiso Taxi Park for a period running from the 1st November, 2008 to 31st/10/2010 when it expired and the same was not renewed.
8. That based on the findings of the investigations and pursuant to the special powers given to the Inspectorate of government under Article 230 (1) & (2) of the Constitution and section 14 (5) & (6) of the Inspectorate of Government Act, the 1st respondent recommended the dismissal of the 5th applicant from the Public Service and no adverse recommendations were made against the other four applicants.
9. That in reply to paragraphs 3 of the 5th applicant's affidavit and paragraphs 16 and 17 of the 6th applicant's affidavit in support, the 1st respondent contends that the purported MC No. 008 of 2010 is in regard to the appointment of members to Wakiso District Service Commission and the same was filed on 21/01/2010 after the 1st respondent had by the 7th September 2009, commenced the investigations into the tendering process by the officials of Wakiso District Administration.
10. That in reply to paragraphs 4 & 44 of the 5th applicant's affidavit, the 1st respondent contends that the purported interdiction of the 5th applicant which is said to have been cancelled by court vide MC No. 46 of 2010 was initiated by the 3rd applicant on different grounds outside the 1st respondent's report and the same was not directed by the 1st respondent.
11. That the interdiction and intended dismissal of the 5th applicant arising out of the first respondent's report which was issued on 09/03/2010 was communicated to the 5th applicant on the 1st June, 2010.
12. That there is ample evidence as contained in the 1st respondent's report to show that for the period which was investigated, the 5th applicant was in charge of performing

the roles of both the Head Procurement & Disposal Unit and Secretary of the Contracts Committee of Wakiso District.

13. That the 1st respondent's report was extensively issued to all the relevant stakeholders who also availed copies to the applicants.
14. That this application for judicial review is illegal and unconstitutional in so far as it is seeking orders aimed at frustrating and obstructing the exercise of the functions and special powers of the Inspectorate of government as provided by law referred to herein and it amounts to an abuse of process.
15. That the applicants are not entitled to any of the prerogative remedies and or orders sought from the court since their application does not disclose any cause of action against the respondents.

For the 2nd and 3rd respondents, Joseph Mukwaya, the Chief Administrative Officer of the 2nd respondent, deponed that;

- a) The 1st applicant's contract to collect revenue from Wakiso taxi park expired and the tender has been awarded to M/s Equator Touring Services Ltd.
- b) The 1st applicant challenged the procurement process vide MC No. 29 of 2010 and also applied for an injunction vide Civil Application No. 100/2010 which was dismissed with costs on 01/04/2010.
- c) That the 2nd applicant's tender is for collection of revenue for medical examination of salon operators, food and beverage handlers.
- d) The applicants have no reason to join me and the district council as respondents to this application since we did not author the report and it also does not remove any rights from the applicants.
- e) The report issued by the 1st respondent did not direct the cancellation of the 2nd and 3rd applicants' tenders but merely directed me to closely monitor the service providers to ensure that there is proper enforcement of the contract agreement.
- f) The district has never awarded any tender to the 4th, 5th and 6th applicant and they have no basis for bringing this application.
- g) The 5th applicant is the subject of disciplinary action by the 2nd respondent and his employment grievances raised in this application are already before court in MC No. 8 of 2010 and Misc No.46 of 2010 arising there from.

In rejoinder, the 5th applicant averred that;

- 1) the 1st applicant's contract to collect revenue from Wakiso Taxi Park is subject of determination by the High Court before His Lordship Justice Zehurikize.
- 2) That in rejoinder to paragraphs 4-7, the contents therein are false and the 2nd and 3rd respondents are behind the report which they sought to prejudice the applicants' rights, court order and pending cases.
- 3) That in rejoinder to paragraph 8, the application is about breach of applicants' right and not award of tenders as falsely alleged by Mukwaya, and that 5th, the 4th and 6th applicants have rights to bring the application.
- 4) That in rejoinder to paragraph 9, the contents therein prove the 2nd & 3rd respondents' blatant contempt of court when Mr. Mukwaya falsely deponed that the 5th applicant is the subject of disciplinary action by the 2nd respondent when the same was quashed by this Honourable Court.
- 5) That the application is against the respondents' irregular process parallel to the court and is not the subject of MC No.8 of 2010 nor was it the subject of MA No 46 of 2010 that was concluded in the 5th applicant's favour and an injunction issued on 25/2/2010, long before the report was issued on 9/3/2010.

The 5th applicant further deponed an additional affidavit in support of the application wherein he averred that the 2nd respondent's District Service Commission acting on the illegal advice of the CAO directed him to answer to an irregular disciplinary process over matters pending before this court; and that the respondents are determined to terminate him from his employment.

During the scheduling which was conducted on 12/3/2012; the parties to the application sought to highlight the facts constituting case before this court; for the applicants, Mr. Simon Tendo Kabenge highlighted the applicant's case as follows:-

The IGG on 09/3/2010 issued a report to the CAO of the 2nd respondent in which he made recommendations and findings that resulted in a directive that affected the applicants; that in making the report, the IGG acted on information/ complaint from the 4th respondent. On the basis of the report, the 2nd and 3rd respondents purported to cancel the contracts of the 1st, 2nd and 3rd applicants by re- advertising the same. The 2nd and 3rd respondents also interdicted the 5th applicant who was the senior procurement officer; the report made by the IGG adversely named the 6th and 4th applicants as having been involved in fraudulent actions to interfere and influence the awarding of the tenders in Wakiso District and fraudulent improper conduct respectively.

Mr. Tendo Kabenge further stated that the said report has never been availed to the applicants nor were the applicants afforded a hearing and that the matters reported on by the 1st respondent were never specifically put to them. He went ahead and stated that the 1st respondent acted irrationally, with bias and prejudice against all the applicants. He also stated that the 2nd respondent acted in contravention of a court order of injunction dated 25/2/2010 that preceded the report and that had quashed the 5th applicants interdiction. The applicants are aggrieved by IGG's report which was based on unsubstantiated materials that were injurious to the credit, employ and occupation of the applicants and hence brought this application seeking orders of mandamus to compel the 1st respondent to avail the applicants a certified true copies of the proceedings and the report of the IGG. The other reliefs being sought are orders of certiorari, prohibition, declarations, permanent injunction, damages and costs of the application.

For the 1st respondent, Mr. Hosea Lwanga, stated that on receipt of a complaint from the 4th respondent, the 1st respondent went ahead and investigated the complaint which culminated into a report. The 1st respondent lawfully carried out the investigations based on its constitutional functions, powers and mandate. He went ahead and stated that all the applicants were given a fair hearing during the investigations as they made statements which were recorded and attached to the report. He further contended that during the interviews, they provided documentary evidence which were relied upon in the final report and that the recommendations made by the IGG are based on the findings; he also stated that the said report was served to all the stakeholders including the applicants.

For the 2nd and 3rd respondents, Mr. Nerima Nelson contended that the IGG issued a report in which he made directives to the CAO containing recommendations and guidance in relation to compliance with procurement procedures; a directive to submit the 5th applicants name to the District Service commission for dismissal- this is however a subject of a separate application vide Misc. Cause No 29 of 2010 pending ruling; a directive advising the incoming contracts committee to display integrity and competence and sign the code of ethical conduct when exercising their duties; and a directive that the CAO closely monitors the performance of service providers who were awarded tenders.

Although no tender was cancelled according to the report, the 1st applicant's tender subsequently expired and the subsistence of the contract is subject of another application vide Misc Cause No, 29 of 2010 pending before this court. He also contended that the 2nd and 3rd respondents should not have been parties to this application as they neither authored the report in issue nor investigated the matter at hand.

During the same scheduling conference, the parties agreed to a number of substantive issues and these are;

1. Whether the 1st respondent in investigating and issuing the impugned report offered the applicants a hearing.
2. Whether the IGG in investigation and issuing the said report acted illegally, irrationally and impartially.
3. Whether or not the 1st respondent made any decisions against the applicants.
4. Whether the applicant have a cause of action against the 2nd and 3rd respondents.
5. Remedies available.
6. Costs.

The parties were allowed to file written submissions accordingly by 24/04/2012 and the necessary rejoinders if any by 30/04/2012.

For the applicants, Mr Simon Tendo Kabenge, proposed to address issues 1, 2, 3 and 4 jointly. While submitting on these issues, he stated that the right of the applicants to apply for the remedy of judicial review of administrative actions and decisions is conferred by statutes, namely Articles 42 & 50 of the 1995 Constitution and the Long Title of Judicature Amendment Act. The pre- conditions that an applicant must satisfy in order to succeed in an application of this nature are now settled by case law. In *Council of Civil Service Unions v Minister for the Civil Service (1985) 1 AC* it was stated that evidence must be adduced of the existence of all or any of the three heads under which administrative action can be subjected to court control by way of judicial review, namely: illegality, ultra vires, irrationality and/ or procedural impropriety.

Counsel sought to define illegality and contextualise its relevance in the application before court. He stated that illegality covers cases where a body acts beyond the powers conferred on it by legislation and where a decision maker incorrectly informs himself as to the law (see Kevin's English Law Glossary: Judicial Review (internet edition at page 2). He contended that the first illegality that exists is borne out of the Constitutional Court decision of Hon. Sam Kuteesa & 2 others Vs. The Attorney General, Constitutional Petition No. 46 of 2011 and constitutional Reference No. 54 of 2011 where it was held that the Inspectorate of Government must be in existence when fully constituted as provided in Article 223 (1) and (2) of the constitution and section 3 (2) of the IGG Act so as to be able to prosecute or cause prosecution of cases involving corruption, abuse of authority or of public office.

Mr. Tendo Kabenge therefore submitted that the action of the 1st respondent and his agents in investigating and issuing the said report and the actions of the 2nd and 3rd respondents in acting upon it are illegal ab initio as at the time of investigating and issuing the said report the 1st respondent was not fully constituted and it did not act as a composite body nor did it exist in law or at all and all actions done by it including the investigation are illegal, null and void. The decision complained of was the decision to investigate, the decision in issue, a report and the recommendation of cancellation of contracts and dismissal which were acted upon by the 2nd and 3rd respondents.

The other element of illegality complained of is the applicants' removal from office and the directive for surveillance of their contracts. Counsel contended that the 5th applicant's tenure of office is guaranteed by Article 173(b) of the Constitution which sets strict preconditions and procedure for removal there from. The decision by the 1st respondent directing the 2nd and 3rd respondents to fire the 5th applicant in the absence of the provision of a right to a fair hearing amounted an ultra vires action/ illegality which must conversely be subjected to judicial review for failure to comply with the rules of natural justice contrary to Articles 28, 42, 44 (c) and 50 of the Constitution. Counsel further contended that the 1st, 2nd and 3rd respondent's conspiracy to cancel the applicants' contracts without affording them a single chance of hearing or putting the accusations to them for explanation was equally irregular. Learned counsel further submitted that the 1st, 2nd and 3rd respondents acted without jurisdiction or ultra vires their authority in undermining the court's injunction. He thus contended that this amounted to procedural impropriety which forms a legitimate ground for subjecting their actions to an order of certiorari. He thus cited, In the Matter of an Application for an order of certiorari by Bukeni Gyabi Misc. Cause No.63 of 1999.

Counsel therefore stated that the illegalities cited above justify the courts intervention by way of judicial review.

Counsel further drew the attention of this court to the issue of irrationality and contended that the affidavits in support of the application indicate that even after the issuance of an injunction dated 25/03/2010; the 1st, 2nd and 3rd respondents conspired to defeat it, made a decision and directive without hearing the applicants. This not only breached the law but also defeats logic hence entitling court's intervention by way of judicial review.

It was also counsel's contention that the applicants were not informed of the grounds on which the 1st, 2nd and 3rd respondents proposed to act and they were not given a fair opportunity of being heard in their own defence. He contended that they were asked general questions about tenders and not specific issues of investigations which eventually formed

90% of the basis of the report. Counsel thus submitted that it is unfair to an accused person generally about administration of his office only to make a report about an impugned transaction in which billions of shillings were lost that he never got an opportunity to explain because it was not specifically put to him. Counsel thus maintained that in an incident like this, it cannot be said that such a person is afforded the right to be heard. He referred the court to a number of authorities i.e. **Kamurasi Charles v Accord Properties Ltd SCCA No.3 of 1996; Matovu & 2 Others v Sseviri & Another (1979) HCB 174; Ridge v Baldwin (1963) 2 All ER 66 and Bentley Roach v Attorney.**

As to whether the applicants have a cause of action against the 2nd and 3rd respondents; Mr tendo Kabenge contended that the application against the 2nd respondent is against it as an administrative body in two respects i.e. as the body who the 1st respondent directed to implement the impugned report; and as the body which allowed its officials to engage in illegal acts such as disobeying the court's injunctive orders issued on 25/02/2010 leading the 1st respondent to come up with the impugned report which itself is based on matters that were solely within the knowledge of the 2nd and 3rd respondents. Counsel thus referred to pages 2 and 3 of the impugned report which stated that, *Akankwasa Sam was interdicted for gross incompetence due to other procurement related issues*. This condemnation was reached by the 1st respondent on the advice of the 2nd, 3rd and 4th respondents who were the subject of the injunction and orders that had quashed the 5th applicant's interdiction. Counsel therefore submitted that the action against the 2nd and 3rd respondents is a proper one as the court must be able to make an order against them or their agents to implement the 1st respondent's report if the application is granted.

Additionally, counsel contended that the 3rd respondent acted in bad faith; his acts of disobedience of the court's injunctive order is illegal and that disobedience alone makes him susceptible to judicial review by virtue of Article 42 especially by the 1st and 4th applicants who fell victim to his actions by their eventual cancellation of their contracts without fair hearing. He cited Article 173 of the Constitution and the case of **Father Francis Bahikire Muntu & 14 others V Kyambogo University HCMA No.643** of 2005 where it was held that acts done by public officials in bad faith, illegality and excess of jurisdiction are acts that strip them bare of the protection offered to public officials. He thus maintained that the 2nd

respondent's actions put him outside the protection of the law. Counsel also contended that the directive of the 1st respondent came from the 2nd respondent's action; and that the same directive was to be enforced by the 2nd and 3rd respondents.

Mr. Tendo Kabenge also contended that MC No 8 of 2010 is distinct from the application before this court as the same could be distinctively, comprehensively and separately dealt with on its own merits. As such the contention that the present application is an abuse of court process is misguided, misconstrued, unfounded and baseless. Counsel therefore maintained that this is a proper case for the grant of the remedies sought in the motion by the applicants against the 1st, 2nd and 3rd respondents. Counsel thus invited court to find issue No. 1 in the negative while the rest of the issues should be answered in the affirmative, grant the prayers sought with costs to all the applicants.

In reply, counsel for the 1st respondent sought to defer from the facts as presented by Mr. Tendo Kabenge on the premise that they were lacking in material particulars and were intended to bias court. He therefore reproduced the facts as presented at the scheduling conference held on the 12th/03/2012. I will comment about this in the course of my ruling.

Counsel also outlined the principles that govern judicial review. He therefore submitted that judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.(See, **Halsbury's Laws of England, 4th edition vol 1 (1) at page 195- 198**). Counsel cited a number of authorities as to the ambit and scope of judicial review, i.e. **Lex Uganda Advocates & Solicitors V Attorney general MA No. 322 of 208 at page 6; Peter Apell & 5 others V the Permanent Secretary Ministry of Lands, Housing and Urban Development.**

Counsel further contended that the 1st respondent professionally and lawfully carried out the investigations against the applicants in accordance with the law, i.e. Articles 225, 226, 227 and 230 of the Constitution which generally provide for the functions, jurisdiction, special

powers and independence of the Inspectorate of government while performing its duties. These are also re-echoed in section 8, 9, 10, 12, 14, 20 and 25 of the inspectorate of Government Act.

As to whether the applicants were given a hearing; counsel did not agree with the applicants' contention that they were not given an opportunity to be heard or defend themselves against the complaints relating to the alleged corruption in the tendering process by officials of Wakiso District Administration. Counsel drew the attention of this court to section 20 (1) of the Inspectorate of Government Act and contended that during the course of the investigations, the procedure which was adopted by the inspectorate in conducting the investigations culminating into the application before this court was in accordance with the section 20 (1) and the inspectorate's operational manual, 2004.

It was his submission that when the 1st respondent received and registered several complaints on the alleged corruption in the tendering process by officials of Wakiso District Administration, it commenced investigations accordingly. During the course of the investigation, information was obtained from various stakeholders especially officials of Wakiso District Administration who were interviewed and statements recorded from them; a number of documents were critically analysed and exhibited while several offices visited in a bid to get more information and clarifications. Counsel went ahead to submit that after the initial investigations, the accusations levelled against the applicants were ably brought to the applicants' attention both orally and by way of interviews and written correspondences for them to respond and present their defence. He further contended that the applicants responded by giving a detailed point by point defence and thus defended themselves against the said accusations. It was after a careful consideration and analysis of all the evidence gathered during the investigations and due consideration of all the applicants' verbal and written statements of defence that the first respondent made several findings and observations thereby exonerating the 1st, 2nd, 3rd, 4th and 6th applicants of any wrong and as such, no recommendation was made against the aforementioned applicants. Counsel maintained that the applicants' counsel's allegations that the 5th respondent issued a directive and orders against the first four applicants are baseless, unfounded and false.

Counsel further contended that the 1st respondent was however satisfied that unlike the case of the other applicants, there was ample evidence against the 5th applicant who had been found incompetent in the performance of his duties as the Head of Procurement and Disposal Unit of Wakiso District and the necessary recommendations were made against him by the 1st respondent. These recommendations were compiled in a report and availed to the responsible authority for implementation against the affected persons.

Furthermore, counsel contended that the 1st respondent in carrying out its investigations does not follow the formal proceedings followed by ordinary courts of law and it does not amount to trial. The procedure is inquisitorial as opposed to an adversarial judicial process; it involves oral interviews which are then reduced into written record of interview or the accused person is required to write a defence. He maintained that since this was done, the applicants cannot claim that they were not heard.

Counsel further stated that under section 20 of the IGG Act, the 1st respondent is mandated to apply its own procedure when conducting investigations; he submitted that an applicant who participates in an investigation by recording a statement is said to have been heard in the circumstances (**see Katamba Fred v Mukono District Local Government and Another MA No.091 of 2009**). It was also his contention that the principle of audi alteram partem or fair hearing does not mean that a person must be heard orally, whether oral hearing is necessary would depend on the law applicable and circumstances pertaining to each individual case; see **Onyait David v Stephen v Busia District Local Government & Anor MA 34 of 2006** where it was held that once one is afforded an opportunity to defend oneself and a written defence is made, it is sufficient.

Counsel further referred to section 21 of the IGG Act which provides that;

Proceedings, findings, recommendations, investigations, or inquiries by the Inspectorate of Government shall not be held null and void by reason only of

informality, irregularity in the procedure and shall not be liable to be challenged, reviewed, quashed or called in question in any court of law.

He submitted therefore that the respondent lawfully carried out the investigations and the applicants were duly given an opportunity to be heard and defend themselves against the allegations levelled against them in accordance with the law and strict observance of the rules of natural justice. He also contended that the decisions cited by the applicants are distinguishable from the instant case.

Counsel further contended that the applicant did not get to the gist of the decision in the case of Sam Kuteesa (supra) where it was stated that;

The decision we have reached will, therefore not be applied retrospectively so as to undo what happened. This is to ensure that there is no disruptive effect in the administration of justice...

He submitted that the investigations in question were carried out on 7/09/2009 and the report was issued on 9/03/2010 long before the delivery of the said judgment (dated 5/04/2012) as such, this judgment cannot be applied retrospectively to affect the investigations of the 1st respondent in the instance. He further contended that the above cited judgment did not specifically address the issue as to whether the IGG can or cannot investigate corruption cases when the Inspectorate of Government is not fully constituted.

As to whether the 1st respondent directed cancellation of the applicants' contract/ tender; counsel had this to say:

There is neither a recommendation nor a directive in the 1st respondent's report directing the cancellation of any of the applicants' tender/ contract. According to the findings of the 1st respondent's investigations, the said tender had expired on 31/10/2009 before the release of the report on 9/03/2010.

Regarding the 5th applicant's interdiction; counsel contended that the said interdiction was never at any point directed by the 1st respondent as it had been initiated independently by the 3rd respondent on different grounds which were actually outside the 1st respondent's report; and that the 1st respondent was never a party to MC No.08 of 2010 wherein the injunction was issued. Counsel therefore contended that a court cannot grant an injunction against the whole world without notice.

Counsel maintained that the court should not interfere with the findings and recommendations of the report since by doing so, it will be interfering with the exercise of powers conferred on to the 1st respondent under sections 8- 10, 12,14, 20 and 25; and Articles 225-227 and 230 of the Constitution. It was his contention that court has power to quash a decision and not a recommendation; what is contained in the report are merely recommendations which can either be acted upon/ implemented or not and not a decision where there is no other option apart from implementation.

As to whether the applicants are entitled to the remedies sought; counsel contended that the applicants have not shown court that the 1st respondent's actions constituting the subject matter of the application for judicial review were made through error of law, illegality, irrationality, procedural impropriety or outright abuse of jurisdiction generally. Counsel further contended that the applicants did not make out any case that would warrant the award of the prerogative orders mentioned in the motion and damages. He thus invited court to dismiss the same with costs to the respondents.

For the 2nd and 3rd respondents, Mr Nerima Nelson contended that the only relevant issue to the 2nd and 3rd respondent is issue 4, i.e. whether the applicants have a cause of action against the 2nd and 3rd respondents. It was his contention that the grounds in the motion attack the report of the 1st respondent, yet the 2nd and 3rd respondents were neither the authors of the impugned report nor did they carry out the investigations leading to the impugned report. Although the 1st respondent directed that the Cao takes action as recommended in the report, no such action has ever been taken in relation to the applicants' tenders. Counsel further contended that the 4th, 5th and 6th applicants did not have any tenders that could have been

affected by the 1st respondent's report which was largely hinged on management of tender. He maintained that if the applicants were aggrieved by the directives in the report, then the proper person to sue should have been the IGG/1st respondent who authored the impugned report and made directives therein; and if that report is quashed, the CAO will have no directive to implement.

Additionally, Counsel contended that it was improper to join the 3rd respondent in his personal capacity since the directives as contained in the impugned report were addressed to the 2nd respondent in the official capacity as the CAO of Wakiso district; as such there was no need to join him personally. It was also his contention that judicial review lies against administrative authorities in their official and not personal capacity. Submitting on alleged tender and employment grievances, Mr. Nerima contended that these were subject of MC 29 of 2009 and MC No.8 of 2010 respectively; while the former was dismissed on 01/04/2010, the latter is still pending before his Lordship Justice Zehurikize.

He also contended that where as counsel for the applicant submitted that the respondent have not respected the injunction granted in MC 29 of 2009, filing a fresh suit/application for judicial review is not the proper procedure of enforcing injunctions. He maintained that since judicial review is discretionary in nature; applicants should not be allowed to abuse court process by filing a multiplicity of proceedings against Wakiso District Council over the same tender and employment complaints. If the applicants were aggrieved, they should have amended their pleadings. He conclusively invited court to dismiss the application against the 2nd and 3rd respondents with costs.

In rejoinder, Mr Tendo Kabenge contended that Mr. Nerima's submission on the issue of an injunction that was granted by Justice Zehurikize was made out of context and intended to misdirect court. The ruling was to the effect that the issuance of the temporary injunction would have the effect of determining the entire suit. That Mr. Nerima's submission that the issuance of the injunction in this matter would contradict the earlier ruling is erroneous as the issuance of an injunction only restrains the implementation of the botched report.

The 1st order sought is the prerogative order of mandamus. Mandamus has been defined as a prerogative writ to some person or body to compel the performance of a public duty. From the authorities, before the remedy can be given, the Applicant must show a clear legal right to have the thing sought by it done in a manner and by a person sought to be coerced. The duty whose performance is sought to be coerced by mandamus must be purely statutory in nature, plainly incumbent upon the person or body by operation of the law or by virtue of that person or body's office, and concerning which he/she possesses no discretionary powers. Moreover there must be a demand and refusal to perform the act which is sought to coerce by Judicial Review (see: **SEMWO CONSTRUCTION COMPANY Vs RUKUNGIRI DISTRICT LOCAL GOVERNMENT (High Court Misc Cause No. 30 of 2011)**, and **KIRWA WOLFARM MINES LTD Vs THE COMMISSIONER GEOLOGICAL SURVEY AND MINES (Misc. Cause No. 145 of 2011)** both unreported).

There was no evidence adduced to prove any of the above elements. There was no evidence that the applicants made a demand for the report which any of the respondents refused to give. The application for an order of certiorari if granted would also necessitate calling for the Investigations and Report which would be quashed if the requirements for the grant of the said order were met. I make a finding that the prerogative order of mandamus is not available to the applicants.

I have carefully studied the report which is the major subject of the application before this court. It is headed;

**REPORT OF THE INSPECTORATE OF GOVERNMENT ON THE
ALLEGED CORRUPTION IN THE TENDERING PROCESS BY OFFICIALS
OF WAKISO DISTRICT ADMINISTRATION (TS.79.2009)**

The report gives details of the investigations as to the circumstances under which the Inspectorate came to carry out investigations and thus drawing the following conclusions and recommendations.

- It was concluded that the Technical Evaluation Committee fell short of the evaluation criteria as well as the general and specific requirements as set out in the bid document. When evaluating bids for revenue collection at Wakiso Taxi Park the committee disregarded the criteria they set and favoured Kira Transporters Association that had quoted below the reserve price and recommended it for approval for contract award since M/s UTODA Wakiso Town Council (the only competitor) did not provide the required payment for 6 months in advance (bid price) as per the condition in the advert. The two bids received for Wakiso Taxi park that were evaluated by the committee should have been rejected since they were not substantially responsive to the requirements thereon set.
- There was lack of objectivity and transparency when awarding the tender for Wakiso Taxi Park. The evaluation committee did not follow the criteria as set in the bid document and the Chairperson Contracts committee confirmed that the contracts committee erred while considering the evaluation report. However the contract agreement between Kira Transporters Association and Wakiso district to collect revenue for Wakiso Taxi Park expired on 31st October 2009
- Mr. Akankwansa Sam, head PDU failed in his duty to guide the Evaluation Committee and the Contracts Committee to comply with the law when evaluating bids and awarding the contract for revenue collection for Wakiso Taxi Park and that he has since 8th February, 2010 been interdicted for gross incompetence due to other related procurement related issues.
- The allegation that Mr. Akankwasa Sam has vested interest in Hope Impressions Ltd, Dada General Enterprises and Kira Transporters Association was not proved by this investigation. The 3 companies belong to Janet Kashozi and her children. The allegations of abuse of office and receiving payment by cheques by the head of Procurement and disposal unit were not confirmed by the investigation.

The Inspectorate made the following recommendations;

- The CAO warns Mr. Kivumbi Apollo, Ms Nankya Harriet and Ms Nakalembe Safina who were members of the technical evaluation committee for the tender for Wakiso Taxi park for failure to adhere to the evaluation criteria set in the bid document when evaluating the said bids

- **The CAO submits Mr. Akankwasa Sam, Head PDU Wakiso District Local Government to the District Service Commission for dismissal for incompetence exhibited by his failure to guide the Evaluation committee and the contracts committee to comply with the law when evaluating bids and awarding the contract for collection of revenue for Wakiso taxi Park and other breaches of the procurement law for which he is already on interdiction**
- **The CAO should advise the incoming Contracts Committee to display an impeccable standard of integrity and competence in performing of their functions**
- **The chairperson of the Contracts Committee ensures that all members of the evaluation committee always sign the code of Ethical conduct while executing their responsibilities with regard to procurement and disposal of public assets**
- **The CAO, Wakiso should closely monitor the performance of the service provider for medical examination of salon operators, food and beverages and collection of revenues- plan fees in the sub counties enforcement of the contract agreement.**

These are the ‘decisions’ that this court is being asked to review. The purpose of judicial review has been well articulated by both counsel. It is not concerned with the decision in issue perse but with the decision making process. It essentially involves the assessment of the manner in which the decision is made; it is not an appeal and the jurisdiction is exercised in supervisory manner, not to vindicate the rights as such but to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality.

This case yet again raises the issue as to whether or not these findings, recommendations, suggestions and observations as opposed to decisions can be a subject of the prerogative orders of certiorari. In the case of **DOTT SERVICES LTD Vs ATTORNEY GENERAL AND AUDITOR GENERAL (Misc Cause No. 125 of 2009)** (unreported) the Hon. Justice V.F Musoke Kibuka discussed the distinction and held as follows:-

“Certiorari issues to quash decisions made by a statutory body or by a public officer or an inferior court or tribunal. It cannot issue against mere findings.

recommendations, suggestions or observations. In the instant application the report of the 2nd respondent against which the prerogative order is being sought clearly contains no decision that can be quashed by way of issuance of certiorari.....”

(emphasis added)

The above case was cited with approval in the case of **Luwero Town Council Vs Attorney General (Misc Cause No. 150 of 2013)** (unreported) where like in this case the IGG had investigated a matter and made recommendations to discipline some official of Luwero Town council including the Town Clerk. Court found that there was no decision to review.

In the instant case the first recommendation is that the CAO warns Mr. Kivumbi Apollo, Ms Nankya Harriet and Mr. Nakalembe Safina who were members of the Technical Evaluation Committee for failure of adhere to the evaluation criteria set in the bid document when evaluating the said bids. It is noteworthy that none of the three persons named is raising a finger and there is no decision that would warrant this court exercising its discretion to grant the prerogative order of certiorari.

On the recommendation that Mr. Akankwasa be submitted to the District Service Commission for dismissal for incompetence it is the view of court that the District Service Commission cannot dismiss an employee on the recommendations of the IGG. If the District Service Commission has any reason for dismissing or disciplining an employee it would have to conduct its own disciplinary proceedings where the third applicant would be afforded an opportunity to present his case and the action of the District Service Commission would be based on their own findings and not the recommendation of the IGG.

The third recommendation is that the CAO should advise the incoming Contracts Committee to display an impeccable standard of integrity and competence in performing their functions, the fourth that all members of the evaluation committed always sign the Code of Ethical Conduct while executing their responsibilities with regard to procurement and disposal of public and the fifth that the CAO Wakiso should closely monitor the performance of the

service provided for medical examination of salon operator, food and beverages and collection of revenue plan fees in the sub counties enforcement of the contract are to me routine matters that an efficient system should address without being reminded by the IGG. There is no decision contained in these recommendations that merits an order of certiorari to quash the impugned Report.

The above discussion disposes of this application. There is no decision to quash. One other matter that normally crops up is as to who is the proper person to sue in cases of Judicial Review like in this case where individuals like Mukwaya Joseph and Okello Silver are brought to Court for recommendations made by the IGG and are implementable by their respective offices especially the office of the Chief Administrative Officer. I presume that these officers are transferable so I do not know what would happen if by the time a decree is passed by this court those two officers are not in office to implement the decree. A similar situation arose in the case of **Beachside Forest Authority, Professor Buyinza Mukadise and Gershom Onyango Misc. Cause No. 123 of 2012** (unreported) where both Professor Buyinza and Gershom had been sued in their personal capacities and this court had this to say:-

“The first issue arising from the above preliminary point is whether the 2nd and 3rd Respondent should have been brought into this action on the ground that they are the ones with the responsibility to grant the licences. I do not think so. One of the leading authorities where an order of mandamus was sought to enforce a court judgment like in this case was the case of SHAH Vs ATTORNEY GENERAL (No. 3) 1970 E.A where the applicant had obtained a judgment against the Government for shs 67.500=interest and costs. The Government failed to pay and the applicant brought the

motion for an order of mandamus directed to the officials responsible for making the payment, to pay the amount of the judgment and it was held that mandamus could issue to the Treasury Officer of Accounts to compel him to carry out the statutory duty to pay cast upon him by S.20(3) of the Government Proceedings Act. Although the order of mandamus was directed to the Treasury Officer of Accounts he had not been made party to the application. The party remained the Attorney General against whom the

judgment had been delivered. The individual or individuals in the Treasury office of Accounts that were going to effect the payment were not named like in this application. An order of mandamus issued to the 1st Respondents would trickle down to the officials responsible for issuing the Licence and not necessarily the 2nd and 3rd Respondents. In fact when the 2nd Respondent declined to sign the Licence in this case someone else did. It was unnecessary to draw the 2nd and 3rd Respondent into this action because an order of mandamus could be issued without their presence and it would be enforceable against the 1st Respondent.”

Similarly the recommendations of the IGG are enforceable by persons holding the offices in their official capacity and as court found in this above case it was not necessary to drag the 3rd and 4th Respondents in this action because if the decision of the IGG was to

be quashed it would be brought to Court and quashed without necessarily involving the 3rd and 4th Respondents.

In the circumstances I find no merit in this application which is dismissed with costs to the Respondents.

Eldad Mwangusya

J U D G E

22.05.2013