THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMAPLA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 137 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

1. DOTT SERVICES LTD

2. GENERAL NILE COMPANY FOR ROADS AND BRIDGES :::::::::::::::::::: APPLICANTS

Versus

ATTORNEY GENERAL ::RESPONDENT

BEFORE: THE HON JUSTICE STEPHEN MUSOTA

RULING

This Ruling is in respect of the two applicants. This is an application for Judicial Review of the findings and recommendations of the Commission of Inquiry into allegations of mismanagement, abuse of office and corrupt practices in Uganda National Roads Authority (UNRA) in so far as the findings affect the applicants. The application is brought under **Sections 36(1) (b)&(c), 41 and 42 of the Judicature Act Cap 13, Rules 3,4 and 6 of the Judicature (Judicial Review) Rules 2009, section 98 of the Civil Procedure Act, O.52 rr 1 and 3 of the Civil Procedure Rules.**

The Applicants seek the following orders;

1. An order of certiorari quashing the findings and recommendations of the commission of inquiry into allegations of mismanagement, abuse of office and corrupt practices in

Uganda National Roads Authority (UNRA), contained in the report affecting the applicants

2. An order of prohibition stopping the government of Uganda from enforcing the findings and recommendations of the commission of inquiry into allegations of mismanagement, abuse of office and corrupt practices in the Uganda National Roads Authority contained in the report against the applicants.
3. Provision be made for the costs of the application

The grounds of the application are briefly set out in the application and in the affidavit in support of the application. In summary they are that the commission acted unfairly when they denied the applicants a chance to submit their evidence, that the commission acted illegally when it refused and failed to follow the terms of the contract between the applicants and UNRA, that the commission's findings and recommendations were irrational because they sought to punish the applicants for the shortcomings and failures of the UNRA officials and consultants, that the applicants applied to the respondents for a copy of the commission's report but the respondent refused to avail a copy and lastly that if the orders sought in this application are not granted the applicants shall suffer irreparable economic loss and will wind up their businesses therefore it is fair and just that this application be granted.

The applicants filed an affidavit in support of the application by Boinapally Venugopal Rao dated 13th July 2016 and filed in this court on 14th July 2016. The respondent filed an affidavit in reply by Richard Adrole State Attorney dated 22nd August 2016 and filed in this court on 22nd August 2016 and a supplementary affidavit in reply dated 27th October 2016 and filed in this court on the same date. The applicants filed an affidavit in rejoinder filed in this court on 28th October 2016.

At the hearing of this application Mr. Enos Tumusiime of M/s Tumusiime, Kabega & Co. Advocates appeared for the applicants and Ms Emelda Adongo of the Attorney General Chambers appeared for the respondent.

Briefly the background of this application is that as demonstrated in paragraphs 1-17 of the affidavit in support of this application, the applicants bided and won contracts for the construction of several roads for the Uganda National Roads Authority which were completed as of July 2016. On 8th June 2015 the applicants through their Joint Venture Director got to learn from the print and electronic media that the president of Uganda had appointed a Commission of Inquiry to inquire into allegations of mismanagement, abuse of office and corrupt practices in UNRA. On the 27th May 2016 in the New Vision Newspaper at page 8, the applicants learnt that the Chairperson of the Commission of Inquiry Hon Lady Justice C. Bamugemereire had presented the report of the Commission of Inquiry to the President of Uganda. The applicant applied to the respondent for a copy of the report but did not get a response. On 14th June 2016 the applicants obtained a copy of the report of the Commission of Inquiry comprising of five (5) volumes out of 6 from third parties. The applicants were aggrieved by the contents of the Report of the Commission of Inquiry in as far as, according to them, the recommendations in the report were unfair, based on misstated facts, and contrary to the contracts signed. The applicants were also dissatisfied in as far as they were blamed for the actions of the UNRA staff and consultants and that it was illogical for the Commission of Inquiry to blame the 1st applicant for the physical progress of the work and further it was illogical for the commission to blame the applicant for having been allegedly unjustifiably awarded an extra 10.5 months which was subsequently paid for. The applicants are also dissatisfied because the commission invited them for questioning on a different contract yet they went on to ask for other contracts which their representative had not prepared for. It is because of these and other grievances that the applicants have filed this application.

This court directed the parties to file written submissions. The applicants filed on 13th September 2016, the respondent filed on 3rd November 2016 and the applicant filed a rejoinder on 9th November 2016.

In their submissions the applicants raised the following issues:

1. Whether the commission of inquiry complied with the law and whether there are errors of fact and law in the report of the commission of inquiry.

2. Whether the findings and recommendations of the commission of inquiry were irrational.

3. Whether the findings and recommendations of the commission of inquiry were procedurally improper.

4. Whether the commission of inquiry followed the principle of proportionality and legitimate expectations.

5. Whether the Judicial Review orders of certiorari and prohibition should issue.

Although the respondents attempted to raise different issues from the ones raised by the applicants I find that the issues as raised by the applicant capture the gist of this application and cover the issues raised by the respondent in submissions. This court therefore adopts the issues identified by the applicants. I shall deal with the issues in the order in which they have been identified.

But it is important to first note that the **Judicature (Judicial Review) Rules 2009** do not strictly outline the decisions that are amenable to Judicial Review. This means that the common law principles will be applicable and at common law I note that the court has jurisdiction to determine whether a commission's terms of reference are lawful per **Cock Vs Attorney-General (1909) 28 NZLR 405 (CA),** to determine whether a commission is acting within its terms of reference per **Re Erebus Royal Commission (No 2) [1981] 1 NZLR 618 (CA),** to intervene to

ensure that the requirements of natural justice are met per **Re Royal Commission on State Services [1962] NZLR 96, 117 (CA); Lower Hutt City Council Vs Bank [1974] 1 NZLR 545 (CA)** and, may review an alleged error of law where it materially affects a matter of substance relating to a finding on one of the terms of reference per **Peters v Davison [1999] 2 NZLR 164 (CA) (review of a Royal Commission for error of law)).**

In the Kenyan Case of **Republic Vs. Judicial Commission of Inquiry into Goldenberg Affair, Ex Parte Hon. Prof. Justice of Appeal Bosire & Another Ex Parte Hon. Prof. Saitot [2007] 2 EA 392** a commission of inquiry was subjected to judicial review. Therefore the proceedings, recommendations and findings of a commission of inquiry are amenable to judicial review.

Issue 1. Whether the commission of inquiry complied with the law and whether there are errors of fact and errors of law in the report of the commission of inquiry.

In their submissions counsel for the applicants indicated that this issue goes to the ground of illegality.

In resolving this issue counsel submitted that The commission of inquiry was set up under the Commission of Inquiry Act Cap 166 Laws of Uganda under section 6 where the duties of the commissioners are to *interalia* make a full, faithful and impartial inquiry into the matters specified in the commission. That therefore the commission of inquiry was bound to follow the Constitution of the Republic of Uganda and all other laws made under the said constitution. Counsel also outlined the Commission's terms of reference which he submits the commission should have complied with strictly.

Counsel cited the decision of Lord Diplock in the celebrated judgment of the House of Lords, in the case of **Council of Civil Service Unions and Ors Vs Minister For Civil Service [1985] 1**

AC 374 where he held that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.

Further counsel cited the Kenyan Case of **Republic Vs Judicial Commission of Inquiry into Goldenberg Affair, Ex Parte Hon. Prof. Justice of Appeal Bosire & Another Ex Parte Hon. Prof. Saitot [2007] 2 EA 392** where it was held that a commission appointed under a Commission of Inquiry Act has a statutory duty to submit a full, fair and impartial report and failure to do so may render the commission's findings, determinations and recommendations *ultra vires* the Act and in particular section 7 (in the case of Uganda section 6). Whether or not the commission has jurisdiction depends on any finding whether or not it acted within its purview under the section and terms of the commission. In the case of the commission, the duty of fairness is a statutory requirement and it's so expressed. The duty to render a full, faithful and an impartial report is statutory and there is no need to have it implied.

Counsel further submitted that in this case the Commission of Inquiry made several alleged findings against the applicants which are illegal in as far as they did not take into consideration the contracts between the applicants and UNRA. That the illegal findings and recommendations of the Commission of inquiry are under Para 26 of Mr. Rao's Affidavit and at page 542 of the Report of the Commission of inquiry which are;

1. That there was poor planning of works leading to excessive revision of time and costs;

2. That there was late commencement of works;

3. That the delays were caused by the 1st applicant who caused UNRA financial loss, page 563 of the said report;

4. That the 1st applicant did not have adequate capacity in terms of numbers and competence of key personnel, page 564 of the said report; and

5. That the 1st applicant did not have adequate equipment and there was frequent breakdown of equipment and at times, the equipment was idle page 564 of the said report

On the Tororo- Mbale road Counsel also submitted that UNRA breached the terms of the contract. For this submission counsel relied on the paragraph 35 of Rao's affidavit. That UNRA changed the scope of works as per annexture R-3 Volume 4 of Mr. Rao's affidavit. That the new scope of works was a reconstruction of the road which involved a different work method, different quantities of materials which increased tremendously and culminated into a second addendum, increasing the contract price to UGX 63,804,103,546/= (Annex "Q", volume 4 of Mr. Rao's Affidavit).

On Mbale-Soroti road contract counsel submitted that whereas the contract was supposed to commence on 21st November 2010 and the 1st applicant fully and duly mobilized on to the site the strip maps delayed and were delivered by the consultant on 1st August 2011 but again without the construction drawings. That the consultant issued the data in a piece meal manner and by 19th March 2012, the 1st applicant had not received the detailed design drawings, as per para 48 49 and 50 of Mr. Rao's affidavit. That UNRA totally changed the scope of the works to full construction of the road. That therefore the 1st applicant's progress was frustrated by the late handover of the site, late instructions, late issue of drawings/designs and change of scope of works and method of execution as per para 5 of Mr. Rao's affidavit. That therefore it is clear here that it is UNRA who breached the terms of the contract and caused the delay. In that regard the commission of inquiry erred not only on the facts but also on the law when it condemned the 1st applicant for breach of the terms of the contracts, under Section 33(1) of the Contracts Act. That such errors of law and fact are ultravires and reviewable by the Judicial Review Orders of certiorari and should be quashed. Further that the commission of inquiry also made wrong findings as per paras 26(f) to (n) of Mr. Rao's affidavit**.** They are wrong because the real facts are as stated in annextures "A", "B", "C", "D", "E", "F", "G", "I", "J", "K", "M", "N" and "O". That these annextures show that the road works were tendered under International Competitive Bidding and Open Domestic Bidding under the Public Procurement and Disposal of Public

Assets Act (PPDA) and the applicants were the best evaluated bidders and with the consent of the Solicitor General signed the contracts. That due to changes in scope of works along the way this caused variations to the contracts and contract amounts. Addenda to the contracts were prepared by UNRA and were approved by Solicitor General before they were signed by the 1st applicant as per annexture "Q" for Tororo –Mbale road, annexture "U" for the Mbale-Soroti road, and annexture X, Y and Z for Jinja-Kamuli Road and annexture "EE" for the Ishaka-Kagamba Road.

Further counsel submitted that every payment to the applicants was according to contracts entered into by UNRA and the applicants. The bills of quantities formed part of the contracts. Therefore there was no collusion with Consultants, Ministers or UNRA officials and variation of the contracts rates was lawfully done and approved by both PPDA and the Solicitor General. That therefore the findings of the commission of inquiry in this regard are errors of fact and errors of law and should be quashed forthwith. That therefore the allegations of the Commission that the applicants defrauded Government of Uganda and were irregularly paid, or that they caused financial loss to UNRA or Government are errors of fact and law.

Further on the Jinja –Kamuli Road contract counsel submitted that as pointed out in Mr. Rao's affidavit paras 66, 67, and 68 the contract was signed on 13th December 2010, the contract works were to be completed in 18 months and to commence in two weeks from date of signature of contract. But UNRA by that time had not even appointed a consultant to supervise the road works. The consultant was appointed on 4th February 2011 and the Consultant did not submit a Draft Design Review Report until 14th October 2011, ten months into the contract period. Even when the consultant submitted the Design Review report it was for a new, improved and changed scope of works as stated in Paras 67 of Mr. Rao's affidavit. The original scope of works was improvement of road drainage, rehabilitation of existing road base through cement stabilization, construction of crushed stone base among others. That therefore the findings by the commission were in error and should be quashed.

On the Ishaka –Kagamba Road contract the applicants submitted that as per para 79 of Mr. Rao's affidavit, the applicants after having been evaluated by UNRA as the best bidder, signed a contract with UNRA on 1st December 2011 to upgrade the road from gravel to paved (bitumous) standard. UNRA had not yet appointed consultants at the time of signature of the contract. Later UNRA realized they had not yet acquired the land privately owned by owners who had to be compensated so they appointed sub consultants two and a half years after. While all this was going on, the applicants had to wait and even waited a further six months for the compensated persons to leave the land.

Further counsel submitted that it was an error of law and fact when the Commission of Inquiry blamed the applicants for poor planning, late execution of works, causing delays and the resultant financial losses, not having adequate and competent personnel or adequate and fit equipment and for applying for and obtaining extension of time and payment therefore (prolongation costs) of the contract as all these extra costs were wholly caused by UNRA. Secondly that it was an error of law for the commission to blame the delays on extension of time on the applicants when the contract and the addendum, annex EE, provided for compensation in such event. Counsel also identified other errors of law and fact at pages 21-23 of the submissions of the applicant.

He also submitted that the only reply to the errors of law and fact by the respondent is in para 13 of the Affidavit of Mr. Adrole where he only states that he knows the commission carried out thorough investigations and relied on all the information, interviews, oral submissions and evidence provided by the applicants before making recommendations and findings and therefore it was not biased. That therefore the averments in Mr. Rao's affidavit are not rebutted and denied so they are accepted. For this submission counsel relied on the cases of:-

Samwiri Musa Vs Rose Achen [1978] HCB 297 per Ntabgoba J (as he then was),

Energo Project Vs Kasirye–Gwanga Misc App No. 558 of 2009 per Murangira J, and

Makerere University Vs Namirembe Bwanga Misc App No. 658 of 2013 per Bashaija J where it was stated that where facts are sworn to in an affidavit and these are not specifically denied or rebutted by the opposite party, the presumption is that such facts are accepted.

Learned counsel also cited Michael Fordham who states in **Judicial Review Handbook 3rd Edition at page 728** that a body must not make errors of precedent of fact, conclusions unsupported by evidence or fundamental factual errors…. if a public body considers the factual trigger to exist when in truth it does not exist, the body is proceeding to exercise a function which in truth is beyond its powers. This justifies the court in investigating for itself the key question of fact on all available material. Further counsel submitted that relying on the same author, instances that justify court's intervention are;

a) A mistake as to fact can vitiate a decision as where the fact is a condition precedent to an exercise of jurisdiction;
b) Where the fact is the only evidential basis for the decision.
c) Where the fact as to a matter which expressly or impliedly had to be taken into account.
d) Where the finding is out of tune with evidence.
e) Where a finding is perverse or the commissioners have misdirected themselves on law, the determination cannot stand.

Learned counsel also submitted that since anything not authorized by law is ultravires, judicial review will stop the unlawful action as refusal to do so would effectively validate an ultravires act. It is trite that an illegality once brought to the attention of court cannot be ignored. See: **Uganda Inland Port Ltd Vs Attorney General and Great Lakes CFS Ltd Misc App No. 145 of 2007 at page 9** per Bamwine J (as he then was).

Learned counsel then concluded that the commission of inquiry did not comply with the law and there were numerous errors of fact and errors of law in the report, hence the illegality and even

under this issue the report of the commission of inquiry should be quashed by an order of certiorari.

In reply counsel for the respondent submitted that the findings and recommendations of the commission of inquiry were lawful because the Commission was set up under the Commission of Inquiry Act. The terms of reference of the commission of inquiry are at page 438 of the report (Volume 2) and Term 1 was to investigate into the procurement and contract management processes by which UNRA awarded contracts for National Road works. Term 9 was to make appropriate recommendations based on findings for remedial actions or such other action against persons found to have acted improperly in the discharge of their public duties and those persons found to have acted improperly in the discharge of their public duties and those persons who benefited from the impugned actions of the public officials. Term 11 was to make any other recommendations as the commission may consider appropriate in the public interest. That the methodology used by the commission is at page 149-155 of the report. That the commission followed the law and did not commit any errors of fact or errors of law.

To demonstrate this the respondent submitted that the Commission was well aware of the contractual obligations as seen at page 151 of the report under item 1.3.4 on document review where it is stated that the commission conducted a review of among others the contract documents, monthly progress reports, contract management files and other laws. That the Commission relied on among others the Consultant's response in relation to site meetings, letters and progress reports. Witnesses were summoned on each of the selected projects and written statements were sought. The respondent then submitted that the findings and recommendations of the commission of inquiry were properly arrived at considering the methodology used as well as the evidence. That the Commission of Inquiry took into account all the oral and written explanations of the applicants on all issues and came up with recommendations which in their view were appropriate as per pages 559 to 560 of the commission report. That the commission at pages 559-560 of the report shows that the commission interviewed the Contract Manager Eng Okiror who at pages 559 line 18 testified that the contractor did not have capacity in terms of

equipment, human and financial resources and this was exhibited by his failure to mobilize in accordance with the contractual requirements which at Page 560 line 15 Mr. Venu the Director of the 1st Applicant also testified in respect of the same. That therefore it cannot be said that there was error of law or fact.

Further the respondent submitted that the commission did not commit any error of law. They directed themselves properly in law, understood the law and applied it correctly. That in **Uganda Bankers (Employees) Association Vs National Union of Clerical, Commercial Professional and Technical Employers (1995) IV KALR 30** where Justice Egonda Ntende (as he then was) held that the alleged error of law for purposes of certiorari must be apparent on the face of the record, must be self evident. That the commission of inquiry was properly appointed under the Commission of Inquiry Act, it duly carried out its mandate in line with the terms of reference.

Further the respondent submitted that at page 581 of the report of the commission it set out the contractor's role in the delayed commencement and completion of works which resulted in financial loss. That the applicants' representative was given an opportunity to explain and at pages 584 of the report the Commission states that it is from this evidence that the Commission deduced that by 18th February 2011 the contractor had not yet mobilized according to the work programme. That therefore there was no error of law or fact.

Further that it can also be seen from pages 601-603 of the commission of inquiry report that the Commission relied on the contract between the applicants and UNRA to arrive at its findings which the applicants at paras 24 and 25 of the affidavit of Mr. Rao admit. That therefore basing on section 6 of the Evidence Act the applicants cannot again turn around after admitting and allege that the Commission acted illegally. The respondent then prayed that court finds that the Commission of Inquiry acted lawfully and the report should not be quashed.

In rejoinder the applicants submitted that the affidavit of Mr. Rao is largely unanswered specifically paras 1-59, 62-100, 104-111 and therefore court should uphold them as true. For this

submission counsel relied on the case of **Samwiri Musa Vs Rose Achen [1978] EA 297** and **Makerere University Vs Namirembe Bwanga MA 658 of 2013.**

Further counsel for the applicants submitted that judicial review is not concerned with the decision making process only but also with the decision as well. I do not agree with this submission, Judicial Review is concerned with the decision making process and where there is fault with the process then the decision must be affected. But just because the decision can be quashed doesn't mean that Judicial Review is concerned with the decision.

Learned counsel also submitted that the affidavits and submissions of the respondents do not effectively answer the errors of law and fact committed by the commission as stated by the applicants in their submissions and in the affidavits. That the respondents are making general statements without specifically justifying the errors cited by the applicants. That the respondent cannot wash away the pleadings and submissions of the applicants by making such general statements in its submissions.

Further that the respondent made the submission at page 4 that the Commission of Inquiry was well aware of the contractual relationship between the parties and among others the Consultant's response are made without any supporting evidence by affidavit. Counsel also submitted that even in the submissions of the respondent there are factual errors in as far as Eng Okiror was not the Contract Manager of UNRA for Tororo-Mbale, Mbale-Soroti. The Engineer was Kaaya Mukasa as per page 559 of the Commission Report. That Mr. Venu did not testify to support the position that the 1st applicant did not have capacity in terms of equipment, human and financial resources. That Mr. Venu did not testify that the road was 6.3 metres as seen in the respondent's own supplementary affidavit Annex A page 13 where it is clear Mr. Rao told the commission that the road had a carriage way of 6 metres and shoulders of 1.5 metres on either side, making the total 9 metres width, which as indicated in addendum 2 to the contract annex q to Mr. Rao's affidavit was increased to 9.3 metres. Lastly that there is nothing at page 582 of the Commission of Inquiry's Report that led the Commission of Inquiry to deduce that by 18th February 2011 the Contractor had not mobilized.

In conclusion counsel for the applicants submitted that the respondent has failed to challenge or rebut the errors of fact and errors of law contained in the commission of inquiry report and the said findings and recommendations should be quashed as prayed by the applicants.

I am not convinced by the case put forward by the respondents. The applicants have made a very clear case of errors of law and fact which the commission of inquiry made. These errors are that:

- the delays were caused by the 1st applicant which caused UNRA financial loss, page 563 of the said report,
- the 1st applicant did not have adequate capacity in terms of numbers and competence of key personnel, page 564 of the said report; and
- the 1st applicant did not have adequate equipment and there was frequent breakdown of equipment and at times, the equipment was idle page 564 of the said report.

The terms of reference of the Commission of Inquiry are at page 438 of the report (Volume 2) and Term 1 was to investigate into the Procurement and Contract Management processes by which UNRA awarded contracts for National Road works. Term 9 was to make appropriate recommendations based on findings for remedial actions or such other action against persons found to have acted improperly in the discharge of their public duties and those persons found to have acted improperly in the discharge of their public duties and those persons who benefited from the impugned actions of the public officials. Term 11 was to make any other recommendations as the commission may consider appropriate in the public interest.

It is not in dispute that the Commission was required under Term of reference 9 to make appropriate recommendations based on findings for remedial actions or such other action against persons found to have acted improperly in the discharge of their public duties and those persons

who benefited from the impugned actions of the public officials. But this did not mean that they had at all costs to blame the applicants. The commission did not effectively evaluate the documents and had they given the applicants that fair opportunity to explain, the errors would not have occurred. It was alleged by the Commission that the applicants were responsible for the delays and the losses in UNRA but there is no evidence whatsoever to show this. Just because contracts were reviewed and extra payments were made did not mean that there was connivance. The applicants have explained that the contracts anticipated and provided for the extra payments in case of delays. It is also logical that where the scope of works is adjusted there must be attendant costs in executing the terms of the contract. The submissions by the applicant clearly shows that UNRA staff caused delays and accordingly caused the situations that led to the losses. The applicant companies are business persons who provide their technical services for profit. The UNRA staff ought to have known that any delays in appointment of Consultants, Contract Managers and providing relevant materials would result in claims for compensation.

It was an error of fact and law for the Commission to treat the applicants as public officials who had to help the government save money amidst irregularity in the management of UNRA. The applicants had UNRA as a client and are in the business of making money. Once they get instructions from their client as long as payment for the work is done, they owe the client no duty to instruct him or her on how to spend. In fact the UNRA officials only objected to specific amounts. For example under para 39 of the affidavit of Mr. Rao in support of the application, the applicant made a claim for losses incurred by the 1st applicant on account of prolongation of contract of 17,766,930,850/= but UNRA approved UGX 11,526,353,155/=. This means that whenever the UNRA staff felt the money was excessive they would reduce it to an amount that was agreeable. I therefore find that it was an error of fact and law for the commission to condemn the applicants for the monies paid to them and for the mistakes of the UNRA staff.

The respondent submitted that the actions of the commission and the recommendations were lawful because the commission was established under the Commission of Inquiry Act and it had terms of reference.

I disagree with this submission. Just because a body had powers does not mean that such body's actions are lawful. In this case even though the Commission had powers to make findings and recommendations against persons who had benefited from actions of UNRA staff it doesn't mean that the commission had to abdicate its statutory duty which was stated by **Lord Diplock** in the celebrated judgment of the House of Lords, in the case of **Council of Civil Service Unions and Ors Vs Minister For Civil Service [1985] 1 AC 374** where he held that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it and in the Kenyan Case of **Republic Vs JudicIal Commission of Inquiry into Goldenberg Affair, Ex Parte Hon. Prof. Justice of Appeal Bosire & Another Ex Parte Hon. Prof. Saitot [2007] 2 EA 392** where it was held that a commission appointed under a Commission of Inquiry Act has a statutory duty to submit a full, fair and impartial report and failure to do so may render the commission's findings, determinations and recommendations ultra vires the Act and in particular section 7 (in the case of Uganda section 6). Whether or not the commission has jurisdiction depends on any finding whether or not it acted within its purview under the section and terms of the commission. In the case of the Commission, the duty of fairness is a statutory requirement and it's so expressed. The duty to render a full, faithful and an impartial report is statutory and there is no need to have it implied.

In this case and as rightly submitted by learned counsel for the applicants, the report of the commission was not full, fair and impartial in as far as it was based on errors of fact and law as submitted by learned counsel for the applicants because the explanations by the condemned were suppressed. I therefore answer issue 1 in the affirmative.

Issue 2: Whether the findings and recommendations of the commission of inquiry were irrational

On this issue counsel for the applicants submitted that Lord Diplock in the House of Lords Decision of **Council of Civil Service Unions & Ors Vs Minister for Civil Service [1985]1 AC 374** defined irrationality to mean a decision which is so outrageous in defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. This definition should not be taken at a literal value on the face of it. It is a legal definition which demeans no one. Counsel at page 27-29 of the submissions goes on to demonstrate the irrationality in the findings and recommendations of the Commission of Inquiry. Counsel then submitted that this court ought to intervene because the Commission of Inquiry failed to take into consideration matters that caused the delays but instead chose to blame the applicants. For this submission counsel relied on the case of **Re - An Application by Bukoba Gymkhana Club [1963] EA 478 at page 489** per Reide J where it was held that where a body has taken into account matters which ought not to take into account, or conversely, has refused to take into account or neglected to take into account matters which it ought to take into account and has come to a conclusion so unreasonable that no reasonable authority could ever have come to it, in such a case, the court can interfere.

That had the Commission of Inquiry taken into account the causes of the delays cited by the applicant in this case then they would not have made the findings and recommendations. But they didn't. That therefore relying on **Kenyan Case of Republic Vs Judicial Commission of Inquiry** (supra) the findings and recommendations of the Commission of Inquiry are so outrageous in their defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could arrive at it. Therefore the findings and recommendations should be quashed.

In reply the respondent submits that the commission of inquiry relied on documents and testimonies to arrive at the finding that the applicants delayed the commencement of works on roads. That at page 596 line 1 of the report it states that it should be noted that in April 2011 the consultant provided to the contractor drawings which were sufficient for him to commence works but the contractor declined to start. That as far as the width of the road is concerned the

commission of inquiry as per page 564-568 of the report relied on the testimony from several witnesses and tender documents which showed the width of the road was 9 metres to 9.7 metres depending on the section of the road as opposed to 6 metres which the contractor/applicants were insisting on. That at page 568 line 4 it can be seen that Mr. Venu a shareholder and Director of the applicants testified that according to the bid, they were supposed to work on 6.3 metres road width and that the Consultant was asking him to do more and when he was presented with a drawing from the bid document which required them to do 6 metres carriageway and 1.5 metres shoulders each side totaling to 9 metres he testified that the drawing was removed from the contract. Further evidence was heard from Eng Godfrey Kaaya Mukasa and Eng Luyimbazi all of whom testified that from the beginning the contractor was supposed to construct a 9metre wide road. That basing on the above evidence it was logical that the commission finds and makes the recommendations it did.

That the findings of the commission of inquiry that the applicants were responsible for the delay and consequential prolongation costs on Ishaka –Kagamba road was arrived at having reviewed a number of documents including the contracts IPC management files and Auditor General's Report as per page 678 of the report. At page 692 of the report it can be seen that the consultant instructed the applicants to commence work and commencement date was to be 6th February 2012. At page 693 of the report it can be seen that according to the site meeting minutes of 13th March 2012 the contractor was still mobilizing and had neither submitted his representative nor the programe of works clause as per 4.3 and 8.3 of the General Conditions of Contract and according to the site meeting of 3rd May 2012 the applicants were yet to commence works. That from the above it was logical for the commission to make the said finding. That the allegations by the applicant are unfounded and so this court should find that the commission did not act irrationally.

Further the respondent submitted that the commission took into consideration relevant matters and addressed their mind to the causes of the delay that made it arrive at the said findings and

contend that the commission's findings and recommendations are not illogical and the same should not be quashed by the court as prayed for by the applicants.

In rejoinder the applicants submitted that the applicant in their submissions pointed out eight grounds of irrationality at pages 27-30 but the respondent has only responded to one ground on delays and even then no grounds of evidence were laid in their affidavit in reply and supplementary affidavit to support its submissions. That the delays were effectively explained in paras 30-104 of the affidavit in support of the application and these statements were never controverted at all by the affidavits of the respondent. That on the issue of delays caused by the applicants on the Ishaka- Kagamba road there was no evidence to prove the allegation. That in view of the unchallenged evidence of Mr. Rao in para 81-89 of the affidavit in support of the application the submissions of the respondent on this issue should be dismissed.

Learned counsel maintained that the grounds of irrationality pleaded, substantiated and submitted on by the applicants should be upheld and the said findings and recommendations be quashed forthwith.

I entirely agree with the submissions of learned counsel for the applicants. I have perused the Commission's Report and I have not found any evidence of bribery, connivance or collusion. All that was before the Commission was mere suspicion and no hard evidence to show that the applicants influenced the decision making processes in the UNRA. What is clear from the report is the fact that UNRA was disorganized administratively and procedures/rules were not followed in the day to day running of their activities. The applicants had to deal with such a client who didn't respect PPDA laws and many times did not follow terms of the contract. The commission made several recommendations in that regard and was proposing that the whole institution be reorganized. It is therefore not just that the applicants should be punished for the actions of errant public servants.

The Commission's recommendations as against the applicants were therefore speculative, in error and therefore irrational. Had the commission allowed the applicants' representative to effectively explain in fairness all the alleged roles they played in the alleged losses some of which have been explained in the affidavit of Mr. Rao, then may be, the commission would have had access to the information disclosed by the applicants in this application. I accordingly answer this issue in the affirmative.

Issue 3: Whether the findings and recommendations of the commission of inquiry were procedurally improper.

On this point learned counsel for the applicants cited the principles of natural justice and submitted that applying those principles to the facts of this application the applicants are very experienced successful road construction and other civil works companies. However under paragraphs 37,40,42,51,56,57,39,62, 26(n),63,100,71, 74,75,89,90,91,92,95,96 and 98 of Mr.Rao's affidavit, the Commission of Inquiry condemned the 1st applicant for lack of personnel and equipment to execute the contract works, and for causing financial loss to UNRA among others**.**

That the commission of inquiry condemned the applicants without giving them a hearing. That as stated in paras 59, 60, and 61 of Mr. Rao's affidavit, Mr. Rao was summoned to appear before the commission on 12th October 2015 towards the end of Commission's hearings. He was asked to make a statement on Kagamba–Ishaka Road by the Directorate of Criminal Intelligence and Investigations. Consequently Mr. Rao appeared before the Commission on 13th October 2015 to testify on the Ishaka-Kagamba Road Project. That as Mr. Rao stated, he was surprised as he was unprepared to instead answer the Commission of Inquiry's questions on Tororo-Mbale, Mbale-Soroti and Jinja- Kamuli roads. That he was also gagged by the Commission as per para 61 and was not allowed to explain. To support this submission learned Counsel cited the case of **Kampala University Vs NCHE** where this court held that a person must be given prior notice of allegations against him and fair opportunity to be heard *audi alteram partem* a fundamental principle of natural justice**.** That one cannot act fairly without giving an opportunity to be heard.

Further learned counsel submitted that had the Commission of Inquiry given the applicants' representative time to explain, all the errors of fact in the report would not have arisen. That this was a flagrant violation of the principles of natural justice and the Constitution articles 20(1) and (3), 28(1), 42, and 44. Relying on the case of **Republic Vs Judicial Commission of Inquiry** (supra) learned counsel submitted that not only were the applicants denied rights to natural justice by being condemned unheard but the commission by suggesting, or implying commission of criminal offences of fraud, forgery, causing financial loss, lodging fictitious claims, the applicants were denied the right to equality of arms and therefore disadvantaged in any future trial. I agree with this reasoning.

Learned counsel also submitted that the Commission of Inquiry was biased in as far as they used repeatedly such words as illegalities, criminal, cheating among others which show that the Commission had a mindset aimed at a particular result to the disadvantage of the applicants. That therefore the commission of inquiry's denial of the applicants a fair hearing was procedurally improper. Further that paras 36, 40, 42, 51, 57, 62, 26(n) 63, 71, 75, 89, 90, 91, 92, 95, 97, 98 and 100 of Mr. Rao's affidavit demonstrate the extent of bias of the Commission. Further that the Commission violated Article 42 of the Constitution and failed to observe the impartiality rule in section 6 of the Commission of Inquiry Act. Counsel also showed that whereas the Commission singled out the applicants' projects, there were other contractors whose contract amounts were increased by 96.69% such as the one for Chingqing International Construction Corporation CICO on Fort Portal Bundibugyo Lamia road. SBI International Holdings on Kabale –Kisoro Bunagana Kyanika road by 82.23 % and CCCC of China was paid an increase of 150,000,000 USD on the Kampala –Entebbe Express Way. Others are at pages 265 -267 of the report.

That therefore to condemn the applicants was a classic case of bias. Further that one of the members of the Commission Engineer Patrick Rusongoza authored an audit report on the applicants' accounts with UNRA while he worked at the Auditor General's Office shortly before he was appointed to the Commission so there is no way he could be an impartial commissioner.

Learned counsel then prayed that certiorari and prohibition should be issued to stop the respondent from acting upon or enforcing the findings of the said report as against the applicants**.**

In reply, the respondent submitted that there was a hearing because the applicant's representative a one Mr. Venu appeared before the Commission. He was summoned and he appeared. That the applicants in paras 59, 60, and 61 of the affidavit in support of the application admit this fact as per section 16 of the Evidence Act. That he even made submissions to the commission of inquiry in writing. Further that in para 8 of the respondent's supplementary affidavit it is clearly stated that the summons served on the representative of the applicants at the hearing did not restrict or limit queries to any particular subject. Lastly the respondent submitted that the applicants' submission at page 41 that they were taken by surprise as they were unprepared to answer the Commission of Inquiry questions on Tororo-Mbale, Soroti and Jinja- Kamuli roads are unfounded, and irrelevant as the applicants cannot determine for the commission which questions were to be asked or which projects were necessary for investigation. That therefore the Commission observed the basic rules of natural justice and acted with procedural fairness towards the applicants.

Further on bias the respondent submitted that the findings and recommendations of the Commission were not made only by one commissioner but by all the commissioners as per para 12 of the respondent's supplementary affidavit. That there is also no positive evidence adduced by the applicants to show that indeed the alleged commissioner had a closed mind. The fact that the alleged commissioner was an Auditor in UNRA one time and made observations in his audit report is not enough for this court to arrive at a finding that he was biased. Further the respondent submitted that the applicants did not at any one point apply for recusal of the said commissioner on the basis that he was biased. That therefore this court should find that there was no bias exhibited against the applicants as alleged and court should not grant the prayers being sought.

In rejoinder counsel for the applicants submitted that the appearance of Mr. Rao before the Commission of Inquiry did not amount to a fair hearing at all for the reasons that he was invited to answer questions on the Ishaka-Kabamba Road project but instead asked questions on other road projects of Tororo-Mbale, Mbale-soroti and Jinja-Kamuli and the applicants advocate Musika was denied audience as well. That the respondents submitted that the summons never restricted questions to a specific project but did not provide proof of this. That according to the attachment to the respondent's supplementary affidavit of 15th October 2016, the commission's proceedings are a clear demonstration of denial of a fair hearing because Mr. Venu was not allowed to explain at page 7 as he was told to be brief and follow the instructions. At Page 16 Mr. Venu asked for more time to check their records and he was not allowed and at page 26 Musika learned counsel for the applicants tried to ask for time and for permission to allow his client's director to be asked one question at a time but the Chairperson of the Commission told him that the Commission does not allow verbose explanation. That therefore all this shows that the applicants were not given a fair hearing. That the respondent's submission that there is no right to legal representation in all cases is an absurd and illegal statement in light of Article 28(3) (d) of the constitution. That Annexture A to Daniel Rutiba's affidavit demonstrates further bias in as far as commissioner 3 said that it had come to their attention that Dott services probably has a godfather in Uganda that is pushing things and that he understands that whenever things get stuck a phone call comes from someone influential. Commissioner 3 also said that it came to their knowledge that the applicants don't have the capacity to even carry out those jobs. Further that the respondent's affidavit in Para 10 denies that the commission did not recommend sanctions against one contractor but does not state any other contractor who was recommended for punishment. So this claim is without evidence.

That to demonstrate how Mr. Rusongoza's previous audit prejudiced the applicants, counsel submitted that in Annexture 'A' to Daniel Rutiba's affidavit page 63 shows where the chairperson of the Commission of Inquiry stated constantly that the Auditor General of Uganda audited the works of the applicants and says that the applicants are overstretched contractors and delay decision making and cannot make decisions, do not obey and they disrespect consultants, they are paid for unexecuted works, do not adhere to contract conditions and always insist on

doing works their own way. Further that the applicants insist so much on getting paid for materials they have assembled. That this shows bias.

Further counsel submitted that the applicants were not under obligation to ask for the recusal of Mr. Rusongoza from the Commission of Inquiry. The Constitution Articles 28, 42, and 44 and section 6 of the Commission of Inquiry Act place such duty upon the Commission of Inquiry including Mr. Rusongoza himself.

At pages 32-35 of Volume 2 Annexture 'P' to the affidavit in support of the application it is clear that the Commission did not implicate only the applicants for collusion to defraud government. They also condemned other companies. I therefore do not agree with the submissions of counsel for the applicants that the Commission was generally biased. I agree with the submissions of counsel for the respondents that the Commission was entitled in every way to rely on the Auditor General's reports. I also do not agree that just because a person who had earlier on audited the applicants' contracts with UNRA was made a member of the Commission it amounted to bias. The applicants have not demonstrated how the presence of that commissioner caused a positive act that exhibited bias**.**

However the fact that the applicants' right to legal representation was abused and the fact that the Commission did not allow the applicants' legal representative or even their Director to explain amounted to denial of the Fundamental Constitutional Right to a fair hearing. The Commission ought to have allowed the applicants' Mr. Venu to explain why the allegations against them were false. The Commission ought to have allowed them some reasonable time to make their case.

I therefore for those reasons find that the recommendations of the Commission and findings as against the applicants were as a result of a procedurally improper hearing and in flagrant violation of the applicants' right to a fair hearing**.**

Issue 4: Whether the Commission of Inquiry followed the principle of proportionality and legitimate expectations.

I do not understand why counsel for the applicants raised this issue. I find that this issue is covered under the ground of procedural impropriety. I therefore find that it is not necessary to consider this issue**.**

Issue 5: Whether the judicial review orders of certiorari and prohibition should issue

Having found merit in all the grounds raised and having resolved all the issues in this case in the affirmative, this application is allowed with costs. The court grants all the prayers prayed for by the applicants in the application.

I so order.

Stephen Musota

J U D G E

21.12.2016