

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

MISCELLANEOUS CAUSE NO.236 OF 2020

1. RUTAYISIRE ALPHONSE
2. PAUL NKWAYA..... **APPLICANTS**
VERSUS

UGANDA REVENUE AUTHORITY
(THE COMMISSIONER CUSTOMS) **RESPONDENT**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application under Sections 33 & 36 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71, and Rules 3 (1) (a), 3A, and 6 (1) of the Judicature (Judicial Review) Rules, 2009. The Applicants seek orders that: -

- a) *An order of certiorari does issue quashing the decision of the Respondent to prosecute the Applicants in HCT-00-AC-C0- 012 of 2020 Uganda (URA) v Mweru Rodgers & 3 Others before the Anti-Corruption Division on grounds of irrationality and abuse of due process.*
- b) *A declaration that the process of making the decision to prefer and sanction charges against the Applicants and to prosecute them in HCT-00-AC-C0- 012 of 2020 Uganda (URA) v Mweru Rodgers & 3 Others before the Anti-Corruption Division was flawed, mala fide, irregular, unfair, a witch hunt, an abuse of authority and irrational intended to achieve collateral ends other than the ends of justice.*
- c) *Costs of the application be provided for.*

The Application sets out the grounds and the same are repeated in the supporting affidavit of the 1st Applicant, **Mr. Rutayisire Alphonse**, the General Manager of Leaf Tobacco & Commodities (U) Limited briefly as follows: -

1. On or about the **7th January 2020**, the Respondent's officials led by a one Kankiriho Denis raided the factory premises of Leaf Tobacco & Commodities (U) Ltd (hereinafter referred to as "the company"), and impounded a motor vehicle registration number **UAQ 987L** on allegations that the Company had made a false customs declaration in respect to customs entry **EX8-281** of **4th January 2020** for the export of 2000 cartons of Supermatch cigarettes to South Sudan via Elegu, to be loaded on motor vehicle registration number **UAZ 979P**.

2. On **8th January 2020**, the clearing and forwarding agent who made the customs entry, All Africa Logistics Solutions Ltd wrote to the Respondent stating that it had made customs entry EX8-281 for motor vehicle **UAZ 979P** and that the Respondent's agents who had raided the Company's premises impounded a vehicle not related to the entry in question and had sought a bribe of 30% of the BIF of the goods.
3. On **17th January 2020**, the Respondent sent Kankiriho Denis on forced leave for Two Hundred Fifty (250) days for carrying out the raid on the Company which was outside his job description.
4. Subsequently, the Respondent issued several letters to the company requiring presentation of motor vehicle registration number UAQ 987L and alleging that it was loaded with uncustomed goods, CCTV camera footage from the day of the raid, as well as details on the transaction for a sale of Supermatch cigarettes to High Move Import of Juba South Sudan.
5. While the investigations were ongoing, the Respondent commenced criminal proceedings before the Chief Magistrates Court of Buganda Road attached to the Anti-Corruption Division vide HCT-00-AC-CO-0012 of 2020.
6. Pursuant to the said case, the Company received criminal summons against former directors of the Company, **Richard Rujugiro** and **Nicholas Watson** dated **23rd January 2020** to appear in court and answer charges under sections 203 (b), 202 (b), 208, 193 of the East African Community Customs Management Act, 2004 on the **28th February 2020**.
7. By letter dated **24th February 2020** the Company's lawyers wrote to the Respondent requesting them to review the malicious investigation and prosecution of the matter, which request was ignored. (**Annexure O to the affidavit in support – page 38**).
8. When the lawyers of the Company informed the Respondent by a letter dated **17th March 2020** that the persons summoned were no longer directors, the Respondent amended the charge sheet to exclude the former directors, replacing them with the 1st and 2nd Applicants being General Manager and a non-resident Director of the Company respectively.
9. The Applicants received criminal summons dated **14th August 2020** requiring them to appear in court on **15th September 2020** to answer to charges under section 203 (b) of the East African Community Management Act, 2004.
10. The Respondent invited the Company and its lawyers for a meeting on **12th June 2020** to aid the investigations of the misconduct of its staff in relation to the incident, and the company supplied all the required information.
11. That at the time of the raid, both Applicants were not in the country and therefore not present at the Company premises. The 2nd Applicant is a non-resident, who was in Dubai

at the material time. The 1st Applicant left Uganda for Canada on 24th December 2019 and returned on 10th January 2020.

12. That the process making the decision to prosecute the Applicants and the decision itself are aimed at intimidating, harassing, and causing the Applicants and the Company to drop complaints of corruption raised by the clearing agent against some of the officials of the Respondent.

The Respondent filed an affidavit in reply deponed by a one **Kalungi Tonny**, an Advocate in the Legal Services and Board Affairs Department of the Respondent.

The affidavit in reply admits the charging of the Applicants solely on the basis of being part of management of the company and does not respond to the irregularities and procedural unfairness of the impugned decision.

1. That the applicants are the controlling Authority of Leaf Tobacco Commodities (U) Ltd as General Manager and Director respectively.
2. That the offences with which the applicants are charged with; to wit Causing to be made a Customs declaration which is false contrary to section 203(b) and Exporting Goods which are packaged in a manner likely to deceive any officer contrary to section 202(b) of the East African Community Customs Management Act 2004 are lawful.
3. That the issuance of criminal summons against the applicants is a rational and proper procedure and was done fairly and reasonably.
4. That the amendment of the charges, dropping the former directors and substituting them with the applicants was informed by fresh information obtained from Uganda Registration Service Bureau.

At the hearing of this application the parties were directed to file written submissions which I have had the occasion to read and consider in the determination of this application.

Preliminary Objections

The applicant's counsel raised a preliminary objection challenging the affidavit of the respondent since it does not distinguish matters of facts that are within his personal knowledge and does not distinguish between matters stated on information derived from other persons and matters to which he swore from his own knowledge. He neither makes mention of personal involvement in the material investigations from which his knowledge could have been obtained, nor credits anyone for availing the information to him. This renders the affidavit in reply defective and should be struck off the record.

The respondent affidavit in reply is sworn by a person who works with the respondent in the Legal services and Board Affairs Department and there is no evidence to prove that the persons who are attached that department aren't conversant with matters involving customs. The affidavit is therefore not defective as contended by the applicant.

Secondly, the argument that the respondent as an advocate has deposed to matters which are of a contentious nature cannot equally be sustained since the deponent is in direct employment of the respondent and there is no problem with him being summoned to be cross-examined on his affidavit.

The respondent has also raised some issues in form of preliminary objections especially in respect of time limit. They submitted that the time within which to file an application for judicial review by the applicant started to run after 14th August, 2020 the date when criminal summons was served on the applicants. That if at all the applicants sought to bring this application within the realms of the prescribed time, he ought to have filed the same before 16th November, 2020.

I find the above submission very confused and devoid of any merit since the application was indeed filed on 28th August 2020. The submissions of counsel for the respondent are not guided by pleadings which are before this court and are intended to mislead court.

In addition I find the rest of the arguments raised as preliminary points of law to be worthless and not being rooted in the present application. It was merely a case of copy and paste from previous submissions as points of law and yet they are not applicable to the present facts.

The applicant's counsel raised two issues for determination by this court;

1. *Whether the application raises issues for judicial review?*
2. *Whether the procedure of taking decision to prosecute the Applicants in HCT-00-AC-CO-12 of 2020 Uganda (URA) v Mweru Rodgers & 3 others before the Anti-Corruption Division was illegal, irrational and procedurally improper?*
3. *What remedies are available to the parties?*

The applicants were represented by *Mr. Francis Gimara (SC) assisted by Lastone Gulume* while the respondent was represented by *Mr Habib Arike and Mr. Thomas Davis Lomoria*.

ISSUE ONE

Whether the instant application is amenable for is amenable for judicial review?

The applicant's counsel submitted that the powers of the Constitution provides for the foundation of judicial review remedies and entitles any person to apply to court for judicial review remedies. It was their contention that in order for an applicant to succeed in an application for judicial review, the decision complained of must be tainted with illegality, irrationality and procedural impropriety.

The applicant submitted this application is intended to quash the decision of the Respondent of maliciously and highhandedly prosecuting the Applicants without probable and reasonable cause is a proper application for judicial review.

The Respondent was bound to treat the Applicants justly and fairly under *Article 42 of the Constitution*, in making its decision to charge the Applicants for alleged offences committed while out of jurisdiction. The Respondent preferred charges against the Applicants solely on the basis that they are part of the management of the Company.

The objectives of judicial review under *Rule 1A of the Judicature (Judicial Review) Rules (as amended in 2019)* are to among others ensure individuals receive fair treatment by authorities to which they have been subjected, and to ensure public powers are exercised in accordance with basic standards of legality, fairness and rationality. This was the position of the court in *Petnum Pharmacy Limited v National Drug Authority Miscellaneous Cause No. 56 of 2018*.

The court through judicial review proceedings exercises its supervisory jurisdiction over proceedings and decisions of bodies and persons who are charged with the performance of public acts and duties such as the Respondent. (see: *Rule 2 of the Judicature (Judicial Review) Rules, S.I. No. 11 of 2009 (as amended)* on definition of Judicial Review).

The Respondent as a body charged with performance of public acts and duties. Its actions are therefore subject to judicial review proceedings before court, where there are procedural irregularities, irrationality and illegalities in its decision-making processes.

In *Director of Public Prosecutions, Ex Parte Kebeline and Others, R v [1999] UKHL 43*, Lord Steyn took the view that prosecutorial discretion can be subjected to judicial review where there is dishonesty, mala fides or an exceptional circumstance. *Black's Law Dictionary, 9th Edition* equates dishonesty and mala fides to conduct involving bad faith, lack of integrity or moral turpitude.

This application seeks the intervention of this Honourable Court because the procedure through which the Respondent decided to prosecute the Applicants is marred with bad faith and lack of integrity and moral turpitude. The Respondent well aware that the Applicants were out of jurisdiction at the alleged date of commission of the alleged offences (between 4th and 7th January 2020), proceeded to amend the charge sheet preferring frivolous and malicious charges against the Applicants. This subjects the Applicants to criminal proceedings for which the Respondent is still investigating. Having been advised about charging persons who are not directors of the Company and not at the scene, the Respondent without reasonable cause opted to subject the Applicants who were out of jurisdiction to the frivolous criminal proceedings.

It was their submission that the application raises issues for judicial review. In particular, whether the Respondent should use criminal proceedings in the manner disclosed by the facts in the affidavit in support of the application?

Analysis

According to the *Black's Law Dictionary* at page 1013 **11th Edition Thomson Reuters, 2019** Judicial review is defined as a court's power to review the actions of other branches or levels of government; especially the court's power to invalidate legislative and executive actions as being unconstitutional. Secondly, a court's review of a lower court's or administrative body's factual or legal findings.

The power of Judicial review may be defined as the jurisdiction of superior courts to review laws, decisions and omissions of public authorities in order to ensure that they act within their given powers.

Judicial review per the Judicature (Judicial Review) (Amendment) Rules, 2019 means the process by which the high Court exercises its supervisory jurisdiction over proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties;

Broadly speaking, it is the power of courts to keep public authorities within proper bounds and legality. The Court has power in a judicial review application, to declare as unconstitutional, law or governmental action which is inconsistent with the Constitution. This involves reviewing governmental action in form of laws or acts of executive for consistency with Constitution.

Judicial review also establishes a clear nexus with the supremacy of the Constitution, in addition to placing a grave duty and responsibility on the judiciary. Therefore, judicial review is both a power and duty given to the courts to ensure supremacy of the Constitution. Judicial review is an incident of supremacy, and the supremacy is affirmed by judicial review.

It may be appreciated that to promote rule of law in the country, it is of utmost importance that there should function an effective control and redressal mechanism over the Administration. This is the only way to instil responsibility and accountability in the administration and make it law abiding. Judicial review as an arm of Administrative law ensures that there is a control mechanism over, and the remedies and reliefs which a person can secure against, the administration when a person's legal right or interest is infringed by any of its actions.

When a person feels aggrieved at the hands of the Administration because of the infringement of any of his rights, or deprivation of any of his interests, he wants a remedy against the Administration for vindication of his rights and redressal of his grievances. The most significant, fascinating, but complex segment in judicial review is that pertaining to judicial control of administrative action and the remedies and reliefs which a person can get from the courts to redress the injury caused to him or her by an undue or unwarranted administrative action in exercise of its powers.

The effectiveness of a system of judicial review under Administrative law depends on the effectiveness with which it provides remedy and redress to the aggrieved individual. This aspect is of crucial significance not only to the person who has suffered at the hands of the administration but generally for the maintenance of regime of Rule of Law in the country.

The weakness of the “remedial and redressal” aspect of administrative law will directly contribute to administrative lawlessness and arbitrariness. According to **WADE & FORSYTH Administrative Law, 34, 8th Edition** 2000, “Judicial review thus is a fundamental mechanism of keeping public authorities within due bounds and for upholding the rule of law.

In Uganda, great faith has been placed in the courts as a medium to control the administration and keep it on the right path of rectitude. It is for the courts to keep the administration with the

confines of the law. It has been felt that the courts and administrative bodies being instruments of the state, and the primary function of the courts being to protect persons against injustice, there is no reason for the courts not to play a dynamic role in overseeing the administration and granting such appropriate remedies.

The courts have moved in the direction of bringing as many bodies under their control as possible and they have realized that if the bodies participating in the administrative process are kept out of their control and the discipline of the law, then there may be arbitrariness in administration. Judicial control of public power is essential to ensure that that it does not go berserk.

Without some kind of control of administrative authorities by courts, there is a danger that they may be tempted to commit excesses and degenerate into arbitrary bodies. Such a development would be inimical to a democratic constitution and the concept of rule of law.

It is an accepted axiom that the real kernel of democracy lies in the courts enjoying the ultimate authority to restrain the exercise of absolute and arbitrary powers by the administration. In a democratic society governed by rule of law, judicial control of administration plays a very crucial role. It is regarded as the function of the rule of law, and within the bounds of law and due procedure.

It is thus the function of the courts to instil into the public decision makers the fundamental values inherent in the country's legal order. These bodies may tend to ignore these values. Also between the individual and the State, the courts offer a good guarantee of neutrality in protecting the individual.

The courts develop the norms for administrative behaviour, adjudicate upon individuals grievances against the administration, give relief to the aggrieved person in suitable case and in the process control the administration.

In this case, the applicant is challenging the decision of the respondent in preferring charges against them as general manager and Director of the Company. The decision by the respondent to institute criminal prosecution is a reviewable act which the court may interrogate to determine its lawfulness. In *Director of Public Prosecutions, Ex Parte Kebeline and Others, R v* [1999] UKHL 43, Lord Steyn took the view that prosecutorial discretion can be subjected to judicial review where there is dishonesty, *mala fides* or an exceptional circumstance.

The nature of the complaints made by the applicant fall squarely within the ambit of judicial review and it is the duty of this court to interrogate the actions of the decision makers and give appropriate orders.

Whether the procedure of taking decision to prosecute the Applicants in HCT-00-AC-CO-12 of 2020 Uganda (URA) v Mweru Rodgers & 3 others before the Anti-Corruption Division was illegal, irrational and procedurally improper?

The Applicants' counsel submitted that the Respondent's process and decision to prosecute the Applicants for criminal offences, on the basis that they are part of the management of Leaf

Tobacco Commodities (U) Limited (the Company), is tainted with illegality, irrationality, and procedural impropriety.

The Respondent in the instant case acted contrary to clear legal principles of corporate personality in seeking to prosecute and hold the directors and management of the Company liable for the alleged criminal offences.

The Respondent in preferring charges against a general manager and a non-resident director acted contrary to the long-standing legal principle of corporate personality in *Salomon v A Salomon and Co Ltd [1897] AC 22*. The alleged offences allegedly committed at the Company premises in the absence of the Applicants cannot vicariously be visited and imputed on the Applicants.

If the Respondent had probable and justifiable cause to prefer criminal charges against the Company, the Respondent could have served Summons on the Company under *Section 49 of the Magistrates Courts Act Cap 16*, and the Company would have appeared for the criminal proceedings under *Section 53 of the Magistrates Courts Act*. There was no justifiable cause for attempting to lift the veil of incorporation to pursue a general manager and a non-resident director for alleged offences allegedly committed when they were out of jurisdiction.

The legal provisions requiring a Company to appear in criminal proceedings under Section 53 of the Magistrates Courts Act recognise the corporate legal personality of a company, as distinct from its members, shareholders, directors, or other officers.

The above provisions of the Magistrates Court's Act explicitly stipulate the procedure for summoning and appearance of companies for criminal matters. They do not provide for prosecution of directors because the distinctness of the legal personality of the company is a settled principle of law.

Secondly the applicants' counsel submitted that the decision to prosecute the applicant was irrational and unreasonable that no authority could ever have come to it given the facts of the case.

The Respondent is faulted for irrationality since on or about the 6th or 7th January 2020, both Applicants were neither at the alleged crime scene nor in the country.

The Respondent's official who led the team that orchestrated the raid is said to have acted in excess of his job description as an officer deployed in the Central Monitoring Centre of the Transit Monitoring Unit when he harassed the people he found on the Company premises and asked for a bribe of 30% of the BIF of the goods.

The Respondent commenced investigations with letters to the Company and before concluding investigations, the Respondent sanctioned charges against former directors of the Company. The clearing agent lodged a complaint of bribery and extortion with Respondent, which the Respondent ignored.

While allegedly investigating customs entry EX8-281, the Respondent requested for information an older and unrelated export entry number E522232 of December 21, 2019.

The Company's lawyers requested the Respondent to review the malicious charges by letter dated 24th February 2020, which request was ignored. The Company's lawyers by letter dated 17th March 2020 informed the Respondent of their errors in charging former directors of the Company.

The Respondent's amendment of the Charge Sheet sanctioning charges against the Applicants while still conducting its alleged investigations is irrational. The clearing agent in their letter dated 8th January 2020 admitted to making the customs entry in question for motor vehicle UAZ 979P and not the erroneously impounded UAQ 987L. The Respondent's sanctioning of charges against a managing director and a non-resident director who did make the customs entry in question in light of the clearing agent's letter is irrational.

The applicants' counsel submitted that the facts surrounding the criminal charges against the Applicants show that the Respondent embarked on a baseless, highhanded, and malicious escapade to pressure the Company into abandoning the complaint against the Respondent of its agent soliciting a bribe and obtaining unlawful financial gain. In a bid to create human pressure points, the charges (if any) were not preferred against the Company but rather against a general manager and a non-resident director. The Respondent's intention was to put pressure on the company to admit to a crime whose investigations are incomplete. By charging the directors with charges that are likely to affect the reputation of the individuals, the Respondent hopes to achieve its targets at the expense of the individual's reputations.

The Respondent's actions and decision to substitute the Applicants in the Charge Sheet and prefer and sanction criminal charges against them as part of the management of the Company, for alleged offences allegedly committed while they were out of jurisdiction was irrational.

The applicant's counsel submitted that under the laws of Uganda, power to institute criminal proceedings is vested in the Director of Public Prosecutions under *Article 120 (3) (b) of the Constitution of Uganda, 1995*. This power can be delegated under Article 120 (4) (a).

Section 228 of the East African Community Customs Management Act, 2004 confers upon officials of the Respondent power to prosecute offences under the Act in subordinate Courts. This conferment of authority is a delegation of the constitutional prosecutorial duties of the Director of Public Prosecution and must be exercised in conformity with the procedures followed by the Director of Public Prosecution. In ***Uganda Law Society v Kampala Capital City Authority High Court Miscellaneous Cause No. 243 of 2017***, this Honourable Court held that:

"A delegate must exercise its jurisdiction within the four corners of its delegation and if he has acted beyond that, his/her action cannot have any legal sanction and is challengeable by way of judicial review."

Under Article 120 (5), in taking a prosecutorial decision, prosecutors are also guided by due regard to the public interest of the administration of justice and the need to prevent abuse of legal process.

The charges were sanction against a general manager and a non-resident director without any communication from the Respondent on the findings of their alleged investigations. All the

correspondences and meetings held between the Respondent and the Company's representatives were therefore a mere sham. The Respondent's criminal proceedings are therefore a mere abuse of process and power.

The respondent counsel submitted that the decision to institute criminal charges against the applicants was lawful and the decision to amend the charge sheet and charge the persons that are part of the management of the company was rightful.

The respondent contended that they acted on reliable intelligence to raid the company and impound vehicle after it had obtained information from All Africa Logistics Ltd. Therefore according to counsel, the respondent lawfully instituted criminal proceedings against the applicants and entered the premises pursuant to fulfilling their legal mandate.

Analysis

The applicants are challenging the decision to be prosecuted for company wrongs rather than the company itself premised on the corporate personality enunciated in the case of ***Salomon v A Salomon and Co Ltd [1897] AC 22*** since the alleged offences allegedly committed at the Company premises in the absence of the Applicants cannot vicariously be visited and imputed on the Applicants.

The applicants' view is that the Respondent in the instant case acted contrary to clear legal principles of corporate personality in seeking to prosecute and hold a non- resident director and general manager and management of the Company liable for the alleged criminal offences.

It seems incontrovertible that a company has the capacity to authorise illegal acts (including criminal) acts. Plainly, a company that has deliberately engaged in such unlawful conduct cannot seek to avoid liabilities on account of its own lack of capacity. It becomes directly liable for the acts and omissions except when an agent acted contrary to and without express authority.

A company is not like a natural person since it is not an integral whole but a composite of various stakeholders. To confer blanket liability to the company upon actions of an agent or because of some elements of the entity (usually the board and shareholders) had condoned the criminal conduct may result in unfairness to other innocent stakeholders.

The reality behind the corporate form are natural persons whose interests and rights vis-à-vis each other are albeit mediated through the company, well recognized by the courts. In the case of ***Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 379*** Lord Wilberforce observed that:

".....a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure."

The problem of attributing criminal liability to a company has to be solved by identifying the acts and *mens rea* of a natural person or persons regarded as the juridical person as those of the company. The acts and knowledge of a natural person or persons are to be identified as those of the company only if the person or persons were the alter ego (in the early cases) or the directing mind and will (in more recent cases) of the company.

Therefore, before the company would ordinarily become automatically liable for criminal acts and this will have to be investigated to establish the knowledge of those directors constituting its “*directing mind and will*”. The term “*directing mind and will*” is not a rule of attribution but simply a description of the person whose acts and knowledge are attributed to the company for a specific purpose. See *Ho. Kang Peng v Scintronix Corp Ltd [2014] 3 SLR 329 at [49]*

The decision to prefer charges against individuals within a company for acts and omissions of the company must be thoroughly investigated in order to avoid victimisation of innocent members of the company or making blanket culpability. If the actions and omissions complained of were committed by third parties or employees of the company, it would be irrational to charge directors or shareholders who may not be directly involved in criminal acts and omissions.

In the case of *Tesco Supermarkets Ltd v Natrass [1972] AC 153*: The company was charged with an offence of misstating under the 1968 Act. Section 24(1) of the Act allowed a defence where ‘the commission of the offence was due to the act or default of another person’ and where the accused had taken ‘all reasonable precautions and exercised due diligence to avoid the commission of the offence’.

The prosecution argued that this defence was not available to the company as the manager (representing the company) had not done all that he could to avoid the offence. The House of Lords held that the store manager was not the directing mind and will of the company. The company, through its officers at a higher level, had done all they should have done to avoid the offence, and the default was that of another person, namely, an employee. Accordingly, the company was acquitted.

Lord Reid explained:

“it must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company’s servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

[A] board of directors can delegate part of their functions of management so as to make their delegate an embodiment of the company within the sphere of delegation. But here the board never delegated any part of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. Shop managers had to obey their general directions and also take orders from their superiors. The acts or omissions of shop managers were not acts of the company itself.”

Therefore, there must be an examination of the corporate constitution in question to determine those who are not merely servants and agents from those whose action is that of the company itself. Criminal liability is to be imposed only if the acts or defaults can be attributed to senior management. A company which holds out or acquiesces in representing that a person has authority to do a particular thing may cause him to be treated as its directing mind and will for that purpose.

The decision to prefer charges or impose criminal liability against a company or its ‘directing mind and will’ or servants and agents involves practical challenges which must be resolved through a thorough examination and investigation of such crime guided by the following;

1. The general rule is that in the ordinary case a company is not guilty of a crime unless the criminal conduct and guilty mind exist not merely in a servant or agent of the company of a junior rank but in those who truly manage its affairs.
2. Statutes may and sometimes do provide that an offence in certain circumstances be committed by a company through its junior employees acting on its behalf.
3. The person whose conduct may be attributed to the company for purposes of establishing criminal liability may depend upon the wording of the statute creating the offence. See *Tesco Stores Ltd v Brent London Borough Council [1993] 2 All ER 718: Re Supply of Ready Mixed Concrete (No.2) [1995] 1 AC 456: Meridian Global Funds Ltd v Securities Commission [1995] AC 500*

The Ugandan law equally allows prosecution of companies for any criminal liability. The Magistrates Courts Act provides for the mode of appearance by a corporation and this clearly implies criminal prosecution can indeed be brought against such entities. In *ACP Bakaleke Siraji v Attorney General, High Court Miscellaneous Cause No. 212 of 2018*, this Honourable Court cited the case of *Hon. Winfred K. Masiko & Others v DPP & Others, Civil Miscellaneous Application No. 15 of 2009* where Court held that:

“...court has analyzed the arguments on either side. It is of the view that indeed the DPP acted irrationally by preferring charges against the applicants who were shareholders of the company instead of preferring those charges against the company itself as a legal entity and in accordance with section 53 of the Magistrates Courts Act. The commission recommendations focused on the company and not its shareholders or its employees upon the above account certiorari shall issue to quash the decisions of the first and second respondents to prefer charges against and conduct prosecution against the applicants instead of the RUGADA Ltd...”

The respondent in this case has not adduced any evidence to justify the decision to prefer charges against the 2nd applicant who is a non-resident director and the 1st applicant who is a general manager of Leaf Tobacco & Commodities (U) Limited who at the time of alleged offence were not in Uganda. The respondent without carrying out any thorough investigations instituted criminal proceedings by way of issuance of criminal summonses against former directors of the company and later amended the charge sheet to substitute the applicants.

The charges preferred are:

1. *Causing to be made a customs declaration which is false in any particular c/s 203(b)*
2. *Exporting goods which are packed in any package in a manner likely to deceive any officer c/s 202(b)*
3. *Aiding and abetting of an offence under the East African Customs Management Act c/s 208*
4. *Conspiring with other persons to contravene provisions of the East African Community Customs Management Act c/s 193 of the East African Community Customs Management Act.*

It is clear from the nature of the charges that there are elements that require personal liability of the persons who made custom declarations at the time of importation of the said goods. Secondly, there is an element of criminal liability attributable to the company itself before the respondent could attribute direct criminal liability to the directing mind and will.

Criminal prosecution should never be used to arm-twist persons who may not be directly involved in the commission of crimes. Persons who are holding high offices may be dragged to courts of law unfairly; since they are directors in some companies which are wholly managed by different persons (employees or servants) and they are the directing mind and will of the company.

Criminal proceedings have serious implications to persons' reputation and personality and it should never be taken lightly even though a person may be acquitted after the due process.

The Respondent is bound to exercise their prosecutorial powers in compliance with the duty to follow proper legal procedure and principles to ensure fairness. In *Lloyd v McMahon [1987] AC 625 at 702 – 703*, Lord Bridge held that:

“It is well established that when a statute has conferred on anybody the power to make decisions affecting individuals, the court will not only require procedure prescribed by the statute to be followed but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness”.

The decision above underscores the need for rigorous adherence to the applicable statutory procedures and legal principles when making decisions that affect individuals. The decision to prefer criminal charges against an individual has grave consequences and as such, due regard to the law and proper procedure and legal principles must be exercised.

For every action that an administrator takes, there must be a valid authorisation in an empowering provision. In absence of such authorisation the administrative action will be unlawful.

A particularly challenging part of lawfulness relates to the reason, purpose or motive for which the action was taken. This is especially the case where the empowering laws grant a wide discretion to the decision maker/administrator.

No administrative power is given without a reason or purpose, doing so would breach the principle of rationality which is a requirement for all public action including legislation. See *Pharmaceutical Manufacturers Association of South Africa & Another: In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674(CC)

Whatever the decision maker's choice may be in exercising his or her (wide) discretionary powers, the purpose in making that choice or his or her reasons for doing so must be aligned to what is authorised within the Constitution and other enabling laws to be rationally justified in a democratic society.

The decision to prefer charges against the applicants who were not within the jurisdiction at the time of commission of the alleged offences cannot be justified and it directly points to arbitrary exercise of power to prosecute. There is no single piece of evidence on court record presented by the respondent to justify their decision to prosecute the applicants apart from making general statements that '*the decision was informed by evidence so far gathered*'

Accordingly this issue is answered in the affirmative.

Whether the applicants are entitled to the reliefs sought in the application?

The application succeeds and *an Order of Certiorari issues quashing the decision of the respondent to prosecute the Applicants in HCT-OO-AC-CO-012 of 2020 Uganda(URA) v Mweru Rodgers & 3 Others before the Anti-Corruption Division on grounds of irrationality and abuse of due process.*

The applicants are granted costs of the application.

I so Order

Dated, signed and delivered by email and whatsApp at Kampala this 19th day of March 2021

SSEKAANA MUSA
JUDGE
19th/03/2021