REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-MC-0139 OF 2001

GREENWATCH (U) LIMITED:: APPLICANT

VERSUS

ATTORNEY GENERAL ::RESPONDENTS

UGANDA ELECTRICITY TRANSMISSION COMPANY LTD

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The Government of Uganda entered into an agreement or a series of agreements, the main agreement being the Implementation Agreement, with the AES Nile Power Limited covering the building, operation and transfer of a hydro electric power complex at Dumbbell Island, on the River Nile, near Jinja, Uganda. In addition, in consequence of the Implementation agreement, a power purchase agreement was executed by AES Nile Power Limited and Uganda Electricity Board, a statutory corporation at the time, established and wholly owned by the Government of Uganda, with the commercial monopoly to generate, transmit and sell electric current in Uganda.

2. Mr. Kabagambe Kaliisa in an affidavit filed in this case states that the Government in its sovereign capacity made undertakings to the parties to the Power Purchase Agreement including AES Nile Independent Power Company and in all related agreements, not to divulge the said Agreements to the public. Doing otherwise would not only impair the economic credibility and sovereignty of Uganda, but would also amount to a breach by the State of its sovereign commitments under the said agreements.

3. The Applicant is an NGO and a company limited by guarantee incorporated in the Republic of Uganda. The main mission of the company is environmental protection through advocacy and education. It sought to obtain a copy of the Power Purchase Agreement from the Government of Uganda in vain. The Government responded to the request, in a letter dated 23nl November 2001, from the Permanent Secretary to the Applicant in the following words, “1 refer to your letter to the Commissioner, Energy Department, dated l November 01 on the above subject. The Power Purchase Agreement (PPA) is a comprehensive document with a lot of information

including the sponsor's technical and commercial secrets. It therefore contains clauses on confidentiality and protection of intellectual property, which do not permit us to make it available to the entire public."

4. Following this letter the Applicant commenced this action initially against the Attorney General. The Attorney General maintained the previous position of Government as noted above and filed affidavits opposing this action. The court asked the Respondent for a copy of the agreement in question. Respondent's counsel promised to avail the agreement to court in a couple of days. However, that was not to be. Court was notified in a letter from the Attorney General's Chambers that the document did not exist. The applicants then filed a further affidavit with both the Implementation agreement and Power Purchase Agreement annexed thereto. Apparently the copies came from those copies of the agreement that had been supplied to the Parliament. The document purporting to be Power Purchase Agreement is in reality a copy of the Implementation Agreement save for the first or cover page that shows it to be a power purchase agreement.

5. At this point it became clear that a Power Purchase Agreement did in fact exist, and the parties to it were, Uganda Electricity Board and AES Nile Power Limited. Subsequently Uganda Electricity Transmission Company Ltd, the successor to the Uganda Electricity Board, in respect of this agreement was added as Respondent No.2.

6. Mr. Kenneth Kakuru, learned counsel for the Applicant, submitted that the Applicant was entitled under Article 41 of the Constitution to have access to information that is in the hands of the state, its organs and agencies. He submitted that Respondent No.2 being a wholly government owned company was a state agency which was obliged to comply with the provisions of this article. He submitted that the obligation was on the respondents to show that access to the power purchase agreement came within the exceptions provided under that article, in terms of state sovereignty or state security or privacy.

7. Mr. James Mastiko, the learned Principal State Attorney who appeared for the Attorney General submitted that this application was frivolous and vexatious as the applicant was seeking a document, that is the PPA, which was already in his possession. Secondly he submitted that the applicant was not a citizen who under Article 41 was the only authorised person to have access to information in state hands. The applicant does not fall into the categories of citizenship that the

Constitution created. Only natural persons were envisioned to be citizens.

8. Mr. Mastiko further submitted that the PPA was not a public document within the meaning of the Evidence Act, and the declarations sought in that regard, that is to declare the same a public document, are without basis in law. Mr. Mastiko also submitted that Government was not a party to the PPA, and therefore, was not a proper party to this action. Lastly he submitted that the Respondent No. 2 is not a government Agency or organ, as it has a separate legal existence. He referred to the case of **Mugenyi and Co v Attorney General Supreme Court Civil Appeal No. 43 of 1995 (unreported).** He prayed that this application be dismissed with costs.

9. Mr. Dennis Wamala, learned counsel for Respondent No.2 opposed this application. Firstly he submitted that the Power Purchase Agreement was not a public document within the meaning of Section 72 of the Evidence, as none of the parties was a legislative, executive or judicial public official of the Govermnent of Uganda. Neither was the Respondent No.2 an official body or tribunal within the meaning of Section 72 of the Evidence Act. The Respondent No.2 being a private limited liability company made its documents private documents in accordance with Section 73 of the Evidence Act. Secondly he submitted that this application is brought under Article 41 of the Constitution which provides access to information in state hands or in the hands of organs of state. The Respondent No.2 being a limited liability company was not an organ of the state, and was therefore outside the ambit of the provision. At the same time Mr. Wamala submitted that as the shares of the Respondent No.2 are freely transferable, it cannot be said that the Respondent No.2 is an organ of state or an official body.

10. Thirdly, Mr.Wamala submitted that the applicant is not a citizen of Uganda for purposes of Article 41 of the Constitution. This is because under Article 10 and 12 of the Constitution, citizenship refers to persons born in Uganda. In the alternative Mr. Wamala submitted that in the event that the court held the Power Purchase Agreement to be a public document, this action was premature as no demand has been to the Respondent No.2 seeking access to this agreement. He prayed that this application be dismissed with costs.

11. Section 72 of the Evidence Act defines documents that are public documents. It states, “The following documents are public documents---

(a) documents forming the acts or records of the acts—

(i)of the sovereign authority;
(ii) of official bodies and tribunals; and
(iii) of public officers, legislative, judicial and executive,
whether of Uganda, or any other part of the Commonwealth, or of the Republic of Ireland, or of a foreign country;
(b) public records kept in Uganda of private documents."
12. I agree that Respondent No. 2 or its officials are not part of the legislative or judicial or executive organs of the Government of Uganda. And quite probably it is not an official body or tribunal within the meaning ascribed to those two categories in terms of the Section 72 of the Evidence Act. But perhaps that is not sufficient to answer whether the Power Purchase Agreement is or is not a public document, in light of the peculiar circumstances surrounding the Power Purchase Agreement.
13. The Honourable Syda Bbumba, Minister of Energy and Mineral Development signed the Implementation Agreement on behalf of Government of the Republic of Uganda. The minister is without doubt a member of the executive organ of the Government of Uganda, and this Implementation Agreement is an act in her official capacity. It is therefore a public document.
14. In the interpretation section of Implementation agreement, 'basis agreements' are stated to be, "This agreement, the Power Purchase Agreement, and the agreements, other than the Financing Agreements, that are required to be executed on or before the Financial Closing in connection with the Project, as the same may be amended from time to time."
15. Section 2.2 of the Implementation Agreement provides, "The Company shall design, finance, insure, construct, own operate, and maintain the Complex and design, finance and insure (during construction) and construct the UEB Line in accordance with the applicable laws of Uganda, all applicable Consents, the Basic Agreements and the financing Agreements." In effect the company undertakes as part of the Implementation Agreement to comply with the Basic Agreements which includes the Power Purchase Agreement.
16. Under Section 3.4 of the Implementation Agreement, the Government undertakes to execute a Guarantee to the AES Nile Power Limited in the form of Annex C to the agreement. I shall set out below Section 2.1 of the Annex C, the Guarantee.
17. "In consideration of the Company entering into the Implementation Agreement and the Power Purchase Agreement, GOU hereby irrevocably and unconditionally.

(a) guarantees to the Company for the term hereof as provided in Section 2.1 the full and prompt payment of any amounts payable by UEB under the Power Purchase Agreement and that have not been paid by UEB as provided in the Power Purchase Agreement, provided that amounts in dispute under the Power Purchase Agreement, shall not be due and owing for purposes of this Guarantee until after the expiration of the dispute resolution procedures provided for in the Power Purchase Agreement, including the 30-day period for payment after resolution of a dispute provided for in Section 8.4 (c) thereof (collectively, the "Guaranteed Obligations"); and
(b) agrees as a primary obligation to indemnify the Company on demand by the Company from and against any loss incurred by the Company as a result of any of the obligations of UEB under or pursuant to the Power Purchase Agreement being or becoming void, voidable, unenforceable or ineffective as against UEB or any reason whatsoever, whether or not known to the Company or any other Person, the amount of such loss being the amount which the Company would otherwise have been entitled to recover from UEB."

18. It is clear to me from the foregoing that the Basic Agreements, or at least the Implementation Agreement and the Power Purchase Agreement are so intertwined that one can not fully comprehend the full import of the Implementation Agreement without reading and digesting the Power Purchase Agreement. Neither of these two agreements is complete without the other. I find that the Power Purchase Agreement is in effect incorporated into the Implementation Agreement by reference. As the Implementation Agreement is a public document, and the Power Purchase Agreement is incorporated by reference into the Implementation Agreement I find therefore that the Power Purchase Agreement is a public document too.

19. The third declaration sought by the applicant is that the refusal to avail the Power Purchase Agreement and other related agreements to the Applicant is in violation of the Applicant's constitutional rights to access to information guaranteed under Article 41(1) the Constitution. Under this head, the Respondent No.1 contends that as it is not a party to the Power Purchase Agreement, it was not the right party to be asked to avail this agreement. The action against it in this regard, it further contended, was misconceived.

20. I reject this argument. I accept that Government is not one of the signatories to the Power Purchase Agreement. Nevertheless I have already found that the Power Purchase Agreement was incorporated by reference into the Implementation Agreement to which the Respondent No.1 is a party. The Respondent No.1 was rightfully in possession of the Purchase Agreement. Initially the

Respondent No.1 admitted the existence of the Power Purchase Agreement in the affidavit of Mr. Kabagambe Kaliisa, Permanent Secretary of the Ministry of Energy and Mineral Development, dated 11th July 2002.

21. In a subsequent affidavit of 18th1 October 2002 Mr. Kabagambe Kaliisa states that the Power Purchase Agreement was executed between UEB and AES Nile Power Limited. It is clear that Ministry of Energy and Mineral Development had all the information pertaining to the agreement sought by the applicant, and for reasons it gave; it refused to avail this agreement to the applicants. The action against it can not therefore be misconceived on account of the Government not being a party to the Power Purchase Agreement. Article 41(1) of the Constitution refers to 'information in possession of the State.' What is important is possession of the information by the State.

22. The Respondent No. 2 contents that no demand has ever been made for the Power Purchase Agreement by the Applicant. And as such this action is premature and misconceived as against it. I agree that no demand has ever been made. This was probably inevitable in light of the veil of secrecy that Government attached to the basic agreements to the extent that details related to these agreements only arose during these proceedings. By the time it was evident that the Respondent No.2 was a successor to UEB for purposes of this agreement, these proceedings had commenced. The response of the Respondent No.2 to this claim, as we shall see when we consider the other arguments of the Respondent No.2, is that the applicant is not entitled to have access to this agreement. Even if a formal demand is made the response of the Respondent No.2 is known. I do not therefore accept the argument that this action is premature against the Respondent No.2.

23. Both learned counsel for the respondents join in the argument that the applicant is not entitled to access to the information for two reasons. Firstly that the Power Purchase Agreement is in the hands of the Respondent No.2 which is not an organ or agency of the state. Secondly that the applicant is not a citizen of Uganda within the meaning of Article 41 as the Constitution only contemplates natural persons to be citizens of Uganda. I will deal with both arguments in that order. I shall begin by setting out Article 41(1) of the Constitution.

24. "(1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to

prejudice the security or sovereignty of the State or interfere with the right to privacy of any other person."

25. In the first place as I have found that the Power Purchase Agreement was incorporated by reference into the Implementation Agreement and was in possession of Government. On that account it was information in possession of the state. Article 41 refers to information in possession of the state. The state does not have to be a party to the agreement in question, for the agreement to be in possession of the State. What is important here is possession in whatever capacity occurring. It has been shown by the affidavit of Mr. Kabagambe Kaliisa that Government was in possession of the Power Purchase Agreement. This was enough to trigger the application of Article 41 of the Constitution as against the Government of Uganda.

26. Secondly I reject the argument that the mere fact a company is a limited liability company that is sufficient to disqualify the company from the possibility of being a government agency for purposes of Article 41 of the Constitution. It is the totality of circumstances surrounding the company that must be taken into account before determining whether it is a government agency or not.

27. In the instant case UEB, or Uganda Electricity Board in full, was a governmental parastatal organisation set up by statute with Government as its full and sole owner for the purpose of developing and supplying power to the people of Uganda. In pursuance of its main objectives, it signed the Power Purchase Agreement with AES Nile Power Limited, as part of a series of agreements negotiated by Government and AES Nile Power Limited. I have no doubt in my mind that the UEB qualified to be a government agency for purposes of Article 41 of the Constitution and with regard to the undertaking under the Power Purchase Agreement. This is so especially in light of the incorporation of the Power Purchase Agreement into the Implementation Agreement.

28. Uganda Electricity Transmission Company Limited, a limited liability company, wholly owned for the time being by Government has now succeeded Uganda Electricity Board. For purposes of this power project I think it matters little that the Successor Company is a limited liability company. The company is an agent of Government in ensuring that power is available to the people of Uganda. The company's obligations as successor to UEB, clothe it with agency of the state for purposes of this project. The Respondent is the sole purchaser of the power from the project being executed between AES Nile Power Limited and Government. Government

guarantees the continued existence of UEB and its successors in title, and ability to purchase the power produced. Information in the company's possession on account of this project is information, in my view, in the hands of a stare agency.

29. Mr. Matsiko did not address me at all on the exceptions provided under Article 41 of the Constitution, that is, State security and state sovereignty that were raised in Mr. Kabagambe Kaliisa's affidavit. I take it that those grounds of defence were abandoned. The affidavit does not disclose how disclosure to the public of the agreements in question would affect the security of the State or its sovereignty. It just lays a claim without providing the grounds to reach such a conclusion. I accordingly reject the claim that disclosure would affect the security or sovereignty of the State.

30. Turning to the question of whether the Applicant is a citizen within the terms of Article 41 of the Constitution the question may best be considered by analogy with another provision that assures certain rights to be available to citizens. This is Article 237 of the Constitution which provides that land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided in the Constitution. That a limited liability company incorporated in Uganda with all its members being citizens of Uganda qualifies to own land in Uganda is not in question at all. That company is accepted as citizen of Uganda albeit a corporate citizenship, if I can call it thus.

31. I take it that this ought to be the same position with regard to Article 41 of the Constitution for consistency of the law. Indeed corporate bodies can enforce rights under the bill of rights for they are taken as persons in law, though not natural persons. Similarly for citizenship, it is possible for a corporate body to be a citizen unless I suppose the provision in question is very clear in stating that it is restricted to natural persons as citizens. This is not the case with Article 41. I therefore find that a corporate body could qualify as a citizen under Article 41 of the Constitution to have access to information in the possession of the state or its organs and agencies.

32. on the evidence before me it is has not been shown that the Applicant qualifies as a corporate citizen. No evidence has been adduced as to its membership, much as it has been established that it is a limited liability company incorporated in Uganda and limited by guarantee. On that account alone, I decline to grant the declaration that it is entitled to access the information sought in the possession of both Respondents under Article 41 of the Constitution.

33. In the result I declare that the Implementation Agreement and the Power Purchase Agreement are public documents. This application is allowed in part and dismissed in part with no order as to costs.

Dated, signed and delivered this 12th day of November 2002

F.M.S Egonda-Ntende

Judge