

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA**

*[CORAM: B.M. KATUREEBE, C.N. KITUMBA, (JJSC) B.J. ODOKI, J.W.N. TSEKOOKO,
G.OKELLO, (AG.JJ.S.C)].*

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**MISC. APPLICATION NO. 06 OF 2012
(ARISING OUT OF CIVIL APPEAL NO. 5 OF 2003)**

1. ATTORNEY GENERAL

2. INSPECTOR GENERAL OF GOVERNMENT :::



APPLICANTS

15

VERSUS

AFRIC COOPERATIVE SOCIETY LTD

RESPONDENT

RULING OF THE COURT

The applicants filed this application under Section 7 of the Judicature Act and under Rules 2(2), 42(1), (2) of the Judicature (Supreme Court Rules) seeking orders to be permitted to file further evidence in the form of the contested report of the IGG to elucidate evidence already on record in **Civil Appeal No. 5 of 2012**, and additional evidence to show that the respondent was and still is under receivership and therefore has no legal capacity to sue or be sued or bring an application for Judicial review. The application was supported by affidavits of James Penywii, Director of Operations at the Inspectorate of Government, and by Robina

5 Gureme Rwakoojo, Ag. Director of Civil Litigation in the Attorney General's Chambers.

On the part of the respondents, Julius Kirya Taitankoko swore an affidavit in reply as well as affidavits surrejoinder.

10 The applicants also filed an additional affidavit in support by one Keto Nyapendi Kayemba, Assistant Auditor General, and an affidavit in rejoinder by Sydney Asubo, Director of Legal Affairs at the Inspectorate of Government.

15 At the hearing of the Application, the applicants were represented by Ms. Patricia Mutesi, Principal State Attorney, and Mr. Elison Karuhanga, Private Counsel, instructed by the Attorney General, and Mr. Sydney Asubo, Director Legal Affairs at the IGG's office.

20 The respondent was represented by Mr. David Sempala and Mr. Mulema Mukasa. Three officials of the respondent, namely Mr. John Watulo, Mr. Sowali Nape and Mr. Kirya Taitankoko were present in court.

25 **BACKGROUND**

This matter started way back in 1978 during the Idi Amin era when the then Government unlawfully confiscated the respondent's motor vehicles and blocked its Bank Accounts. Later the Government withdrew its orders. In 1981, the respondent filed High Court Civil Suit No. 84 of 1981 against the 1st Applicant for the unlawful

5 seizure of the motor vehicles and for the blocking of its bank accounts. Apparently negotiations followed between the parties to settle the matter out of Court. On the 17th July 1989 the parties entered into a Consent Judgment which they filed in court. Pursuant to this agreement, the respondent was compensated for its vehicles but the claim for blocked bank accounts remained pending. Subsequently the Government appointed an auditor who established that by 2005 an amount of Shillings One Hundred Twenty Eight Billion, Eight Hundred Twenty Five Million Four Thousand Three Hundred Ninety Five (Shs. 128,825,004,395/=) was found due and payable. The 1st applicant then approved this payment.

However, before the payment could be effected, the 2nd applicant, apparently after investigations, stopped the payment alleging fraud. The 1st applicant then also advised that payment be stopped.

The respondent claimed that it had not been heard by the 2nd applicant during its investigations and had only come to learn of the investigations in April 2011 when it was making a final demand for payment.

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The respondent felt aggrieved by the above decisions and filed in the High Court an application for Judicial Review (Misc. Cause No. 52 of 2011) against the applicants by which it sought orders that the

5 orders of the applicants be nullified and that the respondent be paid its money as established by the auditor.

The High Court dismissed that application. The respondents then appealed to the Court of Appeal vide **Civil Appeal No. 132 of 2011**. The Court of Appeal allowed the appeal and set aside the decision of the High Court. The Court of Appeal held, inter alia, that the report of the IGG was null and void because the respondent had not been given a hearing during investigations in breach of the Audi alteram partem rule, and that the IGG had no power to investigate a Court judgment or a matter before court.

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The applicants have filed an appeal in this court (Supreme Court Civil Appeal No. 5 of 2012) against the decision of the Court of Appeal. It is out of that appeal that the present application emanates.

20 **APPLICANTS' SUBMISSIONS**

Counsel for the applicants contend that this Court should exercise its inherent power to do justice under Rule 2(2) of the Rules of this Court, notwithstanding the provisions of Rule 30 which would appear to deny discretion for this Court to admit additional evidence. Counsel argued that this was not an application for leave to adduce additional evidence. It was an application for leave to adduce evidence to elucidate on evidence already on the record of the court. The evidence, in the form of the report of the IGG (2nd applicant) had not been before the courts below when they made

5 their decisions. What had been before the court was a report on the report, i.e. a summary of the report of the IGG. The report itself had never been presented to court. Counsel criticized the Court of Appeal for quashing a report that was not before it and which they had not seen. Counsel contended that had the Court seen and analysed the report, it would have found evidence that the respondent was in fact given a chance to be heard during the investigations by the IGG , and therefore, the Court would not have made the decision it did. Counsel submitted that it was in the interests of justice that the evidence be allowed so as to elucidate 15 on evidence already on record. In that regard counsel cited the case of **G.M. COMBINED LTD -Vs- A. K. DETERGENTS SCCA NO. 7 OF 1998** to support the proposition that evidence may be allowed for purposes of elucidating evidence already on record, and it would not be regarded as additional evidence.

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Counsel further submitted, basing on the affidavit evidence of Mr. Penywii, that the report of the IGG would show that there were illegalities and fraud committed by the respondents, citing in particular the alleged forged Consent Judgment upon which huge sums of money are claimed and some have already been paid by government. Counsel contended that proof of fraud would vitiate everything and it was in the interests of justice that this be elaborated upon by admitting the full report of the IGG. In that regard counsel cited the case of **MAKULA INTERNATIONAL -Vs- HIS EMINENCE CARDINAL NSUBUGA (CACA NO. 4 of 1981)** for

5 the proposition that a court should not close its eyes to a raised issue of illegality.

Submitting further on behalf of the applicants, Mr. Elison Karuhanga contended that whereas the respondents had been awarded close to Shs.400 billion on the basis of bank balances, the full report of the IGG would show that in fact the respondent never had any bank balances in 1978. In that regard, counsel pointed to a number of documents contained in the report to support his contention that the claim for bank balances and interest thereon was fictitious and fraudulent. Counsel criticized the Court of Appeal for its evaluation of the evidence contending that the court was wrong to quash a report it had neither seen nor evaluated and proceeded to award such colossal sums of money against the appellants. He also submitted that for justice to prevail, it was crucial that this Court allows the evidence of the IGG which would elucidate on the evidence that was before the court.

Counsel highlighted the findings in the report that there were two Consent Judgments, with one being characterized as a forgery. He contended that although this had been referred to in the letter which was assumed to be the report, it was more elaborated upon in the real IGG Report. So the admission of the IGG Report was necessary to enable this Court to make an informed decision.

On the issue of receivership, counsel contended that the respondent was in receivership and therefore could not maintain an action in

5 its own names. It had no capacity to sue. He relied on the affidavit of Mr. Sydney Asubo. Counsel attached the affidavits of Mr. Taitankoko in reply and surrejoinders as containing falsehoods with regard to whether the respondent was in receivership. He asserted that those affidavits keep changing position from denying that there was receivership, then calling it management receivership, and then claiming the receivership had ended.

Counsel submitted that the issue of receivership was a point of law and that it was in the interest of justice that evidence showing that the respondent was actually in receivership be put before the Court to elucidate on evidence already before court. This evidence is also to be found in the IGG Report. Counsel prayed that the application be allowed with costs.

20 **SUBMISSIONS OF RESPONDENT**

Mr. Sempala and Mr. Mulema-Mukasa replied for the respondent. In his reply Mr. Sempala argued that the application to adduce additional evidence was bad in law as it offended Rule 30(1) of the Judicature Supreme Court Rules. Relying on the decision of this Court in **NSEREKO JOSEPH & 2 OTHERS -Vs- BANK OF UGANDA** Supreme Court Civil Application No. 13 of 2009, Counsel submitted that this Court has no discretion to admit additional evidence, and that the Rule admits no exception. He contended that all the evidence that was not before the lower court and which was not

5 alluded to amounts to additional evidence and Court has no discretion under Rule 30, to admit it at this stage.

With respect to the aspect of elucidation of evidence on record, Counsel submitted that it was the applicants who should have filed all the evidence they had in the High Court where they were faced with an application for Judicial Review. He cited Rules 5, 6 and 7 of the Judicature (Judicial Review) Rules, 2009 in support of his argument that the applicants ought to have filed all the reports in the High Court. He cited the High Court case of **JOHN JET MWEBAZE -VS- MAKERERE UNIVERSITY & ANOR, CIVIL APPLICATION NO. 78 OF 2005**, to support his contention that when a party is served with an application for certiorari that party must bring the record to Court so that the Court looks at it and investigates whether it complies with the rules of natural justice. It was his submission that the applicants ought to have presented this evidence at that time in the High Court proceedings for judicial review. He cited the case of **R -Vs- SOUTHAMPTON JUSTICE, Ex. PARTE GREEN(1976) 1 Q.B 11** to support his contention.

25 Counsel argued that the evidence revealed that the IGG had issued its report in July 2004, yet the report that was brought to court was the letter dated 1st December 2005. It was incumbent upon the applicants to file the real report as it cannot now be said to be new evidence. He cited the case of **ATTORNEY GENERAL -Vs- PAUL**

5 **KAWANGA SSEMWOGERERE & ANOTHER**, (Supreme Court Civil Application No. 2 of 2004) where this court laid down the conditions under which additional evidence may be admitted, emphasizing that there must be exceptional circumstances. Counsel argued that the applicants had not shown that there were exceptional circumstances to warrant the grant of this application.

Counsel argued further that the main matter before the Court on appeal was not the report of the IGG but whether the IGG could investigate a matter pending in court, or investigate a Court Judgment. To counsel, the IGG had no such power under Section 19 of the Inspectorate of Government Act. He asserted that the respondent had not questioned the validity of the IGG Report, but the procedure followed in its investigation in so far as the respondents had not been given a fair hearing.

20 Counsel also questioned the authenticity of the report, claiming that it was not signed and that there was no evidence of its receipt by any person.

With regard to the allegedly forged consent judgment, counsel maintained that what he had was certified from court records by the Registrar of the High Court, and that it was up to the applicants to produce the original since it is the applicants that were alleging fraud. They had a burden to prove it. In any case, counsel argued,

5 the applicants had unduly delayed to bring this application, yet they had the report in their possession all the time.

In further reference to the issue of receivership, Mr. Mulema, counsel for the respondent, submitted, based on the affidavit evidence of **JULIUS KIRYA**, that the respondent had corporate personality under the Cooperative Society's Act, and that the respondent was not under receivership. That receivership had ended in December 2004, according to the said affidavit evidence. He argued however, that even if the respondent was under receivership, it could still bring a suit or an action. In that regard he cited the case of **NEWHART DEVELOPMENT LTD -Vs- COOPERATIVE COMMERCIAL BANK LTD (1978) 1 Q.B 814**.

He further cited the Zambian case of **AVALON MOTORS LTD (IN RECEIVERSHIP) -Vs- BERNARD LEIGH GADSDEN MOTOR CITY LTD (1998) S.J.26(S.C)** as further authority for his contention that a corporate entity, even when in receivership, can bring action in its own name. In his view, therefore, the bringing of additional evidence would not help since the position of the law was settled.

Counsel prayed that the application be dismissed with costs.

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In reply, counsel for the applicants reiterated their earlier submission, emphasizing that if there were two consent judgments, the IGG would not be investigating a matter of court but fraud.

5 Counsel also reiterated their submission that the court in exercise of its inherent power to do justice under Rule 2(2) should allow the admission of the additional evidence to elucidate on matters already before court. Counsel further contended that the amounts of money involved were colossal and detrimental to the Government, thereby making it a case of exceptional circumstances that deserves the court's exercise of its inherent power.

With regard to the issue of receivership, counsel again reiterated that the respondent was, at the material times, under receivership and therefore could not sue. Counsel distinguished the **Avalon** case (supra) by pointing out that the situation in that case was where the company was suing the receiver. In counsel's view this was distinguishable from the present case where the company is bringing action against third parties. This, according to counsel, can only be done by a receiver who will have stepped into the shoes of the directors of the company.

CONSIDERATION OF ISSUES

The gist of this application is the admission of additional evidence by this court. On the face of it, Rule 30 does not give this court discretion to admit additional evidence. This matter was ably considered and decided upon in the **Semogerere case** (supra). This Court clearly ruled that additional evidence would not be allowed in a situation **“where the appeal has been disposed of**

and the party who lost the appeal is applying for a review and reversal of the judgment in the appeal.” The court proceeded to review the legal precedents on the matter and came out with what the court termed useful guidelines.

The Court stated thus:

A summary of these authorities is that an Appellate Court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:

- (i) Discovery of new and important matters of evidence which, after the exercise of due diligence, was not within the knowledge of, or could not have been produced at the time of the suit or petition by, the party seeking to adduce the additional evidence;**
- (ii) It must be evidence relevant to the issues;**
- (iii) It must be evidence which is credible in the sense that it is capable of belief;**
- (iv) The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive;**
- (v) The affidavit in support of an application to admit additional evidence should have attached to it, proof of the evidence sought to be given;**
- (vi) The application to admit additional evidence must be brought without undue delay.”**

5 It has to be borne in mind that the case for the applicants is not merely to adduce additional evidence. It is to be allowed to adduce additional evidence that will elucidate on evidence already on record.

But there must be a limit as to how far the court may go in allowing applications for admission of additional evidence, whether for elucidation of evidence already on record, or new evidence altogether. The principle is that there must be an end to litigation. The guidelines given by this Court must be seen in that context; so must be seen Rule 30 which appears not to give this Court discretion to allow additional evidence. However, consideration must be given to Rule 2(2). This Rule calls upon this Court to exercise its inherent power to do justice or to prevent abuse of due process, notwithstanding anything contained in the Rules. It states thus:-

20 **2(2)" Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, and the Court of Appeal, to make such order as may be necessary for achieving the ends of justice or prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay."**

5 This Rule derives from Section 98 of the Civil Procedure Act which saves the inherent powers of Court. It states thus:-

“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

The above provisions are reinforced by Article 126 of the Constitution, which states as follows

126(1)“Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.”

126(2)“In adjudicating cases of both a civil and criminal nature, the courts shall, subject to law, apply the following principles -

(e) substantive justice shall be administered without undue regard to technicalities.”

25 We are of the view, that this Court as the final Court of Appeal in the judicial process in this Country should bear in mind the above provisions as well as the guidelines when considering a case like the one before us.

The applicants seek to be allowed to present the full Report of the Inspector General of Government on the matters under dispute. Their contention is that already on record is a summary of the report in form of a letter dated 1st December 2005 from the Inspector General of Government to The Minister of State for Justice and Constitutional Affairs. From paragraphs 23 to 28 of the supporting affidavit of Mr. Penywii, it is apparent that this letter was relied on both by the High Court and the Court of Appeal as if it was the Report of the IGG itself.

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Indeed, in his affidavit in reply for the respondent, Mr. Taitankoko bears this fact out in relation to the two documents. In paragraph 7 of his affidavit, he states as follows:-

“That I have thoroughly perused the voluminous Report ²⁰ as it relates to the applicant but the same is not different from the one already on court record save that the one on record of court is a summary of the voluminous report the applicant is seeking to admit.” (Emphasis added).

²⁵ To us, this begs the question as to what the Court of Appeal ordered to be quashed. If the Report was not before the Court, then what was quashed was the summary contained in the letter aforesaid, but not the report itself. Irrespective of who should have presented

5 the report, we think it would have helped the court to call for the report itself and study it before making its decision.

A perusal of the report shows serious allegations of fraud and forgery regarding the Consent Judgment. To begin with, there cannot be two judgments issued by one court over the same matter. If one judgment is a forgery, then it cannot be a judgment of court.

The respondent argued strongly that the IGG had no powers to investigate a judgment of the court or a matter before court. Indeed in his affidavit in reply Mr. Taitankoko states in paragraph 20 as follows

“That since this appeal is not on the merits of the report, but about the 2nd appellants powers to investigate in the instant matter, having a detailed report is not necessary and it suffices that the 2nd

appellant made a report that was only brought to the respondents attention in April 2011 and the detailed report is being brought to the respondents attention in this application.”

25 Then in paragraph 21, he states:-

That in specific reply to paragraphs 28 and 29 of James Penywii’s affidavit; the Court of Appeal quashed the report of the 2nd appellant that purported to investigate

the consent judgment which it declared void and of no consequence as per pages 26, 27 and 28 of the record of appeal in this court.”

Therein lies the problem. If it turned out, and there is credible evidence for it, that in fact there were two consent judgments, and this is coupled with allegations that one of them was forgery, then investigating a forgery could not amount to investigating a judgment of the court. It should have been necessary for the Court of Appeal to study the full report and satisfy itself as to whether the investigations were on the valid consent judgment issued by court is or on the allegedly forged one.

Strangely, the respondent could not produce a copy of the original consent judgment. In paragraph 14 of his affidavit in reply, Mr. Taitankoko states that the respondent **“knows only one consent judgment and decree which were confirmed as existent by the Chief Registrar Courts of Judicature as evidence by annexure “RA” attached hereto.”**

A perusal of that annexure “RA” shows that in fact even the Chief Registrar could not find the original copy of the Consent Judgment on the court file and that only a photocopy remained on the file.

The other aspect of the case that we find exceptional are the very colossal sums of money involved and the length of time these claims have been hanging around the Ministries of Finance, Justice, the Courts, etc. Were it to be established that colossal sums of public

5 funds have been paid or are contemplated to be paid under a Consent Judgment that is a forgery, that would not only be an abuse of due process but would negate the very provisions of Article 126 of the Constitution. That calls for the Court to exercise due care to ensure that justice is done. It would be in the interests of both parties that all the facts that need to establish their respective cases has been presented to the courts, and that whatever was due was strictly in accordance with the law and procedure. A forged judgment, if proved so, cannot confer legal rights upon any party. As was stated in the **Makula International Case**, fraud vitiates everything. Such judgment would be a nullity.

In the peculiar circumstances of this case, it is clear that the evidence being sought to be admitted is intended to elucidate evidence already on record: that is to say, a summary of the report is already on record. The full report could only help give a fuller picture of matters already in the summary. We do not think that this would prejudice the respondent.

We are persuaded by the observations of Oder, JSC, in the **G.M. Combined Ltd case** (supra) to the effect that evidence which merely elucidates on evidence already on record is not additional evidence. In that case the matter in contention was the admission by the Court of Appeal of its own volition, of an agreement of sale which had not been presented in evidence at the trial but was referred to in the transfer instrument. It was contended on appeal that the

5 Court of Appeal was wrong to admit the Sale Agreement as additional evidence. The Supreme Court did confirm the principle that additional evidence can only be admitted by the Court of Appeal in exceptional circumstances. But with regard to evidence for elucidation of evidence already on Court record, Oder, JSC had this to say at page 11:-

“My next comment in this regard, is that what the Court of Appeal admitted as additional evidence was actually nothing new. It was not new evidence. It was evidence already on record. The Sale Agreement in question was part of the instrument of transfer which were already on record. It constitutes part of the instruments of transfer and had to be read together.”

The learned Justice proceeded to cite and analyse the case of **REX - Vs- YAKOBO BUSIGS S/O MAVEGO (1945) 12 EACA 60** by the
20 Court of Appeal for Eastern Africa in which a number of the decided cases were considered. The learned Justice concluded thus:-

“I think that the principle stated in that case is applicable to the instant case. The additional evidence taken by the Court of Appeal was not new evidence but evidence taken merely for elucidation of evidence already on record namely the instruments of transfer.”

In the instant case, it is common position that the IGG carried out investigations into some allegations of fraud and forgery involving

5 not only the respondent but some other officials in government departments, and produced a report. It is common position that a summary of the report in the form of a letter of 1st December 2005 (supra) is on record. On the basis of that the respondents were able to challenge, successfully, in the Court of Appeal, the said investigations and report on the ground that they had not been given a fair hearing in violation of the Constitution, and that they had been prejudiced by the report in so far as it had stopped payment of monies they contend they were entitled to under a consent judgment. In all this, the full report was never presented in evidence, apparently as result of confusion and negligence on the part of staff both in the IGG's Office and the Attorney General's Chambers. Nonetheless the Court of Appeal proceeded to quash the report that it had not seen.

20 We are not persuaded by arguments of Counsel for the respondent that the report of the IGG would be new evidence, or that because the applicants failed to present it, it should not be allowed. We think that the Court of Appeal should, even on its own volition, have called for the full report which would have thrown light on the contentions as to whether the respondents had been denied fair hearing, whether the IGG had investigated a valid Court Judgment, and the validity of the entire procedure the IGG had followed in its investigations. The full report would throw light as to people interviewed and documents exhibited during the investigations.

5 Given the exceptional circumstances of this case as pointed out earlier in this ruling, our considered view is that admitting the full report of the IGG in evidence will elucidate on the summary report already on record and enable this court to finally determine the issues raised on appeal. In that context, the report is not additional evidence but evidence necessary to elucidate evidence already on record. We allow its admission. We do not think it necessary to determine on the issue of receivership in light of our above decision.

These matters can be raised in the arguments in the main appeal in the context of the full Report that we have decided to admit. But no ¹⁵ new matters beyond the report shall be permitted.

Accordingly, we allow the application to admit in evidence the report of the IGG. Given that both parties ought to have ensured that this report should have been admitted much earlier, we order that each party shall bear its costs of this application.

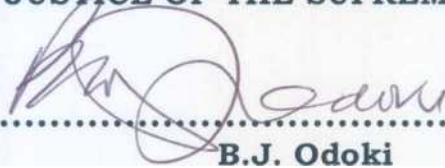
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Dated at Kampala this 25th day of MARCH 2014.



B.M. Katureebe
JUSTICE OF THE SUPREME COURT

C. N. Kitumba
JUSTICE OF THE SUPREME COURT



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B.J. Odoki

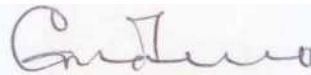
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