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**THE REPUBLIC OF UGANDA**

**IN THE CONSTITUTIONAL COURT OF UGANDA**

**AT KAMPALA**

**CONSTITUTIONAL APPLICATION NO. 2 OF 2013**

**(ARISING FROM CONSTITUTIONAL PETITION NO. 04 OF 2013)**

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**HON. ANDREW BARYAYANGA AJA :::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL OF UGANDA::::::::::::::::::::RESPONDENT**

15 **Corum: Hon. Justice S. B. K. Kavuma, AG. DCJ Hon.**

**Justice A. S. Nshimye, JA Hon. Justice**

**Remmy Kasule, JA**

**RULING OF THE COURT.**

20 **This is an application for a temporary -injunction brought under the Constitutional Court (Petitions and References) Rules SI 91 of 2005, Rule 23(1), Sections 64(c) (e) and 98 of the Civil Procedure Act, Cap.71, Rules 2(2), 43(1) (2) and 44 of the Judicature (Court of Appeal Rules Directions). It arises out of Constitutional Petition NO. 04 of 2013 and seeks the following orders:-**

***(i)That an order for a temporary injunction does issue to restrain the Uganda Government or any of its authorized servants agents/employees or any other person by whatever name called***

***from implementing the recommendations of the IGG'S Report HQT 61/ 01/2013 dated 22/3/2013 or in any other manner interfering with or in any manner reviewing the matters before the High Court of Uganda, the procurement of a contractor for the Karuma Hydro Power Project including awarding a contract to the best evaluated bidder or in any other manner implementing the said recommendations or doing any other act or taking any further steps in connection therewith pending the disposal of the petition or until further orders of this court.***

***(ii) That the costs of the application be provided for.***

The application is supported by an affidavit deposed to by the applicant Hon. **Andrew Baryayanga** AJA in which he outlined the following grounds:-

***(a) A Constitutional Petition has been filed in this court by the Applicant/Petitioner seeking various declarations and orders.***

***(b) The petition has substantial grounds with a likelihood of success.***

***(c) That in the meantime the IGG has released a report Ref HQT/ 61/01/2013 dated 22/3/2013 recommending, inter alia, cancellation of the whole procurement process in issue; disqualification and blacklisting of CWE, one of the bidders, purportedly basing on IGG's findings solely derived from internet search, dictated the method of procurement to be utilized or employed; flouting all known legal procurement***

**laws and regulations as provided for by the Public Procurement and Disposal of Public Assets Act.**

**(d) That the said IGG's report is about to be implemented by different officials/agencies of government to the detriment of the bonafide**

**60 bidders and all Ugandans at large, the ultimate beneficiaries.**

**(e) That the petition meritorious grounds have serious and important Constitutional issues and have a high likelihood of success.**

**65 (f) That it is in the interest of justice that an order for a temporary injunction doth issue to restrain the IGG's unconstitutional acts.**

**(g) That if the orders sought are not granted, the applicant's petition will be rendered nugatory and of no legal consequence and the**

**70 applicant will suffer irreparable loss and infringement of constitutional rights will go on unabated.**

#### **Legal representation.**

The applicant was represented by a tripartite of Counsel namely, John Mary

**75** Mugisha, Mr. Chris Bakiza and Mr. Twinobusingye Severino while the respondent was represented by Mr. Bafilawala Elisha, a Senior State Attorney in the Attorney General's Chambers.

**Issue:**

**80** Whether the applicant is entitled to the Orders sought?  
**Submissions for the applicant.**

Counsel John Mary Mugisha briefly gave the background to the application and highlighted the conditions for the grant of a temporary injunction namely:-

***(a) That the applicant must show that he has a prima facie case with the probability of success,***

***90 (b) That he will suffer irreparable injury not capable of being adequately compensated for by an award of damages and,***

***(c) That in case the Court is in doubt of any of the above two principles, then it will decide the application on a balance of conveniences.***

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**In support of the above, he cited the cases of Humprev Nzei Vs Bank of Uganda. Court of Appeal Constitutional Application NO. 001 of 2013. and Giella Vs Cosman Brown and Company Limited [19731 EA 358.**

On the power of this Court to issue an injunction against Government, counsel cited the case of **Osotraco Vs. Attorney General. Court of Appeal Civil Appeal NO. 32 of 2002.**

He further cited the cases of **Constitutional Court Petition, NO. 003 of 2008 Goodman Agencies Ltd. & Others Vs. Attorney General, and Constitutional Court Petition NO. 004 of 2007 Richard Oscar**

**Okumu Wengi Vs Attorney General**, which emphasise the ratio decidendi that where a petitioner alleges that an Act of Parliament or any Law, or any Act or omission under any law, is in contravention of any provision of the

no Constitution and seeks for a declaration and redress to that effect through a Constitutional Petition, then such a petition conforms to the law and raises matters for constitutional interpretation under **Article 137**.

Counsel contended that the application was not frivolous since it had not been overtaken by events or gone into limbo of legal muteness. He addressed court on the principle of legal muteness where he cited the case of **Legal Brains Trust LBT Ltd. V. The Attorney General, East African Courts of Justice Appeal NO. 004 of 2012** where the test of deciding legal muteness and whether there is a real live dispute for Court's adjudication was considered. He further highlighted the cases of **The Environmental Action Network Ltd. Vs, Joseph Ervau. Court of Appeal Civil Application NO. 89 of 2005. Uganda Corporation Creameries Ltd. & Another Vs Reamation Ltd. Court of Appeal Civil Reference NO. 11 of 19.99** and **Registered Trustees of the Church of Uganda Vs Paul Mainuka. Court of Appeal. Civil Appeal NO. 46 of 2002** as also being relevant to the issue of legal muteness and what factors to consider in determining whether or not there is a live issue that deserves court adjudication in a particular case.

Counsel then submitted that the applicant's grievance was in respect of the implementation of the IGG's recommendations which were found in annexure "JK" to the applicant's amended Notice of Motion. These recommendations were dated 22<sup>nd</sup> March 2013 and addressed to the Permanent Secretary, Ministry of Energy and Mineral Development. The applicant's source of discontent was the IGGs recommendations that because of the large number of disputes and apparent irregularities and illegalities that had been discovered, the whole procurement process of the EPC

contractor for the Karuma hydro project should be cancelled and be repeated right from the beginning.

140 Counsel further contended that in light of the Attorney General's binding opinion, cancellation of the procurement process would not be legal as the same would be a defiance of the Attorney General's said legal opinion. Counsel referred court to the Attorney General's opinion which rubbished the whole report of the IGG as being illegal, null and void. He cited the case of **Gordon**

145 **Sentiba & others Vs Inspectorate of Government. Supreme Court Civil Appeal NO. 6 of 2006.** where it was held that the Attorney General is the Principal Legal adviser to government as provided for under **Article** 119 (3) of the Constitution and that his legal opinion is generally binding on government and public institutions like the IGG. The IGG is a creature of the

150 Constitution and statute and its functions were clearly laid down in those legal instruments, hence it was not a function of the courts to confer corporate legal status or capacity or similar powers on public institutions or bodies which are not specified in the parent Act. The IGG cannot investigate or review matters pending before court.

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Counsel further argued that the IGG's recommendations raised issues which were:-

**(a) Whether the recommendation for cancellation of the procurement process was within the IGG's powers.**

160 **(b) Whether the IGG's findings on misrepresentation of information by CWE, based on internet search, can be**

***relied on to disqualify the bidder?***

***(c) Whether the IGG has power to determine the procurement process?***

Counsel submitted that the Attorney General having tendered a legal opinion that, in the absence of any finding of corruption, the IGG's recommendation of cancellation of the procurement process was contrary to the law, then the IGG did not have powers under the law, to .cancel the procurement process or order it's being repeated under a different procurement method.

Counsel pointed out that the temporary injunction, if granted, would be enforced because the recommendations of the IGG had not yet been implemented.

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Counsel Bakiza in his submissions focused on the affidavit evidence adduced in the application.

He referred to the affidavit in reply of Maureen Ijang, a State Attorney in the Attorney General's chambers filed in the application for and on behalf of the respondent, and submitted that the same had not controverted the case of the applicant. He reiterated the prayer of counsel for the applicants to allow the application with costs.

**Submissions for the respondent.**

For the respondent, counsel submitted that since the applicants had not annexed a copy of the Petition which is pending before this court, they had failed to establish on the basis of pleadings, the existence of a prima facie case. The applicant was neither one' of the bidders, who participated in the **190** procurement process nor was he a representative of any of the bidders.

On the basis of the affidavit in reply of Maureen Ijang, the matters which were being sought in court were mute, academic, hypothetical, and lifeless. He made reference to annexures B, C, D, E and 0 which showed that the contracts committee sat on 23 April 2013 and rejected the bids forwarded by all the bidders for the construction of Karuma hydro electric power project. This showed that the issues in the application were no longer alive. In his view, the cases cited by his learned colleagues were of no value to this case.

Courts do not decide cases for merely academic purposes because court orders must have a practical effect and must be capable of enforcement. The evidence on record showed that there was no live procurement process. The bids were rejected, and the entire process cancelled hence there was no status quo to preserve as sought in the application.

With regard to the opinion of the Attorney General which was against the implementation of the IGG report, upon which the applicant based his claim, counsel argued that the opinion dealt with delaying the process in the event the report had been implemented. The report should not be misunderstood as giving a blanket immunity of non performance of statutory powers of the Public procurement and Disposal of Assets Authority. In support of his argument, counsel cited Section 75 of the PPDA Act of 2003 which empowers the Authority to reject all bids at any time before or prior to the award of the contract.

Counsel Bafirawala further contended that the applicant lodged **Miscellaneous cause NO. 11 of 2013 in the High Court** at Nakawa

against the Attorney General for judicial review seeking to quash the IGG's report. He saw no reason for reproducing the same issues in this application since the

applicant would suffer no irreparable damage and the balance of convenience does not weigh in his favour.

In conclusion, he submitted that the applicant's case was lifeless, riddled with speculation, and purely academic. If court were to grant any of the orders prayed for by the applicant, such a grant would have no practical legal effect.

He prayed that the application be dismissed with costs.

### **Submissions in rejoinder.**

Counsel Mugisha submitted that it was not a requirement that the Constitutional Petition had to be annexed to the application and that failure to do so was not fatal because under **Article 126 (2) (e) of the Constitution**, it was a mere technicality which should not be used to clog justice. He reiterated that there were live issues in the application which needed court's adjudication.

On the Attorney General's opinion, counsel submitted that the Attorney General declared the whole report of the IGG null and void and that it cannot be said that the contracts committee purportedly acted without the tainted environment that surrounded the whole procurement process.

240 Regarding the existence of the status quo, counsel contended that the recommendations of the **IGG** have not yet been implemented and the process has not yet been repeated.

In counsel's view, the applicant had fulfilled all the conditions necessary

for the grant of a temporary injunction and prayed that the court grants the same.

**Resolution of the issue.**

**Whether the applicant is entitled to the orders sought.**

We agree with the authorities cited by counsel Bakiza namely; the cases of **ELT Kivimba Kaggwa Vs Hajji Abdu Nasser. Katende (1985) HCB, 43. CUT Tobacco fKenya! Ltd. Vs BAT (Kenva) Ltd. (2001)1 EA 24** and **Hope Mwine Kashozi Assiimwe Cove Vs Attorney General and others. Constitutional Application NO. 07 of 2010** which are to the effect that the grant of a temporary injunction is an exercise of judicial discretion by court.

Counsel John Mary Mugisha also rightly cited the case of **Humphrey Nzei V. Bank of Uganda & Anor, Constitutional Court Application No. 001 of 2013**, which highlights the different principles precedent to the grant of temporary injunctions which generally are:-

- (a) That the applicant must show existence of a prima facie case with the probability of success.***
- (b) That the applicant stands to suffer irreparable injury not likely to be adequately compensated for by an award of damages, and***
- (c) That, if the court is in doubt of any of the above two principles, it will decide the application on a balance of conveniences.***

In this application there is need first of all to establish what is the status

quo which the applicant seeks to preserve before the main Constitutional Petition is heard and disposed of.

This court in the case of **Humphrey Nzei V. Bank of Uganda & Another, (supra)** defined the meaning of status quo as:-

***“The existing state of affairs, things or circumstances during the period immediately preceding the application for an interlocutory injunction ”,***

**Similarly in the case of American Cyanamid Vs Ethicon Ltd, [1975] AC 396**

it was stated that an injunction order was intended to maintain the status quo to prevent any of the parties involved in the dispute from taking any action until the matter is resolved by court.

As already pointed out, this application arose out of **Constitutional Petition NO. 04 of 2013.**

In the respondent's affidavit in reply sworn by Maureen Ijang, the State Attorney deponed in paragraph 9 thereof that there was no status quo to maintain in the matter as the Inspector General of Government's (IGG) report was implemented and that there were no longer any real and live disputes between the parties to warrant the issuance of the temporary injunctive orders.

On the other hand, it was the applicant's case that the status quo can still be salvaged and that there were live issues to be resolved by Court since the reliefs sought can still be enforced.

We note that on 25<sup>th</sup> January 2013, the IGG wrote to the Permanent Secretary (PS) Ministry of Energy and Mineral Development informing him of the receipt of a complaint from a whistle blower alleging that officials in his Ministry, (Ministry of Energy and Mineral Development), were involved in a blatant abuse of a process that had marred the procurement because of **300** bribery and corruption. The letter was annexed as annexure "A" to the applicant's affidavit in support of the application.

The IGG conducted the investigations, made a report on her findings with orders and directions as is provided for under **Article 230(2)** of the **305** Constitution of the Republic of Uganda and **Section 14(6) of the IGG Act** on 22<sup>nd</sup> March 2013. In summary, the IGG found that no corrupt tendencies as earlier alleged by the whistle blower had been established but all the same she went ahead to make her recommendations.

Under the **IGG Act, Section 8 (1)**, the IGG has power to investigate and take necessary measures for the detection and prevention of corruption in public offices and in particular under **Section 8(1)(i)(iv)**

***“To enlist and foster public complaints of alleged or suspected corrupt practices and injustices and make recommendations for appropriate action on them.”***

On 12<sup>th</sup> April 2013, the cabinet of Uganda considered the IGG's report and the opinion of the Attorney General and decided to direct the Ministry of Energy and Mineral Development to cancel the ongoing procurement of the EPC contractor for the Karuma Hydro Power Project.

The functions of the cabinet are, pursuant to **Article 111** of the Constitution, to determine, formulate and implement the policy of Government and to perform other functions conferred by the Constitution or any other law. The President, Vice President, the Prime Minister and Cabinet Ministers,

Constitute the cabinet. Ministers are accountable to the President and are collectively responsible.

The Attorney General is a cabinet Minister under **Article 119** of the Constitution, and as such is collectively responsible for a decision made by the cabinet under **Article 117**.

Therefore in this case, the opinion of the Attorney General under which the applicant sought shelter when pursuing this application, was overtaken by the cabinet decision which was binding on the Attorney General under the principle of collective responsibility.

On the 23<sup>rd</sup> April 2013, the Contract's Committee of the Ministry of Energy and Mineral Development went ahead to reject all bids and cancelled the procurement for the EPC and this' was communicated to all the bidders. This was a cabinet decision which this court will not interfere with given the particular circumstances of the case. The Attorney General as a member of cabinet is deemed to have been part and parcel of the said decision.

We find the decision of the cabinet as being a lawful exercise of a Constitutional and Statutory power by the Executive arm of the State.

While it is legitimate for the applicants to pursue their Constitutional Petition challenging the powers of the IGG, we see no status quo to preserve, because upon the implementation of the cabinet decision, the subject matter from which the dispute arose, ceased to exist.

**In our recent decision of Twinobusingye Severino Vs Attorney**

**General Constitutional Court Petition NO. 47 of 2011, we held in the majority judgment that:**

***"...the Constitution was structured in such a way that it gave the three organs of Government namely the Executive, Parliament and***

***Judiciary different roles and powers. Each organ is obliged to perform its role in accordance with the Constitution and other enabling laws without interference from the others, except as provided under the Constitution. However, a mechanism of checks and balances was built in the Constitution to ensure that no single organ of the State acts in contravention of the Constitution without being stopped by the rest of the other two organs, or any of them. Otherwise when everything is normal and in accordance with the Constitution, the internal management of the organs of the State is a no go area for the others. For example, the Judiciary has no powers to interfere or question methods of the internal management and running of the affairs of Parliament unless a complaint is raised by an aggrieved person in Courts of Law."***

The applicant in this application is not questioning the powers of cabinet in ordering cancellation of the procurement process. Functions alien to the judiciary cannot validly be vested in court unless they are merely ancillary to judicial functions. Cabinet, of which the Attorney General is a member, took a decision and directed the Ministry of Energy and Mineral Development to cancel all the bids. The said directive of cabinet was implemented and the process the applicant is seeking to protect ceased to exist. It is thus impossible for this Court to

grant .the orders sought as to do so would not only

**be in vain, but would also amount to questioning a legitimate decision of cabinet against which no one is lawfully, complaining and as such, over which this court has no jurisdiction to question by self moving itself.**

For the reasons given, we decline to grant the order(s) sought. The application stands dismissed.

As to costs, we have come to the conclusion that the applicant is acting in the public interest in pursuing this application. He should therefore not be condemned in costs. We accordingly order that each party bears its own costs of this application.

**Dated at Kampala this 29<sup>th</sup> day of January 2015.**

**HON S.B.K KAVUMA, AG DEPUTY CHIEF JUSTICE**

**HON. A.S NSHIMYE, JUSTICE OF APPEAL**

**HON. REMMY KASULE, JUSTICE OF APPEAL**

