THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 21 OF 2009

[Appeal from the Ruling of the High Court of Uganda Commercial Division (L. Mukasa J) at Kampala dated 6th Oct. 2008 arising out of Civil Suit No. 1026 of 2004]

1. **INSPECTORATE OF GOVERNMENT**
2. **JINJA DISTRICT ADMINISTRATION::::::::::::::APPELLANTS**

VERSUS

BLESSED CONSTRUCTORS LIMITED::::::::::::::::::RESPONDENT

CORAM: HON. JUSTICE A.E.N MPAGI-BAHIGEINE, JA
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.K. BYAMUGISHA, JA

JUDGMENT OF AE.N.MPAGI-BAHIGEINE.

This appeal is against the decision of the High Court Commercial Division, (Lameck-Mukasa J) at Kampala, dated 6th October 2008, allowing the 1st appellant to become a co-defendant to HCCS No. 1026/2004 and an amicus curiae.

The following was the back ground to this matter. The respondent, a company by the name of Blessed Constructions Limited, was awarded a tender to construct some schools by the 2nd appellant, Jinja District Administration.

The respondent commenced the work using its own funds while the process of formalizing the contract progressed. In the meantime, the 1st appellant, the Inspectorate of Government, carried out investigations over the award of the tender by the 2nd appellant and recommended that the respondent should not be paid for the work so far carried out.

Thereupon the respondent initiated a suit against the 2nd appellant for payment of the amount they had expended on the construction. At this point the 1st appellant applied to court to be joined

as a defendant to the suit vide Miscellaneous Application No. 73 of 2007. The learned trial Judge allowed the application and ordered that the 1st appellant be added as a defendant coming in as a friend of court. The 1st appellant filed its written statement of defence.

At the hearing of the main suit, the 1st appellant raised a preliminary objection that the suit was wrongly brought before court. The 1st appellant's objection was that the matter should have been brought by judicial review instead of an ordinary suit. The trial Judge overruled the preliminary objection hence this appeal.

The memorandum of Appeal comprised four grounds namely that:

1. **The learned Judge wrongly evaluated the evidence on record when he held that the first appellant be joined as amicus curiae and not defendant to the main suit and made wrong conclusions.**

2. **The learned Judge erred in law and fact when he held that Civil Suit No. 1026 of 2004 is properly before court despite the investigations, findings and recommendations of the first appellant as contained in its report dated February, 2004 that was within the respondent's knowledge.**

3. **The learned trial Judge erred in law and fact when he ordered to proceed with the hearing of High Court Civil Suit No. 1026 of 2004 which was filed in abuse of court process.**

4. **The learned trial Judge erred in law and in fact when he held that the respondent had no cause of action against the first appellant who investigated the contract to justify an application for judicial review.**

At the hearing of the appeal learned counsel Mr. Simon Peter Kinobe and Mr. Hosea Lwanga appeared for the first appellant. The second appellant was not represented.

Learned counsel Mr. Noah Sekabojja was for the respondent.

Submissions on Ground No. 1

Regarding ground No. I, it was the contention of the appellants that when the first appellant applied to be joined as a defendant to HCCS No. 1026/2004 vide Miscellaneous Application No. 73 of 2007, the application was allowed, and it duly filed its written statement of defence. The first appellant was therefore joined as the second defendant and not as a friend of the Court. The learned Judge, therefore, erred in law and in fact when he held that the first appellant was an *Amicus Curiae* and could not challenge HCCS No. 1026/2004.

On the other hand, the respondent contended that it was wrong to join the first appellant as *Amicus Curiae* for two reasons. Firstly, an *Amicus Curiae* is joined to a case on a court's own volition and not on an application of a party. Secondly, a person invited as an *Amicus Curiae* is supposed not to have an interest in the case.

The respondent further argued that it was also wrong to join the appellant as a defendant because the respondent has no cause of action against the appellant. HCCS No. 1026/2004 is between the respondent and Jinja District Administration. The action is based on breach of contract to which the first appellant is not a party and could not be joined as a defendant. Therefore it is only the parties to the contract who can sue and be sued on it. It was therefore erroneous for the learned Judge to join the first appellant as defendant in the suit as well as a friend of the court.

Court's findings on Ground 1

The learned Judge ruled on the issue of amicus curiae thus:

> **"In Inspector General of Government vs Kikonda Butema Farm Ltd and AG C.A Constitutional Application No 13 of 2006, the IGG applied to appear as Amicus Curiae (friend of court) According to the Blacks Law Dictionary (7th Edn) that is a person who "is not a party to a law suit but who petitions the Court to file a brief in the action because that person has a strong interest in the subject matter" By virtue**

of the Applicant's Constitutional and statutory functions in the circumstances of this case I find the Applicant such a person in circumstances of this case."

Be that as it may, the amicus curiae was not made a party to the suit. I think this is an erroneous finding, with due respect. Perhaps a clearer position is to be found in **Words and Phrases Legally Defined**, (Vol. 1: A-C, 3rd Ed, London: Butterworths 1988) at page 79,

"**Amicus Curiae…is one who as a bystander, where a judge is doubtful or mistaken in a matter of law, may inform the court. In its ordinary use the term implies the friendly intervention of Counsel to remind court of some matter of law which escapes its notice and in regard of which it is in danger of going wrong."**

Furthermore, an *amicus curiae* is invited by Court and he should be an independent person without proprietary interest in the case. The case law in point is ***Attorney General vs. Silver Spring Hotel Ltd. & Others (SCCA No. 1 of 1989),*** where Ntabgoba, PJ (as he then was) observed:

"Even if there was a necessity for an amicus curiae, this court would ask a person whose interest as an amicus would not clash with his client's interests, in other words, an independent person."

On that premise, I accept the submission of counsel for the respondent that it was wrong to join the appellant as *Amicus Curiae.*

As regards joining the first appellant as a defendant to the suit, the learned trial Judge ruled:

"The Applicant has to become a party to the suit. In the circumstances of this case the Appellant cannot be joined as a plaintiff since its interests conflict with those of the plaintiff. It cannot be joined as a third party since no such application has been made in that respect by the 2nd Respondent who is the defendant. The Applicant's interests are more in line or akin to those of the defendant. Therefore most logical action would be to add the Applicant as a defendant coming in as a friend of Court."

With due respect, the learned trial judge seriously misdirected himself in law when he made the foregoing finding. The first appellant should not have been joined as a party to the suit because it is not privy to the contract between the second appellant and the respondent. See **Dunlop Pneumatic Tyre Co., Ltd v. Selfridge & Co., Ltd, [1914] ALL ER 333.** The first appellant cannot be joined as a defendant by virtue of the fact that the respondent does not claim any right to relief against it. **Order 1 rule 3 of the Civil Procedure Rules (S.I. 71-1) quite clearly lays it down** as follows:

> **"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common question of law or fact would arise."**

Applying the above test, I find that the learned trial Judge wrongly evaluated or misconstrued the evidence on record and came to an incorrect conclusion when he joined the first appellant as a defendant as well as a friend of court in the same suit. The 1st appellant should never have been joined to the application in the first place since it had investigated the matter.

Submissions on Grounds 2 and 3

Learned counsel for the appellants pointed out that the IGG's investigations and recommendations are protected under **Articles 225, 227 and 230 (2)** of the Constitution and **sections 8 (1), 9, 10, 14 (5) (c) of the IGG Act**. Article 227 of the Constitution and **section 10 of the IGG Act** emphasizes the independence of the first appellant in conducting its functions. Counsel further contended that the respondent seeks to rely on the first appellant's report but has not taken any step whatsoever to challenge the report and recommendations therein. It therefore follows that the report as it is remains valid, enforceable and unchallenged and both the first and second appellants are entitled to enforce and implement the same report. Consequently, the filing of HCCS No. 1026/2004 by the respondent is an attempt to ignore the recommendation and fetter the functions and independence of the first appellant contrary to **articles 225, 227 and 230 (2) of the Constitution and sections 8 (1), 9, 10, 14 (5) (c) of the IGG Act**.

Learned counsel further submitted that the recommendations cannot be disregarded and that the respondent can only challenge and set aside or dismiss the first appellant's report by applying for judicial review under the Judicial Review Rules of 2009. Therefore, the prerogatives of mandamus, prohibition and certiorari would lead to the decision whether to pay the respondent or not. This is because the first appellant is an administrative/quasi-judicial entity and HCCS No. 1026/2004 is an abuse of court process, incompetent and premature.

Counsel also referred to **section. 22 of the IGG Act** and **section 173 of the Local Governments Act** which protects persons who act on the instructions of the IGG and bringing a suit against those very persons is a violation of that protection.

In reply learned counsel for the respondent did not agree with the appellant's foregoing submissions. He pointed out that HCCS No. 1026/2004 is properly before court. It was a matter arising out of a contract between the respondent and the Jinja District Administration. The investigations by the 1st appellant and the resultant report were done against Jinja District Administration. It is not the respondent who is being investigated. The report is implemented by the 1st appellant against the Jinja District Administration and not against its officials. There is no way the respondent could seek to question the report against other persons. Besides, the respondent is not seeking prerogative orders against the first appellant but payment to be made by the second appellant. Therefore, HCCS No. 1026/2004 is properly before the High court.

Concerning the respondent's reliance on the report, learned counsel submitted that the report is only attached to the respondent's list of documents for evidential purposes.

Concerning ground three of the memorandum of appeal, counsel submitted that HCCS No. 1026/2004 is competent and not an abuse of court process in any way. The case should be determined by High Court on its merit.

Court's findings on Grounds 2 and 3

Although it is true that **Articles 225, 227** and **230 (2) of the Constitution** and **sections 8 (1), 9, 10, 14 (5) (c) of the IGG Act** provide for and protect the independence of the first appellant, I feel compelled to reject counsel's contentions that the filing of **HCCS No. 1026/2004** and its

prosecution would interfere with or has interfered with the functions and independence of the Inspectorate of Government. As pointed out by counsel for the respondent, and I would repeat it, the Inspectorate of Government is not a party to the contract.

As regards whether or not the respondent should have first challenged the appellant's report and recommendations by applying for judicial review under the Judicial Review Rules of 2005, I must say that since the intention of the respondent is neither to challenge the IGG recommendation nor sue the IGG; the remedy of judicial review is not appropriate. It is superfluous Judicial review would have been appropriate if the respondent was seeking a prerogative order such as mandamus, prohibition, certiorari, injunction and declaration. See **Article 42 of the Constitution and section 38 of the Judicature Act as amended by the Judicature (Amendment) Act of 2002.** I would therefore find that **HCCS No. 1026/2004** is meritorious and properly instituted on the basis of the fact that the respondent is seeking remedies against the second appellant for breach of contract and for the construction work done, that far before the contract was terminated.

I would also not accept the submission of Counsel for the appellants that the filing of **HCCS No. 1026/2004** violates **section 22** of the Inspectorate of Government Act and **section 173** of the Local Governments Act. For the sake of convenience and clarity, I have to quote *in exitenso* the relevant provisions of those statutes. **Section 22** of the Inspectorate of Government's **Act No. 5 of 2002** provides:

> (1) **No proceedings, whether civil or criminal, shall lie against the Inspector General, Deputy Inspector-General, an officer or any other person employed or authorized to execute the orders or warrants of the Inspectorate for anything done in good faith and in the course of the performance of her duties under this Act.**
>
> (2) **Subject to the provisions of this Act, no officer or person serving in the Inspectorate shall be compelled to give evidence before any tribunal in respect of anything coming to his knowledge by virtue of his or her services.**

It is my view that this provision of the IGG Act provides immunity to persons who render service in the IGG office. The section does not at all attempt to bar persons from suing other Government entities whether or not the matter in question is the subject of the IGG investigation as in the instance case.

On the other hand, **section 173 of the Local Government Act (Cap. 243)** provides that:

> **"No action, matter or thing done or omitted to be done by**
>
> (a) **any member of a local government or administrative council or a committee of a council;**
>
> (b) **any member of staff or other person in the service of a council; or**
>
> (c) **any person acting under the direction of a council shall, if that act, matter or thing was done or omitted in good faith in the execution of a duty or under direction, render that member or person personally liable to any civil action, claim or demand."**

This section as it stands does provide immunity to individuals who act for and on behalf of local governments. The section does not prohibit persons from suing local governments because by virtue of **section 6 of the Local Government Act**, a local government is a body corporate, capable of suing and being sued in its corporate name. Consequently the **HCCS No.1026/2004** is properly instituted, I would so hold.

<u>Submissions on Ground 4</u>

Counsel for the appellants reiterated his submissions above to the effect that the respondent seeks to rely on the first appellant's recommendations which is attached to his plaint as annexture "D" and as such, the respondent should first have that report challenged by judicial review. Besides, the ruling of the High Court dated 7-10-08 should be set aside or quashed and the respondent's case be dismissed or struck off for being incompetent and an abuse of court process. Counsel therefore prayed that Court allows this appeal.

In reply, the respondent conceded that it was correct that the respondent neither has a cause of action against the first appellant nor does the respondent seek any remedy against the first appellant. Therefore, Court ought to find that the respondent has no cause of action against the first appellant.

Court's finding on Ground 4

I have already unequivocally stated above that, the respondent has no cause of action against the first appellant. Its claim against the second appellant is based on contract. No action can lie against the first appellant because it is not privy to the building contract between the respondent and the second appellant. Furthermore, the interest of the first appellant is only very remotely associated with the outcome of the said suit. I would therefore disallow ground 4 of this appeal.

In sum the appeal fails and is so dismissed with costs to the respondent.

As my Lords A. Twinomujuni and Byamugisha JJA, both agree the appeal stands dismissed as indicated above.

Dated at Kampala this…*17th* ...day of…*November*...2009.

Hon. A.E.N.Mpagi-Bahigeine

JUSTICE OF APPEAL

JUDGMENT OF TWINOMUJUNI, JA

I have had the advantage of reading the judgment, in draft, by Hon. A.E.N.Mpagi-Bahigeine, JA.

I concur and I have nothing useful to add.

Dated at Kampala this ...*17th*….day of ….*November*……2009

Hon. Justice Amos Twinomujuni,
JUSTICE OF APPEAL

JUDGMENT OF C.K. BYAMUGISHA, JA

I concur with the conclusions of the lead judgment and the orders proposed therein. I have nothing useful to add.

Dated at Kampala this …..*17th*…day of …..*November*….2009

C.K.Byamugisha,
JUSTICE OF APPEAL