

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

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**CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE G.M. OKELLO, JA
HON. JUSTICE A.E. MPAGI BAHIGEINE, JA
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.K. BYAMUGISHA, JA**

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CONSTITUTIONAL PETITION NO.2/2006

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NSIMBE HOLDINGS LTD.....PETITIONER

V E R S U S

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**1. THE ATTORNEY GENERAL }
2. INSPECTOR GENERAL OF }...RESPONDENTS
GOVERNMENT**

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RULING OF THE COURT:

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The appellant filed this petition under article 137 of the Constitution of 1995 and the Constitutional Court (Petitions and References) Rules 2005 No.91. The three parties to the petition met in this court on 12th September 2007 before the Registrar and signed the following memorandum which contains the gist of agreed facts of the petition and the issues to be determined by the court:-

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“JOINT CONFERENCING MEMORANDUM

AGREED FACTS

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1. The petitioner in a Joint Venture Company (JVC) between Mugoya Estates Ltd and Premier Development Ltd established with the major objective of developing the Nsimbe Estate Housing Project as a model project of planned housing scheme in Uganda.

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2. In 2005, the Inspectorate of Government conducted an investigation into allegations of corruption and mismanagement on the part of some of the officials of the National Social Security Fund (NSSF) and the other individuals who were involved in ‘conceptualising, authorising and implementing the joint venture.’
 - 10 3. In October 2005 the IGG submitted the report of her findings to H.E. the President of the Republic of Uganda.
 - 15 4. The petitioner is aggrieved by some of the findings of the report and petitioned this court.

15 **POINTS OF DISAGREEMENT FOR DETERMINATION BY COURT**

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1. Whether the petition discloses any issue for constitutional interpretation, and/or is misconceived, defective, incompetent, frivolous and vexatious;
 - 20 2. Whether section 21 of the Inspectorate of Government Act No.5 of 2002 is inconsistent with articles 20(2), 28(1) and 44(c) of the 1995 Constitution to the extent to which it ousts the jurisdiction of court to challenge, review, quash or call in question the proceedings, findings, recommendations, investigations or inquiries by the office of the Inspector General of Government.
 - 25 3. Whether section 21 of the Inspectorate of Government Act No.5 of 2002 is inconsistent with articles 20(2) and 42 of the 1995 Constitution to the extent to which it denies any person who is aggrieved by the proceedings, findings, recommendations, investigations or inquiries by the office of the IGG the right to challenge or question the same before a court of law.
 - 30 4. Whether section 34(2)(b) of the Leadership Code Act No. 17 of 2002 is inconsistent with articles 20(2) and 42 of the 1995 Constitution.
 - 35 5. Whether the appointment of Justice Faith Mwendha, a sitting judge of the High Court, as the IGG, contravened articles 128(1), (2) & (3), 129 144, 139, (2), (3) & (4), 126(1), 223(4), 227 and 231 of the Constitution.
 - 40 6. Whether the act of the IGG in making her impugned report based on documents including “anonymous documents”, the purported correspondence, minutes of NSSF Board Committee Meetings, NSSF Board Papers, Agreements, Bank Statements, Memoranda and Articles of Association and Land title deeds is inconsistent with article 45 20(2), 28(1), 42 & 44 (c) & 225(1)(a) of the Constitution.
 7. Whether the IGG’S action of freezing of the petitioner’s Stanbic Bank accounts number 014/00/036481/01 and 014/00/036481/02 held with

Stanbic Bank Garden City Branch was inconsistent with articles 26(1) & (2), 27(2) and 40(2) of the Constitution.

8. Remedies.”

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The petition was then fixed for hearing for 13th September 2007.

When the petition come up for hearing, Mr. Vincent Kasujja, learned counsel who appeared for the 2nd respondent, namely the Inspector General of Government [IGG], applied to raise
10 four oral preliminary objections against the validity of the petition. We will hereunder outline the gist of each objection and the reply to it from counsel for the petitioner, Mr. Muzamiru Kibedi. Mr. Henry Oluka, a Senior State Attorney of the first respondent concurred in the preliminary objections raised and did not wish to add thereto.

15 OBJECTION NO.1:

Mr. Kasujja submitted that the petitioner had no locus standi to file this petition. He contended that the petitioner was incorporated contrary to the provisions of section 28(1) of the Companies Act (Cap.110). He pointed out that the company was a result of a joint
20 venture agreement between Premier Developments Ltd and Mugoya Estates Ltd. Premier Developments Ltd was itself owned by the National Social Security Fund (NSSF) which is a body corporate under an Act of Parliament (Cap.301). He argued that section 28 of the Companies Act prohibited a body corporate, like NSSF, to be a member of such a company (Nsimbe Holdings Ltd). Section 29(1)(b) of the Companies Act limited the membership of a
25 private company to 50 excluding members who are in the employment of the company or were formerly employed by the company. He contended that the formation of Nsimbe Holdings Ltd was right from incorporation in contravention of sections 28 and 29 of the Companies Act and therefore void abnatio. He gave an illustration that Mr. Onegi Obel who was the Chairman of NSSF was also the Chairman of Nsimbe Holdings Ltd. In his view, if
30 the membership of NSSF in Nsimbe Holdings Ltd was found to be irregular, that would only leave Mugoya Estates Ltd as the sole shareholder in Nsimbe Holdings Ltd which in his view would contravene section 29 of the Companies Act.

In reply, Mr. Kibedi submitted that the petitioner was a duly incorporated company. It has a Certificate of incorporation issued under the Companies Act. Section 16(1) of the Act
35 provides that a Certificate of Incorporation was sufficient evidence that all requirements prior

to incorporation had been compiled with. In his view, the petitioner existed in law and is competent to bring the petition in court.

OBJECTION NO.2.

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Mr. Kasujja contended that there was no company resolution authorising the petitioner to file this petition in court. He relied on the cases of **Makerere Properties vs M. R. Karia HCCS No.32 of 1994** [1995] 3KLR 25 and **Bugerere Coffee Growers vs Sebaduka & Anor [1970] E.A. 147** for his submission that a suit instituted by a company without authority of the
10 directors is not maintainable.

In reply, Mr. Kibedi submitted that the decisions of court relied upon by the respondent have been overruled by the Court of Appeal and the present position was that any director could authorise the filing of the suit. In his view, since Mr. Onegi Obel, the chairman and a director
15 of the petitioner had authorised the filing of the petitioner, that constituted sufficient authority.

OBJECTION NO.3:

20 Mr. Kasujja submitted that the petition was originated under a revoked law namely Legal Notice No.4 of 1996 which was revoked by rule 24 of the Constitutional Court (Rules and References) Rules 2005. In his view, the petition was a nullity.

Mr. Kibedi's reply was that when he first filed the petition he was not aware that the law had been repealed. However, he amended the petition as soon as he learnt of the repeal and the
25 petition was now in order. He submitted further that since the petition was said to be filed under article 137 of the Constitution which was valid, the original filing under the repealed Legal Notice was a minor irregularity which is not fatal to the whole petition. As to amendment to the petition, Mr. Kasujja observed that it was done without leave of court and therefore invalid.

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OBJECTION NO.4:

The last objection raised by Mr. Kasujja is that some of the prayers in the petition are for prerogative writs like injunctions and mandamus which only the High Court has jurisdiction to grant. In reply, Mr. Kibedi submitted that as long as this court found that the petition was correctly filed, then it had power under article 137 of the Constitution to grant any remedy it deemed appropriate, including prerogative writs where applicable.

Mr. Kasujja's prayer was that for reasons given above, we should hold that the petition was invalid and declare it null and void, strike it out as incompetent with costs to the respondents. On the other hand Mr. Kibedi asked us to dismiss all the preliminary objections as frivolous and non-consequential with costs to the petitioner and order that the petition proceeds.

RESOLUTION OF PRELIMINARY OBJECTIONS:

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OBJECTION NO.1:

Mr. Kasujja, learned counsel for the 2nd respondent, the IGG, challenges the legal existence of the appellant on the grounds that the appellant was incorporated in contravention of sections 28 and 29 of the Companies Act. Section 28(1) of the Act provides:-

"28. Membership of a holding company

(1) **Except in the cases hereafter in this section mentioned, a body corporate cannot be a member of a company which is its holding company, and any allotment or transfer of shares in a company to its subsidiary shall be void."**

Let us now apply the provisions of this section to the instant case. It was common ground that the National Social Security Fund floated a company called Premier Developments Ltd. This latter company is a subsidiary of the NSSF. It was formed as a special purpose vehicle purposely to enter into a Joint Venture with a private company called Mugoya Estates Ltd (MEL). As we understand section 28(1) of the Companies Act, it prohibits Premier Developments Ltd (PDL) from becoming a member of its holding company, which is NSSF in this case. It prohibits the holding company, NSSF, from transferring any shares to the

subsidiary company Premier Developments Ltd (PDL). This scenario does not exist in the instant case. Premier Developments Ltd does not own any shares in NSSF nor has NSSF transferred any shares to Premier Developments Ltd. Up to that stage the formation of Premier Developments Ltd was in order.

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But, the matter does not end there. Mr. Kasujja submitted that the formation of Nsimbe Holdings Ltd the petitioner in this case, was in contravention of the said section 28 of the Companies Act. Nsimbe Holdings Ltd (NHL) is a result of a merger between Premier Developments Ltd and Mugoya Estates Ltd. The merger agreement gave Mugoya Estates Ltd 51% of the shares of Nsimbe Holdings Ltd and 49% to Premier Developments Ltd. To us, we do not think that Nsimbe Holdings Ltd is a subsidiary of NSSF because through Premier Developments Ltd, NSSF holds minority shares in Nsimbe Holdings Ltd. Nsimbe Holdings Ltd is totally a private company in which Mugoya Estates Ltd, another private company, holding majority shares. Nsimbe Holdings Ltd does not own any shares in NSSF nor has NSSF made any transfer of its shares to Nsimbe Holdings Ltd. In our opinion section 28(1) of the Companies Act does not apply to the arrangements between NSSF and Nsimbe Holdings Ltd.

Mr. Kasujja submitted that section 29 of the Companies Act requires that a private company be owned by at least two people and its membership should be limited to fifty

“not including persons who are in employment of the company and persons who, having been formerly in the employment of the company, were, while in that employment, and have continued after the determination of that employment to be, members of the company.”

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In his view, if one knocks out NSSF from Nsimbe Holdings Ltd membership, then Nsimbe Holdings Ltd would remain with Mugoya Estates Ltd as its only member contrary to the provisions of section 29 of the Act.

We think it is now necessary to examine how Nsimbe Holdings Ltd came into existence. When Nsimbe Holdings Ltd (NHL) started operations, a lot of outcry was raised which led the Minister of Finance to ask the Auditor General to audit the firm. His findings are contained in his report which is annexed to the affidavit of Mr. Onega Obel Geoffrey in

support of the petition. In the Executive Summary of the report, the Auditor General gives the following brief background of Nsimbe Holdings Ltd.

5 **“Nsimbe Holdings Limited (NHL) was the joint venture company that was formed between NSSF (through its 100% shareholding in Premier Development Limited), and Mugoya Estates Limited (MEL). The shareholding in NHL was 49% and 51% respectively. Premier Development (PDL) which was 100% subsidiary company of NSSF was principally formed as a special purpose vehicle to invest in the joint venture, in order to shield the parent company from possible litigation. MEL contributed its land into the joint venture purportedly valued at shs.8.545 billion, which was agreed to represent its 51% shareholding in NHL; whilst PDL’s 49% contribution of shs.8.2 billion was in cash, as a direct transfer from NSSF. The principal and fundamental decisions undertaken in the meeting on Tuesday 13 April 2004 between management of NSSF and Mugoya Estates Ltd (MEL) set out the guiding framework on which the activities of NHL would be determined.”**

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When this report was brought to the attention of H.E. The President of Uganda, he ordered an investigation by IGG into the allegations of mismanagement of NSSF in general and the joint venture between Mugoya Estates Limited and Premier Developments Limited for development of Nsimbe Estate Housing Project, in particular. The IGG submitted her report to the President in October 2005 containing very critical findings of corruption against the management of NSSF committed during the process of forming Nsimbe Holdings Limited. It is that report that is being challenged in this petition. The report is also annexed to the affidavit of Mr. Onegi Obel Geoffrey dated 10th September 2007.

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In her report to the President, the IGG made the following findings, which are relevant to the question whether Nsimbe Holdings is an illegal company or not:

- 30 **“(i) The formation of Premier Development Ltd was irregular as it was done without the authorization of Government (through cabinet);**
- 35 **(ii) It was irregular for the then Minister responsible for Labour to sanction the establishment of the company [Premier Developments] without cabinet sanction and legal counsel from the Attorney General;**
- 40 **(iii) It was irregular for the Minister to approve the formation of the joint venture between Mugoya Construction Ltd and Premier Developments Ltd without referring the Joint Venture agreement to the Attorney General contrary to the provisions of article 119 of the Constitution;**

- 5
- (iv) **Premier Developments was operating with membership below the legal minimum required by sections 3 and 29(1) of the Companies Act;**
- (v) **The legal fees paid for the floating and incorporation of the company were unproportional and avoidable;**
- 10 (vi) **The Joint Venture was a mis-procurement, not in accordance with the provisions of the Public Procurement and Disposal of Public Assets Act;**
- (vii) **The operationalization of the Joint Venture was fraught with conflict of interest.”**
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H.E. The President then directed the Attorney General to write a legal opinion on the findings of the IGG. The legal opinion of the Attorney General to H.E. The President is annexed to Mr. Onegi Obel’s affidavit (supra). Commenting on whether the formation of Premier Developments Limited was in violation of section 29(1) of the Companies Act, the Attorney

20 General advised that it was not and that the Premier Developments Limited was properly constituted with two shareholders, namely NSSF with 9,999 shares and Mr. Onegi Obel with 1 share. We agree with this opinion of the Attorney General that the formation of Premier Developments Limited was not in contravention of section 29 of the Companies Act. But the formation of Nsimbe Holdings Ltd is quite another story.

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Commenting on the IGG’s findings that NSSF failed to obtain advice from the Attorney General for the joint venture, the learned Attorney General opined:-

30 **“Indeed article 119(5) of the Constitution provides that no agreement, contract, treaty, convention or document by whatever name called to which the government is a party or in respect of which government has an interest, shall be concluded without the legal advice from the Attorney General.**

35 **It would appear from the above provision that the advice of the Attorney General is mandatory in contracts in which government has an interest. Since NSSF is a Government body, Government had an interest in the joint venture between Premier Developments Ltd and Mugoya Construction Ltd. Accordingly, the IGG is correct in contending that the**

40 **NSSF Board of management should have submitted the joint venture agreement to the Attorney General for legal advice.**

5 It is unconstitutional to proceed without the legal advice of the Attorney
General where the Government of Uganda is a party to an agreement.
Among other things, it is part of business and diplomatic prudence that
10 article 119 be complied with. However, the consequences for the
transaction or agreement of the absence of legal clearance by the
Attorney General have not been specified anywhere. This is a major
lacuna (gap) which needs urgent rectification. There are clear and grave
consequences for an individual public officer who after swearing to
uphold the Constitution omits or fails to comply with article 119 in the
15 course of his or her official work. The same consequences cannot
legitimately be transferred by implication, to the transaction. The failure
or omission to obtain the legal advice of the Attorney General is a serious
breach of the operational code. But in the absence of an express legal
provision to that effect, this failure to obtain advice alone does not vitiate
the subject contract. In the particular instance, account must be taken of
the fact that the other contracting party is private or non-governmental.”

We shall comment on this opinion shortly. However, it is quite clear that whether Nsimbe
Holdings Ltd is a legal entity or not is a moot question. NSSF is a public company
20 established by statute and wholly controlled by the Government of Uganda on behalf of the
workers of this country who are the beneficiaries. It was quite proper for the NSSF to form a
subsidiary called Premier Developments Ltd. However, the manner in which Premier
Developments Limited merged with Mugoya Estates Limited raises a number of questions:

- 25 (a) Mr. Onegi Obel was the Chairman NSSF, a member of Premier Developments
Limited and the Chairman Nsimbe Holdings Ltd. The first two companies are public
companies and the third a private company in which the interest of the NSSF are in
minority. Was it legal for NSSF to pass on public funds to a joint venture in which
NSSF had a minority holding thus putting the funds beyond the control of the Auditor
30 General and Parliament? Article 164(3) states:-

“Parliament shall monitor all expenditure of public funds.”

35 In our considered view, the moment Premier Developments Limited agreed to hold
minority shareholding in Nsimbe Holdings Ltd, the transaction put public funds held
by NSSF at risk and beyond the control of the Auditor General and Parliament in
contravention of article 164(3) of the Constitution. Such a transaction should not
have been proceeded without advice of the Attorney General in accordance with
article 119(5) of the Constitution.

(b) We do agree with the opinion of the Attorney General that it was unconstitutional for the NSSF to enter into a merger agreement with Mugoya Estates Ltd without submitting such an agreement to the Attorney General for legal advice. However, we cannot agree with him that:-

“the consequences of the transaction or agreement of the absence of legal Clearance by the Attorney General have not been specified anywhere [that] this is a lacuna (gap) which needs urgent ratification.” Further on the Attorney General stated:-

“Failure or omission to obtain the legal advice of the Attorney General is a serious breach of the operational Code. But in absence of an express legal provision to that effect, this failure to obtain legal advice alone does not vitiate the subject contract.”

With respect to the learned Attorney General, we are of the view that he failed to appreciate the consequences of a constitutional violation. He ought to have known that under article 2 of the Constitution, any law or act that contravenes the Constitution is void to the extent of the contravention. In our judgment, the merger agreement was in contravention of articles 164(3) and 119(5) of the Constitution. The agreement was null and void. The consequence of this holding is that the agreements leading to the formation of Nsimbe Holdings Limited were unconstitutional and therefore the company does not exist in law. It is a non-entity which cannot sue or be sued. Consequently this petition is incompetent. On this ground alone, the preliminary objection succeeds.

The other consequence of this holding is that the other three preliminary objections do not arise as there is no petition properly before us. We must state for the record that had we not upheld the first preliminary objection, we were inclined to reject the other three preliminary objections, for reasons given by Mr. Muzamuri Kibedi on behalf of the petitioner. Since Nsimbe Holdings Ltd does not exist, it cannot be ordered to pay costs.

Dated at Kampala this6thday of ...November.. 2007.

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Hon. Justice L.E.M. Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE

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Hon. Justice G.M. Okello
JUSTICE OF APPEAL

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Hon. Justice A.E. Mpagi Bahigeine
JUSTICE OF APPEAL

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Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL

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Hon. Justice C.K. Byamugisha
JUSTICE OF APPEAL

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