THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 65 OF 2007

(arising out of HCCS No. 431 of 2006)

INSPECTORATE OF GOVERNMENT **:::::::::: APPLICANT**

VERSUS

GORDON SENTIBA & 2 OTHERS :::::::: 1ST RESPONDENT

ATTORNEY GENERAL :::::::::::::::::: 2ND RESPONDENT

BEFORE: HON. AG. JUDGE REMMY K. KASULE

RULING

The applicant seeks orders that this Court reviews and sets aside the consent Judgment in H.C.C.S No. 431 of 2006, dated 29.12.06 and filed in Court on 02.01.07 by reason of the manner in which the consent Judgment was entered by the parties in total disregard to the instructions from Ministry of Finance, Planning and Economic Development.

The application is premised on several grounds. First that the first Respondents do not represent all the non Government minority share holders of Nyanza Textiles Ltd that ought to be compensated under the contested consent Judgment. Second, that the second Respondent failed to take remedial action when irregularities in the consent judgment were brought to his attention. Third, that the said irregularities necessitate further thorough investigations on the part of the applicant; and fourth, that the irregularities are likely to cause irreparable loss to Government.

The application is supported by the affidavits of Lady Justice Faith Mwondha, the Inspector General of Government and Dr. Ezra Suruma, the Hon. Minister of Finance, Planning and Economic Development.

In opposition to the Application Mr. Gordon Sentiba, one of the first Respondents deponed to an affidavit. So too did Mr. Henry Oluka, a senior State Attorney of the second Respondent.

Each of the Respondent's affidavits in reply was rebutted by another affidavit deponed to by Lady Justice Faith Mwondha.

The background to the application is that Nyanza Textiles Industries Limited (NYTIL) incorporated in Uganda in 1949, by British shareholders to produce textiles, was nationalised by Government in 1973. Government Parastatals acquired 99% of the shares. The 1% of shares was subscribed to by non-government shareholders.

In 1993, there was a Government policy about turn. The same company was offered by Government for privatisation.

On 30.10.95, Picfare Industries purchased the Company by private treaty for US$ 10 million. Payment of purchase price was to be, over time, in cash and issuance of guaranteed redeemable preference shares. In particular, the non government shareholders were to be paid US$ 3 million contributed by accumulated pre-tax profits after a period of four (4) years. As a guarantee of this, a redeemable preference share, guaranteed by National Insurance Corporation, was issued.

Unfortunately Picfare Industries went into receivership before completing payment for the purchase. In September 2000, Southern Range Company Limited bought, at a discount, the debt Picfare Industries was owing the lender. The Uganda Government, accepted at Ug: Shs.1000/=, for the purchase of all debts owed to it by NYTIL.

With regard to compensation of the non-government Share holders, when, after the expiry of the four (4) years, the preference share guaranteeing payment of their US$ 3 million, matured, government did not collect payment from the guarantor. Instead, Government wrote off the unpaid purchase price, part of which was to compensate the non-government shareholders, in exchange for the stated token payment of Ug.Shs.1000/=.

The non-government shareholders were and remained not paid.

Through Miscellaneous Application No. 95 of 2006, this Court, on 24.05.06 granted to the first Respondents leave to file a representative suit on behalf of non-government shareholders seeking compensation from the second Respondent..

On 13.07.06 the suit: H.C.C.S No. 431 of 2006 was filed. The Government represented by the second Respondent filed a defence denying the claims.

Correspondence was exchanged between the Attorney General's Chambers and the Ministry of Finance and other concerned Departments of Government about the merits of the defence to the suit.

On 19.12.06 the Attorney General's Chambers called for a meeting of stakeholders in the case at its premises. The first Respondents and their Counsel, as well as the Ag. Director, Civil Litigation, Ministry of Justice and a representative of Privatisation Unit attended the meeting. The Ag. Director, Civil Litigation, informed the meeting that Government had decided to settle the case out of Court.

Thereafter the meeting considered several scenarios of settlement proposals, but did not agree on any particular one.

The meeting was adjourned for about a week so that the Ministry of Finance, Planning and Economic Development, considers and approves a settlement proposal.

On 29.12.06, a consent judgment was executed between the first and second Respondents in the suit. The same was signed and sealed by the Court Registrar, on 02.01.07. Following the settlement, the Solicitor General wrote to Minister of State for Finance (Privatisation) bringing to his attention the result of the negotiated settlement, the consent Judgment thereof, and requested him to expeditiously pay the decretal sum to the first Respondents as Plaintiffs/Decree holders. The letter is mistakenly dated "3rd January 2006", instead of 2007.

The first Respondents, in the meanwhile commenced Garnishee Proceedings and on 15.01.07, Garnishee Order Nisi was issued by Court, attaching funds of the Divestiture Account with Stanbic Bank, Kampala.

The Minister of Finance, Planning and Economic Development, contending he did not approve the settlement, complained to the Applicant; who in turn, lodged this application.

Learned Counsel Ebert Byenkya assisted by Oscar Kihika for the first Respondents and Joseph Matsiko, Ag. Director, Civil Litigation, for the second Respondent, have by way of preliminary objection, submitted that the application is incompetent in law and ought to be dismissed. They have advanced three grounds for the preliminary objection.

The first ground is that Section 19 (1) (a) and (c) of the Inspectorate of Government Act expressly bars the applicant from questioning or reviewing a decision of any Court of law or any civil matter which is before Court at the commencement of the Inspectorate's investigations. For the Court to allow the applicant to question or review the consent Judgment, Garnishee Order and Representative Order, all relating to H.C.C.S No. 431 of 2006, is to condone a nullity. The Court ought not to do that.

The second ground is that the applicant has no locus to present the application as she is not an aggrieved party of the Judgment or any of the orders made in H.C.C.S No. 431 of 2006. She has suffered no legal grievance.

Further, the applicant cannot purport to represent any Government entity in the matter, because the Constitution and the Government Proceedings Act vest such representation in only the second Respondent.

Lastly as a third ground, it is submitted that the Application is incompetent as the affidavits supporting it are incurably defective.

Mr. Kasuja, Counsel for the applicant, submitted in reply that the four grounds have no merit. He maintained that the Application was competent and should be determined on its merits.

Court will resolve each ground in the order submitted.

As to the first ground, Section 19(1) (a) and (c) of the Inspectorate of Government Act 5/02 provides that:-

> 19 **(1) The Inspectorate shall not have power to question or review any of the following matters --------**
>
> (a) **the decision of any Court of law or of any judicial officer in the exercise of his or her judicial functions;**
>
> (b) **----------**
>
> (c) **any civil matter which is before Court at the commencement of the Inspectorate's investigations."**

The intent of the above provisions is to preserve the independence of the Judiciary; and to ensure that the operations of the Inspectorate are not above, but are subject to the jurisdiction of the Courts of Judicature.

It is however, in the considered view of Court, to misinterpret those provisions, if they are taken to mean that the Inspectorate, in appropriate cases, is barred by law from moving Court for the Court itself, and not the Inspectorate, to review its own decision. It has to be appreciated that in such a case, it is not the Inspectorate questioning or reviewing the decision of Court. It is the Court itself reviewing its decision. The Inspectorate just adduces evidence to Court and the Court decides, on the basis of the evidence adduced and the law, whether to review its decision or not. Would, for example, the Inspectorate be barred by Section 19 (1) (a) and (c) to move Court to review by setting aside or otherwise, a consent judgment, in a running down case purportedly involving a Government owned Motor-vehicle, executed and filed in Court, benefiting a Plaintiff who, from the facts the Inspectorate obtains, subsequent to the execution and filing in Court of a consent Judgment, was never a victim of the traffic accident but a cheat?

Court is of the considered view, that the Inspectorate would not be barred by law from moving Court for the Court to review such a consent judgment.

This is the more so because the law is now settled that the Inspector-General of Government has capacity to sue or to be sued: See **Constitutional Court Constitution Application No. 13 of 2006: Inspector General of Government Vs. Kikonda Butema Farm Ltd and Attorney General,** when the Constitutional Court held:-

"**We think that there are legal provisions in the Constitution that set up the Inspectorate of Government and the Act that operationalised those provisions that indicate to us that the applicant has capacity to sue and be sued."**

The considered view of Court is that when the Applicant moves Court to review the consent judgment or any Court decision, it is not the applicant carrying out the review or questioning, but rather the Court itself. The Court, depending on the evidence and the law before it, may refuse or allow to review such a decision. The applicant can only be said to question or to review a Court decision if, on her own, without resorting to Court, she interferes with the enforcement and implementation of that Court decision. This is not what the applicant has done in this case. Accordingly there is no illegality being condoned.

At any rate Court can only decide whether or not the applicant has valid grounds in law for the Court to review its own decision, only after hearing the applicant on the substantive Application, and not before.

Therefore the objection based on Section 19 (1) (a) and (c) of the Inspectorate of Government Act No.5 of 2002 is disallowed.

The second ground of objection is that the applicant has no locus in matters of H.C.C.S No. 431 of 2006. She is not a party to the suit. She has no powers in law to represent any Government Ministry.

Court notes that applicant is a creature of the 1995 Constitution, Chapter 13 thereof, and the Inspectorate of Government Act No. 5 of 2002.

The Inspectorate of Government is a new feature in the governance of the country, first introduced by the NRM Government for the main purposes of ensuring strict adherence to the rule of law and principles of natural justice in administration as well as the elimination of corruption, abuse of authority and of public office, amongst others. See Article 225 of the Constitution and Section 8 of the Inspectorate of Government Act 5 of 2002.

The jurisdiction of the Inspectorate embraces officers or leaders, whether employed in Public Service or not, (Article 226), and range from those serving in Government, Cabinet, Parliament, Judiciary, Disciplined Forces, Local governments, Government aided schools and Institutions to any one administering public funds on behalf of the public. (Section 9 of Act.).

In carrying out its duties the Inspectorate is independent: Article 227 of the Constitution: and Section 10 of Act. Of this Article and Section the Constitutional Court has held in **Constitutional Application No.13 of 2006**: **Inspector General of Government Vs. Kikonda Butema Farm Ltd & Attorney General (**Supra) that:-

> "**The first most important provision in the Constitution and the Act are Article 227 (supra) and Section 10 of the Act that guarantees the independence of the inspectorate in the performance of its functions. It is not subject to direction or to control of any person or authority. It is only responsible to parliament. It is therefore independent of all Government departments and agencies including the office of the Attorney General. This means as we understand it, that the Inspectorate and the Inspector General of Government in particular must own its/her decisions and have the capacity to defend those decisions in any form, including Courts of law, if necessary."**

It follows from the above authority that the Inspectorate of Government can pursue and defend her decisions independent of the Attorney General, Article 119 of the Constitution notwithstanding. The rationale for this has been given by the **Constitutional Court in Constitutional Petition No. 1 of 2006: Kabagambe Asol & 2 others Vs. The Electoral Commission & Dr. Kiiza Besigye**; (unreported): The Court stated:-

"First, we do not accept that the Electoral Commission is subject to the "direction or control" of the Attorney General or any other authority. It is an independent public institution subject to some other provisions of the Constitution. Article 119 of the Constitution is not one of them. There are other provisions, for example relating to powers of the Judiciary and the legislature to which Article 62 of the Constitution is subject. The 1995 Constitution created many other independent Institutions e.g. the Human Rights Commission, the Judicial Service Commission, the Public Service Commission etc …….. which can be advised by the Attorney General but are not bound to follow his advice. It would indeed be absurd if Article 119 of the Constitution was construed to mean that the Courts of law of this Country, which are the third arm of the state, are bound by the advice of the Attorney General."

This Court observes that amongst the new independent Institutions created in the 1995 Constitution is the Inspectorate of Government/Inspector General of Government.

Disregarding the advice of the Attorney General, while possible and permissible, should however, not be a matter of course and should be resorted to where it is only necessary to do so.

The **Supreme Court has held in Civil Appeal No. 1 of 2001 Bank of Uganda Vs. Banco Arabe Espanol, unreported: Lead Judgment of Kanyeihamba, JSC:**
"In my view, the opinion of the Attorney General as authenticated by his own hand and signature regarding laws of Uganda and their effect or binding nature on any agreement, contract or other legal transaction should be accorded the highest respect by government and public institutions and their agents. -------- ---------- It is also my view that it is improper and untenable for the Government, the Bank of Uganda or any other public institution or body in which the Government of Uganda has an interest, to question the correctness or validity of that opinion in so far as it affects the rights and interests of third parties."

The Court's appreciation of the law: Article 119 (3) and (4) of the Constitution, Section 10 of the Government Proceedings Act, Cap 77 and the above referred to Court decisions is that independent state bodies created under the Constitution, may, in order to preserve their independence, pursue matters independent of the Attorney General. However, where the Attorney General has given a legal opinion, as Government Advisor, such opinion should be regarded as weighty and given due respect; particularly if third parties have acted upon it.

Given the peculiar facts of this Application where the applicant appears to be moving Court to review the Consent Judgment on the basis of the conduct of the officers of the Attorney General's Chambers/Ministry of Justice & Constitutional Affairs themselves, it is not practicable that the applicant would rely upon the advice, let alone the representation of the Attorney General.

It remains to be decided whether the applicant is an aggrieved party.

The applicant has moved Court first Under Order 9 Rule 12 which empowers Court to set aside a judgment entered by the Registrar under order 50 of the Rules. It is also made under Order 46 Rules 1 and 2 and Section 82 which provide for Review.

In **Ladak Abdullah Mohamed Hussein versus Griffiths Isingoma Kakiiza & 2 others, the Supreme Court,** Odoki J.S.C, as he then was, held with regard to Order 9 Rule 9, now Rule 12, that:-

"Order 9 Rule 9 is therefore not restricted to setting aside ex-parte judgments, but covers consent Judgment entered by the registrar. It gives the Court unfettered discretion to set aside or vary such judgments upon such terms as may be just. See *Mbogo Vs. Shah (1968) EA 93.* Nor is it restricted to parties to the suit but includes any person who has a direct interest in the matter, who has been injuriously affected: See *Jacques Vs. Harrison (1883-4) 12 AC165, Employers Liability Assurance Corporation Ltd Vs. Sedgwick Collins and Company Ltd (1927) AC 95.* The Supreme Court practice, 1988, P. 129."

The Applicant has asserted that the first Respondents are not representative of all those non-Government Shareholders entitled to compensation; and that Government is likely to suffer loss if those left out re-surfaced later on and sue the Government in future. To the applicant this would amount to corruption. As one constitutionally mandated to eliminate corruption in public offices, applicant prays Court to be heard on merit, as to the appropriateness of the consent Judgment, whether it is tainted with corruption, abuse of power or not.

The Court, in the exercise of its discretion holds that the applicant has, at this level of the proceedings put forward sufficient averments for her to have shown locus in the matter: namely to prevent corruption and possible future loss to Government. It is a constitutional and statutory duty she has to perform. She should therefore be heard on merit in the substantive Application.

As to review, in both Section 82 and Order 46 Rules 1 and 2, in Order for a person to have locus standi to bring application for review, that person must be, "a person considering him or herself aggrieved: meaning one who has suffered a legal grievance: See **Yusuf V. Nokrach (1971) EA 104,**

In Re Nakivubo Chemists (U) Ltd (1971) HCB 12.

and

Supreme Court of Uganda Civil Appeal No. 8 of 1995 Ladak Abdulla Mohamed Hussein Vs. Griffiths Isingoma Kakiiza & 2 others (Supra).

Court has already held that the applicant has established sufficient locus standi to bring the application. It follows therefore that the substantive Application be determined on its own merits.

The third ground of objection is that the application is incompetent by reason of being accompanied by defective affidavits.

The affidavit of Lady Faith Mwondha is said to be defective because it does not disclose in the Jurat the place where it was deponed to. The affidavit of Dr. Ezra Suruma, is said to be incompetent because it is drawn by Ministry of Finance, Planning and Economic Development, Kampala, and not by the Attorney General who in law is mandated to represent the Ministry of Finance, as a component of Government.

Section 6 of the Oaths Act, Cap.19, requires the Commissioner for oaths to state truly in the jurat or attestation at what place, on what date the oath or affidavit is taken or made. There is no place stated in the jurat of the affidavit of Lady Justice Mwondha in her affidavit of 14th February 2007.

But there are sufficient particulars in the body of the affidavit for one to conclude it was made and attested to in Kampala. The first sentence of the affidavit is:-

I, Lady Justice Faith Mwondha of P.O. Box 1682, Kampala, do solemnly swear and state on oath as follows:-

2. **"That I am the Inspector General of Government and depone to these facts in that capacity."**

At the bottom of the affidavit there is a stamp of the Commissioner for oaths Jackie Okot, P.O.Box 27310, Kampala. Then the affidavit is shown to have been drawn at:
Inspectorate of Government
Jubilee Insurance Centre Building
P.O.Box 1682
Kampala.

Court observes that the oaths Act does not provide for any penalty for non compliance with Section 6 thereof.

It is also appreciated that Lady Justice Faith Mwondha, filed on record two other affidavits in rebuttal dated 22nd and 27th February 2007 which are comprehensive and comply with the law.

Court finds that the omission to state the place where the affidavit of 14th February 2007 was deponed is cured by the general body of the affidavit where it can be inferred that it was deponed to at "Kampala".

At any rate given the fact that two other affidavits in rebuttal were deponed to and filed by the same person, no miscarriage of justice has been caused. The two affidavits in rebuttal have sufficient averments to maintain the applicant's case.

This is also a case where Court is enjoined to administer substantive justice without undue regard to technicalities: Article 126 (2) (e) of the Constitution.
Court therefore holds the omission of the place where the oath to the affidavit was administered not fatal.

As to the affidavit of Dr. Ezra Suruma, the Evidence Act, places the burden of proving that the affidavit of Mr. Suruma was not drawn by an authorised qualified person, upon the Respondents: See Sections 101-103 Evidence Act Cap.6. No attempt was made at all to discharge that burden by the Respondents. There is no basis for Court to conclude that an affidavit by, of or from Ministry of Finance, Planning and Economic Development must be incompetent by reason of that fact alone. The objection to this affidavit has no merit.

The preliminary objections to the Application are overruled. It is ordered that the substantive application be heard and decided on its own merits.

The applicant shall have the costs of this preliminary objection.

Remmy K. Kasule
Ag. Judge
16th March 2007