

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISC CAUSE NO. 303 OF 2013**

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

1. OJANGOLE PATRICIA
2. ANDREW MULUBYA
3. DANIEL KAGWA
4. DR. SAMUEL SEJAKA
5. UGANDA DEVELOPMENT BANK

:..... **APPLICANTS**

VERSUS

ATTORNEY GENERAL :..... **RESPONDENT**

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

The five applicants to wit; Patricia Ojangole, Andrew Mulubya, Daniel Kagwa, Dr. Samuel Sejjaka and Uganda Development Bank Limited through their lawyers M/s Ligomarc Advocates filed this application for Judicial Review by way of Notice of Motion under Articles 28, 42, 44 & 50 of the Constitution, S. 38 of Judicature Act, S. 98 of the Civil Procedure Act and rules 3(2) and 6 of Judicature (Judicial Review) Rules 2009 moving this court for orders declaring that:-

1.

- (i) The Inspector of Government (IGG) misused its discretionary powers when it directed the 5th applicant's Board of Directors, whose Chairman is the 4th applicant to suspend the 1st, 2nd and 3rd applicant from their positions as employees of the 5th applicant.

- (ii) The IGG acted illegally, high handedly, irrationally and unreasonably when it directed the 5th applicants Board of Directors to suspend the 1st, 2nd, and 3rd applicants from their employment with the 5th applicant without affording them a fair hearing.

The applicants further sought for orders of this court issuing:-

(2) An order of Certiorari to move to this court to set aside, quash the IGG directive issued on 30th July 2013 directing the 4th applicant to suspend the 1st, 2nd and 3rd applicant from their employment with the 5th applicant.

(3) An injunction restraining the IGG or any of the respondent's agents from making any further orders directives for the interdiction suspension, termination or removal by any other means the 1st to the 4th applicant from their respective employment and positions with the 5th applicant on the premise of the impugned investigation.

(4) An order awarding general damages to the applicants for the anguish inconvenience, injury, suffered to the 5th applicant's business and the good will due to the respondent's illegal actions against the applicants.

The grounds of the application are that:-

- i) The investigations conducted by the IGG out of which the impugned directives has been made were conducted in an oppressive, irrational, vindictive and biased manner.
- ii) The IGG's directive to suspend the entire Senior Management team of a financial institution will result in significant disruption of the Bank's operations.

- iii) The implementation of the IGG's directive does not serve the general interest of the public.

Finally the applicants prayed for an award of costs occasioned by this litigation.

The Notice of Motion is supported by the affidavit of the 4th applicant Dr. Samuel Sejjaka the Chairman Board of Directors of the 5th applicant. The affidavit is a lengthy narrative of the functions of the applicant, the board and the administrative steps taken to streamline the operations of the 5th applicant. I will not reproduce the contents of this affidavit but suffice to mention that in paragraph 23 thereof, the 4th applicant deponed that he received summons to appear before the IGG officials to answer more defined queries relating to the alleged irregular termination of staff, illegal recruitment process of new management and an alleged irregular loan approval to Savannah commodities Ltd.

In paragraph 26, he depones that the IGG questioned other members of the board and members of staff with regard to the matters of the 5th applicant. That he was surprised when he received a call from the 1st applicant on 29th July 2013 informing him that she and the entire Senior Management team at the Bank had been arrested by the IGG for victimizing of a whistle blower. That it was the first time he was learning of the offence because the IGG inquiry was generally about the manner of termination of staff. Further that the 1st applicant informed him that the 2nd applicant had been made to hurriedly write statements immediately after arrest and arraigned before the Chief Magistrate's Court.

According to this deponent, the investigation by the IGG has been conducted in a high handed, biased and irrational manner, and her directives were unreasonable and irrational in as far as the 1st , 2nd and 3rd applicants constitute the 5th applicant's Management Committee mandate to execute its day to day managerial function and make decisions for the daily smooth running of the Bank.

Several annexures are attached to the affidavit in support including annexures A, B1, B2, BB, CB1, CB2, CB3, CB4, CB5, C1, C2, D1, D2, D4, E, F1, F1, F2, G, H, H2, H3, H4, I, J, L, M.

Another affidavit in support is that of the 1st applicant Patricia Adongo Ojangole the Chief Executive Officer of the 5th applicant. Hers is equally a lengthy narrative of the circumstances surrounding her complaint. She acknowledged being summoned by the IGG by telephone call to appear before Annet Twine and Kabbale John Bosco. She was interrogated in the presence of her lawyer Joshua Ogwal regarding allegations of termination, dismissal and intimidation of staff allegedly working professionally. That she was surprised to be arrested for victimizing a whistle blower instead called Charlotte Mucunguzi, the 5th applicant's former Principal Project Analyst whose services had been terminated after a senior Manager's meeting held on 24th January 2013. The 1st applicant's affidavit has a bundle of attachments from A to L respectively.

In this affidavit in support, Andrew Mulubya the 2nd applicant and Director of Management and Information Systems outlined how he was employed by the UDB and how disciplinary proceedings were conducted before he joined the Bank and why Ms Mucunguzi was terminated.

He further deponed that the Bank was raided by police and officials from the IGG who claimed to be conducting investigations about alleged wrongful termination of senior staff and other Bank officials and the decision relating to the relocation of office from Ruth Towers to Rwenzori Courts.

The second applicant further deponed that the allegation arose before he joined the Bank. That he was surprised when on 29th July 2013 officials from the IGG came to the Bank offices and placed him and the rest of senior management team under arrest for allegedly victimizing a whistleblower. That he was not aware that someone had blown the whistle

and that moment was the first time he was hearing about it. He believes that the IGG investigations were manipulated and conducted in a high handed, biased and irrational manner. That it was unreasonable and irrational since the 1st, 2nd and 3rd applicants constitute the 5th applicant's management committee mandated to execute its day to day managerial function and make decisions for the daily smooth running of the Bank. The 2nd applicant's affidavit is accompanied by several annexures comprised in A to J.

The respondent's affidavit in reply was deponed to by the Deputy IGG George Nathan Bamugemeirwe. According to him the IGG received three separate complaints against UDB alleging grand corruption abuse of office and bad governance. That the complaints further disclosed that the board of Directors:-

- (a) Illegally dismissed the Managing Director without following due process and compensation.
- (b) Illegally dismissed senior management team and other experienced staff in total breach of their employment contracts.
- (c) Illegally recruited a junior officer as Managing Director.
- (d) High jacked the roles of management including upraising loan applications.
- (e) Disregarded procurement laws and participated in illegal procurement
- (f) Illegally increased their remuneration.
- (g) Abused financial resources by meeting almost on a daily basis and claiming allowances; and
- (h) Dismissed, threatened and intimidated officers who tried to work professionally.

The Deputy IGG further deponed that they received a complaint against the board that suspected whistleblowers who gave information to the IGG office and the Director Criminal Intelligence Investigation Directorate were suspended thus contravening the provisions of the Whistleblower's Protection Act No. 6 of 2010 S. 16 thereof. That on 9th July 2013 the IGG caused the arrest and subsequent prosecution of the 1st, 2nd and 3rd

applicant including one Ojede Francis and Ms Juliet Nagawa Lugya vide CR 657 of 2013 on account of victimization of a whistleblower c/s 16 of the Act.

The Deputy IGG further deponed that the suspension of the 1st, 2nd and 3rd applicants would in no way prejudice the day to day management and operations of the 5th applicant since it had been ever happened before in 2012 and it did not jeopardize the normal day to day operations of the 5th applicant.

The hearing of this application was by way of written submissions.

The applicants were represented by Ligomarc Advocates while the respondent was represented by Mr. Elisha Bafirawala of the Attorney General's Chambers. I do not intend to reproduce the said submissions but suffice to mention that I have meticulously studied the same and related to law applicable, the pleadings by the respective parties.

In the respondent's submission, there is availed preliminary objection suggesting that this application is not properly before court because it was brought under S. 38 of the Judicature Act Cap 13. According to the respondent, S. 38 of the Judicature Act was amended and substituted by the Judicature (Amendment) Act of 2002 and therefore the application was brought under a repealed provision of the law.

Learned counsel for the applicant submitted to the contrary saying that this application is properly before court and I agree. By virtue of S.3 of the Judicature (Amendment) Act 2002, the original S. 38 of the Judicature Act Cap 13 was substituted with a new S. 38. The said S.3 states that:-

***“The Statute is amended by substituting for S. 38 the following new section –
“Judicial Review””***

In my view if an update is done on the old section by deleting it and replacing it by the new S. 38, that section remains the same. Therefore this application is properly before court.

Both counsel correctly outlined the law governing the grant of such an application when they referred to the cases of:-

- (1) **John Jet Tumwebaze Vs Makerere University Council and 3 others Civil Application No. 353 of 2005; and**
- (2) **Twinomuhangi Vs Kabale District & others [2006] HCB Vol. 1 page 130, 131.**

In order for one to succeed in an application for Judicial Review the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultravires or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the rules of natural justice or to act with procedural unfairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

From the above parameters, it is apparent that Judicial Review is concerned not with the private rights or the merits of the decision being challenged but with the decision making

process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected. **Republic Vs Secretary of State for Education and Science Exparte Avon County [1991]1 ALLER 282.**

In the instant case, the decisions made by the IGG against the applicants were made in exercise of Statutory powers. The exercise of its discretion affected the rights of the applicants and were therefore judicial in nature.

The only issues for decision in this application, and which has been submitted upon by both learned counsel is:-

Whether in the circumstances of this case the applicants are entitled to the remedies sought.

In his submission Mr. Bafirawala learned counsel for the respondent submitted that since the applicants were charged before Buganda Road Chief Magistrates Court for victimizing a whistleblower C/s 16 of the Whistleblowers Act, the applicant's contention that they were not afforded a hearing as set out in Articles 28, 42 and 44 of the Constitution of Uganda is misplaced and grossly misconceived. That the applicants are expected to have a fair hearing when they appear in Court to answer the said charges. That all the allegations related to investigations, the alleged influence of Mr. Mucunguzi of the IGG and malicious investigations are all matters that can afford a good defence in a criminal trial. The respondent further submitted that the allegations that the applicants had never seen or victimized the whistleblower is equally a good defence in a criminal trial. That there are no traits of illegality, irrationality, procedural impropriety exhibited by the IGG as alleged by the applicants.

Learned counsel for the applicants submitted to the country and I agree. Even in cases of criminal investigations, principles of fairness and natural justice must be applied. The

argument that the IGG or any criminal investigation agency can conduct partial or weak investigations merely because the victim will be afforded a hearing during the criminal trial lacks merit. Investigation agencies must conduct their investigations with fairness and impartiality. No one has a right to prosecute people any how because they will defend themselves in the trial. This is more so when the alleged offences arise from employer's discretion when managing an institution or when it relates to an employee. Therefore while the 1st to the 3rd applicants may be heard in their defence to criminal charges against them in a criminal court, the right to a fair hearing is sacrosanct especially for an employee prior to his/her Employer's decision to invoke disciplinary penalties which is enshrined in the employment law and not criminal law.

The procedures and processes involved in the two situations are distinct.

From the evidence on record, it is apparent that when the IGG directed the termination of the applicant's employment the applicants did not know that there was a whistleblower. What the IGG initially investigated was the alleged irregular termination of staff, illegal recruitment process of new management and an alleged irregular loan approval to Savannah Commodities Ltd. None of the applicants' attention was ever drawn to the complaint concerning a whistleblower. This shows that none of the applicants was afforded a hearing concerning the allegations raised by the whistleblower. The averment by the applicants that the 5th applicant conducted restructuring in which many employees' services were terminated including Ms Mucunguzi was not sufficiently rebutted by the respondent.

From the evidence on record, it remained undisputed that the 2nd and 3rd applicants were only a couple of days on their job at the time the complainant was dismissed. If they had been given a hearing on the issue of the whistleblower, the proper verification made, it would have been established for a fact that the applicants did not know the complainant at all and that the action taken by the Bank's management were verifiable.

I agree with the submissions by learned counsel for the applicants that had the applicants been given a proper chance to explain themselves in the context of fair investigation they would have brought forth the scheme by disgruntled members of staff. For example the unrebutted Mulubya's affidavit revelations in paragraphs 29-32 that the complainant was involved in a scheme to steal confidential information which is being used against the 5th applicant would have come out.

It is now settled that it is a fundamental principle of justice and procedural fairness that no person is to be condemned unless that person has been given prior notice of the allegations made against him or her, and a fair opportunity to be heard.

In Halsbury's Laws of England 5th Edition 2010 Vol. 61 para 639, It is stated as follows with regard to the right to be heard:-

“The rule that no person is to be condemned unless that person has been given prior notice of allegations against him/her and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adopted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court”.

In the case of Onyango Oloo Vs Attorney General [1986 -1989] EA 456 the court of Appeal of Kenya considered in a local context the application of the rules of Natural Justice as follows:-

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others, to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard There is a presumption in the

interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice To 'consider' is to look attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to hold the opinion Consider implies looking at the whole matter before reaching a conclusion A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded the decision maker.”

In terms of conduct of proceedings the court of Appeal of Kenya proceeded to observe that:-

“..... In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings. It is not to be implied that the rules of natural justice are excluded unless parliament expressly so provide and that involves following the rules of natural justice to the degree indicated.

..... It is to everyone’s advantage if the executive exercises its discretion in manner, which is fair to both sides, and is seen to be fair Denial of the right to be heard renders any decision made null and void abnatio.”

See also **Kuluo Andrew & 2 others Vs Attorney General & others HC Misc Cause No. 106 of 2010** per Bamwine J (as he then was).

From the above celebrated pronouncements it is apparent that the rule of natural justice obliges an adjudicator faced with the task of making a choice between two opposing stories to listen to both sides. He should not base his decision only on hearing one side. He should give equal opportunity to both parties to present their cases or divergent view points. The scales should be held evenly between the parties. It does not matter that the result would be the same

In the instant case I am constraint to find that the applicants were not accorded a fair hearing during the IGG investigations of this case. Even in matters of criminal investigations, whether or not they lead to administrative sanctions, rules of natural justice must be observed and the affected parties must be accorded a fair hearing to state their side of the story in an investigation conducted free of bias.

In Uganda the right to fair hearing is enshrined in our Constitution, Article 28 (1). The right to fair and just treatment by an administrative body is enshrined in Article 42 of the Constitution.

The actions of the IGG in this case amounted to procedural impropriety. The applicants were given the impression that what was being investigated was different from what they were arrested for, i.e victimization.

On whether the IGG acted in an irrational manner in making the decisions in this case, the submission by learned counsel for the applicants is spot on. It is apparent that the IGG completely ignored the evidence on allegations of fraud involving 54 Billion shillings and opted to swiftly and vigorously pursue the case of victimization of a whistleblower.

In answer to the complaint by the applicants that the IGG's suspension of the entire management staff could adversely affect the operations of the bank, the Deputy IGG deponed that this was not the case. According to him, the suspension of the 1st, 2nd and 3rd applicants would in no way prejudice the day to day management and operations of the 5th applicant since it had ever happened before in 2012 and it did not jeopardize the normal day to day operations of the bank. This assertion has no empirical supporting evidence to determine what effect such a move had on an institution like a Bank which is a business organization. It is true as submitted by learned counsel for the applicant that anything that distracts its functions threatens the organization.

As can be seen in paragraph 33 and annex 'J' to Mulubya's affidavit as well as paragraph 43 and annexure 'N' to Ojangole's affidavit, lines of credits and trainings that had been opened in favor of the Bank were immediately cancelled and/or withheld upon hearing of the applicants arraignment. A bank's business is premised on stability and credibility. By insisting on the implementation of the directive which attracted negative publicity to the Bank's executive, the IGG injured the Bank's and public interest which was irrational.

The illegality in the IGG's actions can be found in the Human Resource Manual of the applicant. The directive of the IGG which ordered the 4th applicant to interdict or suspend the 1st to 3rd applicants to pave way for investigations or to avoid interference in the investigations is contradicted by what was revealed in court on 29th July 2013. The IGG informed court that investigations in the matter had been completed and in fact prayed for a hearing date (*see paragraph 31 of Ojangole's affidavit*). This means that the argument

of interference with investigations cannot and could not stand. Therefore the insistence that the applicant should be interdicted to prevent interference with inquiries was unfounded.

I also agree with the submission by learned counsel for the applicants that the IGG's directive to the 4th and 5th applicants were illegal and an abuse of its powers as it seeks to exert influence on the board to exercise its discretionary powers in disciplinary matters in the IGG's favor. The 5th applicant is a duly incorporated company and its Human Resource Manual (annexture 'M' to Mr. Sejjaka's affidavit) is implemented by the Board of Directors which is mandated to manage the institution.

According to Clause 5.3 of the Human Resource Manual the Board of Directors have the Supreme disciplinary control over all members of staff and therefore invoking a particular disciplinary procedure against an employee is within the sole discretion and mandate of the Board.

Clause 5.12 of the Human Resource Manual which the IGG invoked to issue her directive provides that:-

“the procedure for suspension shall be as follows;

a) A member of staff may be suspended with or without pay or on half pay on the recommendation of the disciplinary committee, the Chief Executive Officer or the Board of Directors.

.....

d) Where an employee is awaiting trial in relation to a criminal offence, the suspension shall be for 90 days and if the matter is not resolved, management may terminate the contract.

e) *Suspension shall be lifted by a letter signed by the Chief Executive Officer or any other officer authorized to handle the issue.”*

From the wording of the provision in Clause 15.12 (a) suspension of a member of staff is discretionary and such action is taken upon a recommendation of the Disciplinary Committee, the Chief Executive Officer or the Board of Directors.

Clearly the directive by the IGG was *ultra vires* the above provision as there was no recommendation for the suspension from the bodies or persons envisaged in the manual of both the corporate 5th applicant and the 4th applicant.

The IGG was in essence exerting pressure and influence on the 4th applicant and the Board of Directors of the 5th applicant to exercise their discretionary powers through threats to take actions against them if they did not comply with her directive. Obviously such threats are high-handed because disciplinary action against the employees of the 5th applicant is the preserve of the board. In modern corporate governance such arrangement ought to be respected.

I agree with the applicants that the IGG does not have mandate to direct the Board of Directors on how they should exercise their discretionary powers to discipline staff. A similar scenario arose in the case of **Livercot Impex limited & another Vs Attorney General & another, Misc, Cause 173/2010** where Justice Eldad Mwangusya J (as he then was) held *inter alia* that the IGG was not enjoined with powers to direct the Minister of Lands to caution the Chairman of the Board, Members of the Board, the Secretary of the Uganda Land Commission and the Ag. Commissioner Land Registration on the conduct of their respective offices. The learned judge noted and I agree with him, that those were matters of discipline and the IGG did not have powers to direct the Minister to take action on matters of discipline.

Therefore, the IGG does not have powers to direct the 4th applicant and the Board of Directors of the 5th applicant on how and when to invoke their disciplinary procedures. The latter is the preserve of the board.

In view of the procedural defects, irrationalities and illegalities, I have outlined in this ruling, the IGG's directive against the applicants cannot be allowed to stand. The same stands quashed by way of an order of certiorari. I will also order that an injunction issues restraining the IGG and any of the respondents' agents from making any further orders or directives for the interdiction, suspension, termination of the 1st to the 4th applicant and/or any director or employee of the 5th applicant from their respective employment and positions on the premise of the impugned investigations.

As regards the claim for general damages, I will not award any since there has been no evidence to prove on a balance of probabilities that any of the applicants is entitled to an award of General Damages.

Consequently this application for judicial review is granted with costs.

Stephen Musota

J U D G E

14.04.2014