THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO.395 OF 2019

IN THE MATTER OF SECTION 36 OF THE JUDICATURE ACT, CAP. 13 AS AMENDED

AND

IN THE MATTER OF THE JUDICATURE (JUDICIAL REVIEW) RULES SI 11 OF 2009

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

1. JOHNAS TWEYAMBE

2. IVAN ASIIMWE :: APPLICANTS

VERSUS

1. THE ATTORNEY GENERAL

2. THE REGISTRAR OF COOPERATIVE SOCIETIES::

RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING:

Johnas Tweyambe and Ivan Asiimwe *(hereinafter referred to as the 1st and 2nd Applicant respectively)* brought this application against the Attorney General of the Republic of Uganda and the Registrar of Cooperative *(hereinafter referred to as the 1st and 2nd Respondent*

respectively); under Article 28, 42, 44 and 120 (5) of the Constitution of the Republic of Uganda, Section 36 of the Judicature Act Cap 13; Rules 3, 4, 6, and 7 of the Judicature Act (Judicial Review) Rules, 2009 SI. No. 11 of 2009 (as Amended by SI No.32 of 2019; seeking for orders that;

1. ***A declaration doth issue that the decision by the 2nd Respondent dated 24th October 2019, to conduct an investigation on the Applicants and the Uganda Cooperative Alliance is illegal, ultravires, biased, highhanded and irrational.***
2. ***A declaration doth issue that the decision by the 2nd Respondent dated 24th October 2019, directing the Applicants to take leave from office was ultravires, arrived at illegally, highhandedly, irrationally, in bad faith, unreasonably and in breach of the rules of natural justice.***
3. ***An order of Certiorari doth issue quashing the decision of the 2nd Respondent dated 24th October 2019 to conduct an investigation and directing the Applicants to step aside and handover office.***

4. ***An order of Prohibition doth issue prohibiting the 2nd Respondent from conducting the said investigation and/or suspending the Applicants from office.***
5. ***A permanent injunction doth issue restraining the 2nd Respondent, his servants and/or agents from implementing the decision dated 24th October 2019 to conduct an investigation and to dismiss and/or suspend the Applicants from office.***
6. ***Costs be provided for.***

The grounds of the application are that the 1st Applicant is the Chairperson of the Board of Uganda Co-operative Alliance (UCA) having been elected on 14th September 2018. The 2nd Applicant is the General Secretary UCA having been appointed on 1st January 2017. That on 24th October 2019, the 2nd Respondent issued a letter purporting to suspend the Applicants from office and directing them to hand over to their immediate deputies to allegedly pave the way for investigations. That the above impugned decision dated 24th October 2019, is illegal and void in as far as it was arrived at in breach of the Cooperatives Societies Act, and in utter disregard of

the procedure for holding an inquiry into the constitution, working and financial condition of a registered society, provided for under the law. That as such, the impugned decision dated 24th October 2019 is tainted with bias as the 2nd Respondent stated that the Applicants were at the centre of frustrating proper conduct of business at UCA, prior to holding an inquiry. Further, that the impugned decision is unfair, highhanded, irrational and contrary to the rules of natural justice, and is in utter breach of the Constitution. That it is in the interest of equity and justice that this application be granted.

The application is supported by the affidavit sworn by the 1st Applicant, Mr. Johnas Tweyambe. In brief, he avers that he was elected as Chairperson of the Board of UCA. That the 2nd Respondent's decision dated 24th October 2019 directing the Applicants to take leave from office was ultravires, illegal, and breached the principles of natural justice. He prays that the application be allowed and the above stated remedies be granted.

The 1st and 2nd Respondent opposed the application and filed an affidavit in reply sworn by the 2nd Respondent Mr. Joseph William

Kitandwe. In brief, he does not contest that the 1st Applicant is the Chairperson of the Board of UCA. However, that there are circumstances and process that were followed before the impugned decision was reached. That the Registrar Cooperatives is mandated to provide and administer services required by societies for their formation, organization, registration, operation and advancement. That a meeting convened by the committee of inquiry who were Board members, on 28th June 2019, recommended further investigation of the Applicants' allegations of forged resolutions. That the Registrar acted within his powers in taking the decision he did. That as such this application has no merits and should be dismissed with costs.

Background:

On 24th October 2019, the Applicants attended a meeting with the Minister of State for Cooperatives to discuss affairs of the UCA, following a Board investigative report. Immediately after the meeting, the 2nd Respondent issued a suspension order requiring the Applicants to step aside as officers of UCA, allegedly to pave way for conducting an investigation into the affairs of UCA, and to hand

over offices to their deputies. Aggrieved by the above decision, the Applicants filed this application for judicial review challenging the 2nd Respondent's exercise of his power.

The Applicants were at the hearing represented Mr. Joseph Matsiko of *M/s. Kampala Associated Advocates*, while the Respondents were represented by Ms. Charity Nabaasa State attorney in the 1st Respondent's Chambers. Both counsel filed written submissions to argue the application and availed authorities to court for which court is thankful to them. The following issues were framed for determination;

1. ***Whether this application is amenable for judicial review.***
2. ***Whether the impugned decision by the 2nd Respondent constituted illegality.***
3. ***Whether the decision of the 2nd Respondent was irrational.***
4. ***Whether the 2nd Respondent's decision was procedurally improper and violated the principles of natural justice.***
5. ***What remedies are available to the parties***.

Resolution of the issues:

Issue No.1: Whether this application is amenable for judicial review.

Judicial review is defined under Rule 3 of the Judicature (Judicial Review Rules 2019 means;

> ***"...the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of a subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties;"***

The same definition above was adopted in ***Clear Channel Independent Uganda vs. PPDA H.C.M.A No. 380 of 2008.*** Judicial review is also a remedy that in rooted in Article 42 of the Constitution, and this was reiterated in ***Wanyama George Stephen vs. Busia District Local Government H.C.M.A No. 0225 of 2011*** where it was held, inter alia, that;

> ***"The right to apply for juridical review is now constitutional in Uganda by virtue of Article 42; which***

empowers anyone appearing before an administrative official or body a right to be treated justly and fairly with a right to apply to a court of law regarding the administrative decision taken against such a one. This right, to a just and fair treatment in administrative decisions cannot be derogated according to Article 44."

As these principles apply to the instant application, the Registrar Cooperatives Societies is a public officer and fits well within the definition under Rule 2 of the Judicature (Judicial Review) Rules 2009 as amended by S.I No. 32 of 2019, and his decisions are amenable to judicial review.

A number of decisions of court have held that the grounds upon which an application for judicial review may be granted are illegality, irrationality and procedural impropriety. See: ***His Worship Aggrey Bwire vs. Attorney General & Another (Civil Appeal No. O9 of 2009.*** The grounds were further elucidated in ***Thugitho vs. Nebbi Municipal Council HCMA No 0015 of 2017,*** that "illegality" means that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

"Irrationality" means particularly extreme behavior; such as acting in bad faith, or a decision which is "perverse" or "absurd" that it implies the decision – maker has taken leave of his senses. Taking a decision that is outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. "Procedural impropriety" encompasses four basic concepts of; (a)the need to comply with the adopted (and usually statutory) rules for the decision making process;(b) the common law requirement of fair hearing; (c) the common law requirement that the decision is made without an appearance of bias; (d) the requirement to comply with procedural legitimate expectations created by the decision maker.

Grounds 4, 5 and 6 of the application invariably show that the Applicants are challenging the decision of the 2nd Respondent in suspending them and conducting investigations as illegal, tainted with bias, unfair, irrational and contrary to the rules of natural justice. Therefore, the decision the subject of this application falls squarely within the ambit of judicial review.

Issue No.2: Whether the impugned decision by the 2nd Respondent constituted illegality.

"Illegality" was defined in the case of ***Ojangole Patricia & 4 Others vs. Attorney General H.C M.C No.303 of 2013*** as when the decision making authority commits an error of law in the process of taking the decision or making the act the act, the subject of the complaint. This was further restated in ***Rebecca Nassuna vs. Dr. Diana Atwine & 3 Others H.C.M.C No.322 of 2018*** and court added that;

> ***"Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality."***

The parameters of illegality were further explained in ***Thugitho vs. Nebbi Municipal Council*** (supra) at page 8-9.

In the instant case, the impugned decision of the 2nd Respondent is constituted in letter *Annexture "B"* to the application dated 24th October 2019 by which he directed the Applicants to step aside and be investigated until further notice. The letter further required the

Applicants to hand over office to their immediate deputies as soon as possible. The effect of the decision in letter amounted to a suspension of the Applicants and commencement of an investigation which were done in contravention of the law.

Section 52 of the Cooperatives Societies Act, 1992 provides for the manner in which an inquiry can be conducted. The provision of the law requires consultation of the Board at all times before and during the inquiry. Further reading of this provision shows that where the Registrar is to hold an inquiry and suspend any officer, he/she consult the Board. After consulting the Board, the Registrar constitutes a committee of inquiry; suspension can only be done during the period of inquiry; and a caretaker manager is appointed in consultation with the Board.

From the evidence adduced by all the parties, it is clear that none of these requirements of the law were complied with in the decision of the 2nd Respondent communicated by the said letter. There was no consultation with the Board of UCA which is a mandatory requirement under Section 52 (supra) and runs through sub-sections 1, 4 and 6 thereof. In enacting the provisions, Parliament

was acutely alive to the need for consultation and that is why it is re-emphasized in Section 52 (supra). Being a corporate body, the Registrar's powers must be exercised in strict conformity with the law and after due consultation. The requirement for consultation in administrative law is well explained in ***Oyaro vs. Kitgum Municipal Council H.C.M.C No. 07 of 208,*** per Mubiru J., quoting the case ***R (United Company Rusal PLC) vs. The London Metal Exchange [2014] EWCA Civ. 1271;*** where court held, inter alia, that;

> ***"Where a public body is under a duty to consult, the content of that duty to consult is governed by common law duty to act fairly, and the Court should only intervene if there is a clear reason on the facts of the case for holding that consultation is unfair.... In order for consultation to be fair, the public body must ensure that consultation must be at a time when the proposal is still at a formative stage ...the proposer must give sufficient reason for any proposal to permit intelligent consideration and response, adequate time must be given***

for consideration and response and finally, the product of consultation must be conscientiously taken into account in finalising the proposal."

The facts as can be ascertained from the Respondent's affidavit in reply, in paragraph 3 to 13, are briefly that the senior management staff petitioned him and he instructed the Board to investigate. The Board constituted a committee which came up with a report. However, the committee report did not find the 2nd Applicant guilty of any wrong doing but recommended further investigation by the Board only on the alleged forged resolution. Subsequently, the report was considered by the Board on 18th October 2019 and the 2nd Applicant was absolved of any wrong doing. It was then resolved that the Board carries out further investigations as to the alleged forged resolution. Subsequently, on 24th October 2019, a meeting was held by the Minister which was attended by the Applicants and the 2nd Respondent, among others. As can be clearly discerned in paragraph 5 to 8 of the 1st and 2nd Applicants' affidavits in support, paragraph 13 of the Respondents' affidavit in reply, and paragraph 4 of the affidavit in rejoinder, no resolution or decision whatsoever

as to the suspension of the Applicants or for any investigation, was reached or taken. However, on his own prompting the 2nd Respondent purported to suspend the Applicants and to have an inquiry without consulting with the Board. This was without doubt contrary to the law as required under Section 52 (1) (supra).

In addition, Section 52 (4) requires that where the chief executive has been suspended in accordance with subsection (3) thereof, a caretaker manager is appointed by the Registrar in consultation with the Board. The decision of the Registrar, by his above stated letter, was that Applicants handover office to their immediate deputies. This was in utter contravention of subsection (4) as there was no such consultation at all. The net effect is that the 2nd Respondent acted in total contravention of the law which renders his decision null and void. On this account alone, this application would succeed.

Issue No.3: Whether the decision of the 2nd Respondent was irrational.

The Applicant, in paragraph 6 of the application, contends that the decision of the 2nd Respondent was irrational. "Irrationality" was

defined in ***Dott Services Ltd & Another vs. AG HCMA No. 137 of 2016*** quoting the case of ***Council of Civil Service Union & Another vs. Minister of Civil Service [1985] 1 AC 374,*** that;

> ***"Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing its mind 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."***

See also: ***Marvin Baryaruha vs. Attorney General HCMC No. 149 of 2016*** and ***Thugitho vs. Nebbi Municipal Council*** (supra).

A careful evaluation of the evidence, in paragraphs 5, 8 and 12 of 1st and 2nd Applicants' affidavits, paragraph 4 of the affidavit in support deponed by Rev. Fr. Safari, paragraph 13 of the 2nd Respondent's affidavit and paragraph 4 of the 2nd Applicant's affidavit in rejoinder, clearly reveals the irrationality of the 2nd Respondent's decision. To begin with, the decision was made without the consulting the Board as required by Section 52(supra) as already observed above. In addition, the Respondent claims, in

the letter, that the decision to conduct an inquiry was as a result of meeting held with the Minister of State for Cooperatives, yet there was only one meeting and no such resolution whatsoever was made as to either conducting an inquiry or suspending the Applicants.

In his affidavit in reply, the 2nd Respondent does not rebut the particular averments of Applicants that no resolution as to cause of investigation or suspend the Applicants was ever reached at the meeting with the Minister. It is thus presumed that the 2nd Respondent accepts the particular averment. In ***Basajjabalaba Hides and Skins Ltd vs. Bank of Uganda & Anor HCMA No. 738 of 2011,*** quoting the case of ***Samwiri Massa vs. Achen [1978] HCB 297,*** it was held that;

> ***"Where certain facts are sworn to in an affidavit, the burden to deny them is on the other party and if he does not, they are presumed to have been accepted."***

Therefore, it was irrational that the 2nd Respondent immediately after the meeting, issued a letter quoting the said meeting and then giving directives which were not resolved at that meeting. It is apparent that he was acting in bad faith.

In addition, the 2nd Respondent decided to commence an inquiry at the time when the Board had commenced an inquiry, received a report, considered it and resolved to conduct a further investigation by itself and not the 2nd Respondent. This is evident from a copy of the of the minutes of the said meeting attached to the Applicants' affidavit in rejoinder. The 2nd Respondent was well aware of such resolution, but nonetheless went ahead to institute an inquiry without complying with the legal requirement of prior consultation with the Board. That too was irrational.

Also to note is that the 2nd Respondent, by his letter *Annexture "B"* to the application, claims to base his decision on the committee report, yet the evidence shows otherwise. For instance, the involvement of the 1st Applicant was not mentioned in the petition, he never defended himself before the committee and the committee report does not mention his name at all. Besides, the committee report does not point out the 2nd Applicant as the wrong doer. It was thus irrational of the 2nd respondent to institute an inquiry based on the committee report that does not in any way implicate the Applicants in any wrong doing. The 2nd Respondent's decision is

thus so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. On that account, this court would be justified to interfere in the impugned decision.

Issue No.4: Whether the 2nd Respondent's decision was procedurally improper and violated the principles of natural justice.

In the oft cited case of ***Twinomuhangi Pastoli vs. Kabale District Local Government & 2 Others [2006] HCB 130,*** at page 131, it was held, inter alia, that "procedural" impropriety refers to when there is failure to act fairly on part of decision making authority in the process of taking a decision. The unfairness may be in the non – observance of the Rules of natural justice. See also: ***Ridge vs. Baldwin [1964] AC 40 (1963) 2 ALL ER 66.***

In Uganda, the rules of natural justice are embedded in the Constitution under Articles, 28, 42 and 44 which guarantee every person a right to a fair hearing before an administrative body. The case of ***Ojangole Patricia & 4 Others vs. Attorney General H.C.M.C No. 303 of 2013,*** underscores the application of the rules

of natural justice. Citing ***Halsbury's Laws of England 5th Edition 2010 Vol. 61 para 639***, it is stated that;

> ***"The rule that no person shall be condemned unless that person has been given prior notice of the 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 courts."***

The first aspect of the rule of natural justice is adherence to the protection of the right to a fair hearing. The right is provided for under Article 42 and 28 of the Constitution. It is sacrosanct and non derogable right under Article 44(supra). The right to fair hearing was restated in ***Thugitho Festo vs. Nebbi Municipal Council*** (supra) and ***Ojangole Patricia & 4 Others vs. Attorney General*** (supra) ***quoting*** the case ***of Onyango Oloo vs. Attorney***

General [1986 – 1989] EA 456, where the Court of Appeal of Kenya considered a local context of the application of the rules of natural justice and held as follows;

> ***"The principle of natural justice applies where ordinary people reasonably expect those making decisions which affect others, to act fairly and they cannot act fairly and be seen to have acted fairly without giving opportunity to be heard...There is a presumption in every 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..."***

From the above principles, the 2nd Respondent did not accord the Applicants a fair hearing in suspending them and his decision was biased. He suspended the 1st Applicant who was not mentioned in the petition by the staff, who had not defended himself before the committee, and whom the committee did not mention in its decision. Up to date, the 1st Applicant is not aware of what he is being accused of, the nature of evidence against him and how he is

supposed to respond. This was a gross violation of his right to a fair hearing.

Regarding the 2nd Applicant's right to a fair hearing, that too was violated. The 2nd Applicant had been investigated by the committee which did not find him of any wrong doing. The Board went further to clear his name while considering the committee report. This is very evident in paragraphs 5-9 his affidavit in reply and paragraph 8 of the affidavit in rejoinder, which too were not rebutted by the 2nd Respondent. Therefore, the 2nd Respondent could not cause another investigation basing on a report that cleared the 2nd Applicant, without according him a fair hearing.

The second aspect pertaining to natural justice is the rule against bias. The principles of bias were laid down by Odoki JA (as he then was) in the case of ***Libyan Arab Uganda Bank for Foreign Trade & Development & Another vs. Adam Vissiliadis C.A.C.A No. 9 of 1985*** that;

> ***"Bias therefore means a real likelihood of an operative prejudice whether conscious or unconscious. See R. vs. Justice of Queens Court (1908) 2 IR 282. In considering***

the possibility of bias it is not the mind of the judge which is considered but the impression given to reasonable persons. See Tumaini vs. Republic (1972) E.A 441."

Based on the evidence, it is not open to doubt that the Registrar's decision was tainted with bias. He suspended the Applicants and commenced an investigation immediately after the meeting with the Minister yet no such decision had been reached. In addition, the suspension was done after the Board had resolved to conduct a further investigation by itself and had already cleared the 2nd Applicant. Further, the 2nd respondent suspended the 1st Applicant without any evidence or any allegations against him which all point to the 2nd Respondent's bias. Therefore, the 2nd Respondent not only violated the Applicants' right to a fair hearing but was also biased in making the impugned decision. As was stated in ***Ridge vs. Baldwin case*** (supra) a decision reached by an administrative body in disregard of the principles of fair hearing or natural justice is null and void. Similarly, in the instant case where there was a

violation of the principles of natural justice the 2nd Respondent's decision is rendered null and void.

Issue No5: What remedies are available to the parties?

The remedies ordinarily issued in judicial review are declaration, certiorari, mandamus and prohibition and they are discretionary in nature. See. ***Kasibo Joshua vs. The Commissioner of Customs, Uganda Revenue Authority H.C.M.A No. 44 of 2007.*** The principles to be considered were stated by Kasule J., as he then was, in ***John Jet Tumwebaze vs. Makerere University Council and 3 Others, Civil Application No. 353 of 2005)*** cited in the ***Kasibo case*** (supra*)* at page 5 thereof, as common sense and justice, whether the application is meritorious, whether there is reasonableness, and whether there is vigilance and no waiver of the rights of the Applicant.

In the instant application, the Applicants have advanced a plausible case for judicial review and demonstrated that the decision of the 2nd Respondent in commencing an inquiry and suspending the

them was illegal, ultravires, irrational, and violated the principles of natural justice. That makes the instant application a clear case for judicial review and this court exercises its discretion and grants the orders sought by the Applicants as follows;

1. ***A declaration doth issue that the decision by the 2nd Respondent dated 24th October 2019, to conduct an investigation on the Applicants and the Uganda Cooperative Alliance is illegal, ultravires, biased, highhanded and irrational.***
2. ***A declaration doth that the decision by the 2nd Respondent dated 24th October 2019, directing the Applicants to take leave from office was ultravires, arrived at illegally, highhandedly, irrationally, in bad faith, unreasonably and in breach of the rules of natural justice.***
3. ***An order of Certiorari doth issue quashing the decision of the 2nd Respondent dated 24th October 2019 to conduct an investigation and directing the Applicants to step aside and handover office.***

4. ***An order of Prohibition doth issue prohibiting the 2nd Respondent from conducting the said investigation and/or suspending the Applicants from office.***
5. ***A permanent injunction doth issue restraining the 2nd Respondent, his servants or agents from implementing the decision dated 24th October 2019 to conduct an investigation and to dismiss and/or suspend the Applicants from office***
6. ***The Applicants are awarded costs of this application.***

BASHAIJA K. ANDREW
JUDGE
14/02/2020.