

UGANDA / JUDGMENT

**Inspector General of Government & Anor v
Attorney General & 2 Ors (Misc. Application
No.
744 of 2014) [2015] UGHCCD 1 (9 January 2015)
[2015] UGHCCD 1**

COURT

HC: Civil Division (Uganda)

BEFORE

Musene, J

CASE / FILE NUMBER

Misc. Application No. 744 of 2014

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT NAKAWA****MISC. APPLICATION NO. 744 OF 2014****[Arising from Misc. Application No. 703/2014 and 704/2014 and Misc. Cause No. 63 of 2014]**

- 1. INSPECTOR GENERAL OF GOVERNMENT**
- 2. INSPECTORATE OF GOVERNMENT ::::::::::: APPLICANTS**

V E R S U S

- 1. THE ATTORNEY GENERAL**
- 2. CHONGQING INTERNATIONAL
CONSTRUCTION CORPORATION LTD ::::::::::: RESPONDENTS**

- 1. UGANDA NATIONAL ROADS AUTHORITY**

Before: HON. MR. JUSTICE WILSON MASALU MUSENE**RULING**

The Applicants, Inspector General of Government and Inspectorate of Government filed Misc. Application No. 744 of 2014 by Notice of Motion under 0.1r.10 (2) and 13, 0.50 r.8, 0.51 r.6 and 0.52 r.3 of the Civil Procedure Rules, section 33 of the Judicature Act, sections 79 (1) (b), 80, 96 and 98 of the Civil Procedure Act. They were seeking orders that:-

1. The Applicants or either of them be substituted for the Attorney General as the Respondent in **Misc. Cause No. 63 of 2014 International Construction Corporation vs. Attorney General** and all other applications incidental and connected thereto;
2. **IN ALTERNATIVE**, the Applicants or either of them be joined as Parties to Misc. Cause No. 63/2014, and all other Misc. Applications incidental and connected thereto;
3. Leave be granted to extend time within which to appeal against the decision and orders of the learned Deputy Registrar, Her Worship Lillian Mwandha, issued in Miscellaneous Application No. 704 of 2014 on 06th November 2014;
4. The order of Her Worship Lillian Mwandha issued on 06th November 2014 in Miscellaneous Application No. 704 of 2014, restraining the Attorney General and (UNRA) or their agents from implementing the order/directive of the 1st Applicant to exclude the 2nd Applicant from participating in the emergency procurement for the construction of Mukono-Katosi-Kyetume/Kisoga-Nyenga Road be set aside.
5. Miscellaneous Application No. 703 of 2014 be disposed of by the Court as soon as is reasonably practicable.
6. Costs of the application be provided for.

There were several grounds in support of the application, which grounds were expounded in the affidavit of Irene Mulyagonja Kakooza, the Inspector General of Government. In summary, the grounds were:-

1. Miscellaneous Cause No. 63 of 2014 was brought against the wrong person, the Attorney General, because the decision, orders and directives being contested were not made by him but by an authority/body or person who has both constitutional and statutory powers to make them, the Inspector General of Government;
2. In Misc. Cause 63 of 2014, the Applicant therein (2nd Respondent in this Application) seeks an order of mandamus against the Applicant and all Government Departments, including the Inspectorate of Government to implement the “opinion” of the 1st Respondent contained in a letter dated 29th October 2014;
3. The application was a deliberate attempt to embarrass the Attorney General in his defence if he continues to represent the Inspectorate/Inspector General of Government because the 2nd Respondent erroneously assumes that the Inspector General of Government is bound by the opinions and recommendations of the Attorney General;
4. The applicants are not bound by the opinions of the Attorney General whose office and person as a leader falls within the jurisdiction of the applicants by virtue of Article 226 of the Constitution and section 9 (a) of the Inspectorate of Government Act; the applicants cannot be subject to the control or direction of any person or authority, except Parliament by virtue of the provisions of Article 227 of the Constitution;

5. The 2nd Respondent deliberately placed the 1st Respondent, the Attorney General, in Misc. Cause No. 63 of 2014 in a conflicted position which he is not able to defend because he lacks the information related to the basis and or reasons for the applicants' decision, orders/directives to UNRA in respect of the contract in project in dispute;
6. The Inspectorate of Government is an independent body that derives its mandate, powers and functions from Chapter 13 of the Constitution of the Republic of Uganda, and the Inspectorate of Government Act (2002); it is a body exercising public functions that makes quasi-judicial decisions and issues orders and directives pursuant to the two enactments;
7. The Inspectorate of Government and the Inspector General of Government are directly amenable to judicial review, not through the Attorney General who is a stranger to the decisions and orders of the Applicants;
8. The mischief in the 2nd Respondent's application and the Attorney General's actions can only be cured by excluding the Attorney General from defending/representing the Inspector General of Government/Inspectorate of Government in Misc. Application No. 63 of 2014 and all applications incidental and connected thereto;
9. The applicants are aggrieved by the interim **ex parte** order issued by Her Worship Lillian Mwandha on the 06th November 2014, which effectively disposed of the pending application for judicial review, thus occasioning a miscarriage of justice;

The Respondents were the **Attorney General, Chongqing International Construction Corporation and Uganda National Road Authority (UNRA)**. When the matter came up for hearing on 05th December 2014, Mr. Kassuja Vincent and M/s Salama Mwanja represented the Applicants. Miss Margaret Nabakooza together with Mr. George Kalemera represented the Attorney General (1st Respondent), while Mr. Siraji Ali and Mr. Kavuma Terrance represented the Chongqing International Construction Corporation (2nd Respondent) and Mr. Andrew Munanura appeared for Uganda National Road Authority (3rd Respondent).

Before the hearing could start, M/s Margaret Nabakooza for the 1st Respondent stated that they intended to raise a preliminary objection on points of law. Mr. Siraji Ali for the 2nd Respondent also added that they also had a preliminary objection. The points of law raised related to whether the Applicants had **locus standi** to bring any proceedings before this Court. The 3rd Respondent also raised a preliminary point of law regarding the legality of the interim order issued by Her Worship Lillian Mwandha on 06th November 2014. I shall deal with the preliminary objections in the order they are submitted, one by one.

The major thrust of the 1st Respondent's preliminary objection is that the first and second Applicants have no **locus standi** and therefore cannot bring this application before this Honourable Court.

They urge that the Applicants are not a party to Miscellaneous Cause No. 63 of 2014, Miscellaneous Causes No. 703 and 704 of 2014 and therefore the Orders sought in the present application regarding matters arising out of Miscellaneous Cause No. 63 cannot be invoked by a stranger, but can only be invoked by litigants in that cause/application only, which the Applicants are not. They concluded that the present application is therefore an abuse of Court process in that regard and consequently, the Applicants have no locus to bring the current application.

They further added that since the Applicants were not a Party to the Orders they seek to set aside and in the same vein, cannot seek for leave to extend time within which to appeal against the decision and Orders of the Learned Deputy Registrar when they were not Parties to the decision of the said Registrar in Miscellaneous Application No. 704 of 2014.

Counsel for the 1st Respondent submitted that section 3 (1) and (2) of the Inspectorate of Government Act, 2002 establishes both Applicants and does not grant them corporate status in Law. It is therefore the contention of the 1st Respondent that the Applicants are non-existing legal entities with no capacity to sue or be sued. By analogy, a non-entity incorporates the legal doctrine of a capacity to sue and establishes the same that only a Party with legal capacity to sue can bring an action (like the present application), in a Court of Law. The Applicants therefore, do not have **locus standi** to bring this application before this Honourable Court.

Reference was made to the case of ***Fort Hall Bakery Supply Co. Ltd. V. Fredrick Muigai Wangoe (1959) EA 474***, the Plaintiffs were a group of persons not having legal existence under the Companies Ordinance. The Plaintiffs filed the suit in the name of "Fort Hall Bakery Supply Company." Templeton J agreed with the words ***of Bankes L. J in Banque Internationale De Commerce De Pertogard. V. Goukassaow (3), [1923] 2 K. B. 682 at page 688*** that:

"The Party seeking to maintain the action is in the eyes of our law not party at all but a mere name only, with no legal existence."

In addition to lack of ***locus standi** as submitted on behalf of Attorney General, Counsel for the 2nd Respondent also submitted that the Applicants are precluded by the doctrine of **issue stoppel** from proceeding with this application.

They submitted that the Applicant is stopped by the doctrine of issue estoppels from proceeding with this application because it would re-open issues that have been conclusively determined against the Applicant in ***Misc. Application No. 536 of 2014; Inspectorate of Government vs. Uvetiso Association Ltd & three others,*** a decision made by Justice Musota on the 17th day of November 2014.

They quoted **Halsbury's Laws of England 4th Edition Reissue** at paragraph 977 which defines the doctrine of issue stopped as;

***"An Estoppel which has come to be known as 'Issue Estoppel' may arise where a plea of res judicata could not be established because the causes of action are not the same."**

This principle applies whether the point involved in the earlier decision, and as to which the Parties are stopped, is one of fact or one of law, or one of mixed fact and law.

They added that issue Estoppel has the two-fold purpose of protecting litigants from the burden of re-litigating identical facts and issues with the same Party and promoting judicial economy by preventing needless litigation in Courts with the same jurisdiction. And that it also ensures that Courts of the same jurisdiction do not arrive at different decisions in respect of the same issues.

Counsel for the 3rd Respondent, did not object to the Applicant's Application to be added as Parties to Miscellaneous Cause No. 63 of 2014. They indicated so in the affidavit in reply sworn by Mr. James Okiror, the Ag. Executive Director of UNRA.

In their written submissions, the Applicants stated that they received a complaint concerning the irregular award of a contract to M/S EUTAW Construction Company (M/S EUTAW DELAWARE) to upgrade the Mukono-Kyetume-Katosi-Nyenga Road from gravel to paved (Bitumen) standard by Uganda National Roads Authority (UNRA).

They added that it was further alleged that M/S EUTAW Construction Co. submitted a forged insurance bond from Statewide Insurance Co. and fraudulent performance guarantee/bond issued to UNRA in the names of M/S EUTAW Construction Co. Inc. of Aberdeen Mississippi when the contract with UNRA was signed with M/S EUTAW Construction Co. Inc. of 622 Beach Florida and on that basis UNRA had paid UGX. 24,790,823,522/=.

According to the Applicants, it was further alleged that M/S EUTAW Construction Co. had subcontracted Chongqing International Corporation Ltd on 15th July 2014 to do the work contrary to the terms of the contract with UNRA.

Counsel for the Applicants stated that preliminary investigations were made, documents retrieved from banks, insurance companies, Uganda Registration Bureau Services, interviews conducted and statements recorded and an order was issued on 17th July 2013 to the Ag. Executive Director of UNRA not to assign, sub-contract or otherwise deal with the contract in issue till the conclusion of the investigations by the Applicants.

It was also Applicants' submissions that the Deputy Attorney General issued an opinion to the Minister of State for Works dated 23rd September 2014 and concluded that the contract between UNRA and M/S EUTAW Construction Co. was null and void.

It was also their contention that the Applicants revisited the order of 17th July 2013 and issued another dated 3rd November 2014 in accordance to Article 230 (2) of the Constitution to the Accounting Officer of UNRA not to entertain any bid by the 02nd Respondent in the recommended new procurement which the 2nd Respondent seeks to quash through Misc. Cause No. 63/2014 for judicial review.

They also submitted that whereas the Attorney General agreed with the opinion of the Deputy Attorney General that the contract was null and void, they recommended that there was no incontrovertible evidence to prove that M/S Chongqing International Corporation Ltd and M/S EUTAW Construction Co. had colluded to commit fraud, when it is not the Attorney General investigating the matter.

Counsel for the Applicants objected to the submission that the Applicants have no ***locus standi*** to file this application and that the Applicants are strangers to Misc. Application No. 703 and 704 of 2014 and cannot set aside any orders as the application is an abuse of Court process.

It was also the contention of the Applicants that they are not attempting to usurp the 1st Respondent's constitutional mandate regarding legal representation.

I have carefully considered the detailed submissions of all the Parties as far as the preliminary objections are concerned. I shall start with the matter of **locus standi** of the Applicants, the Inspector General of Government and the Inspectorate of Government. In that regard, it is pertinent for this Court to re-appraise itself on the **principles of Judicial Review. Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.**

The duty of the Court in judicial review is to confine itself to the question of legality. Its concern is whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers.

The traditional test for determining whether a body of persons is subject to judicial review is the source of its power. If the source of power is a statute or subordinate legislation under statute like for the Applicants' the source of power is spelt in the Chapter 13 and 14 of the Constitution and the Inspectorate of Government Act, 2002, then it means the Applicant is amenable to judicial review. These principles are well articulated by Ssekana in his treatise on Public Law in East Africa (Law Africa Kenya Ltd, 2000) at page 37-47 where he discusses the availability of Judicial Review.

For avoidance of doubt, I wish to reproduce some of the expositions by the learned author in detail as extracted from the submissions of the Applicants.

Judicial review describes the process by which the Courts exercise a supervisory jurisdiction over the activities of public authorities in the field of public law. This procedure is generally regarded as a public law remedy; the remedy of judicial review is only available where an issue of 'Public law' is involved. The application for judicial review is a specialized procedure by which an Applicant can seek one or more of the existing prerogative remedies, which can now only be claimed under such application.

Judicial review is only available against a public body in a public law matter. In essence, two requirements need to be satisfied. First, the body under challenge must be a public body whose activities can be controlled by judicial review. Secondly, the subject matter of the challenge must involve claims based on public law principles not the enforcement of private law rights.

Halsbury's Laws of England define a 'public authority' as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private profit. In the past, the Courts focused primarily on the source of the power in determining whether a body was a public one subject to judicial review.

However, other factors such as the nature of the function, the extent to which there is any statutory recognition or underpinning of the body or the function in question and the extent to which the body has interwoven into a system of Governmental regulation may indicate that the body performs public functions and is, in principle, subject to judicial review.

In the present case, the decision or directive which is the subject matter of Miscellaneous Cause No. 63 of 2014 for Judicial Review was made by the Applicants under Article 230 (2) of the Constitution of Uganda and S. 14 (6) of the Inspectorate of Government Act, 2002. For avoidance of doubt, I shall reproduce Articles 230 (1) and (2) of the Constitution in that regard.

Article 230 (1)

The Inspectorate of Government shall have power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office.

Article 230 (2)

The Inspector of Government may, during the course of his or her duties or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances.

In the context of this particular case, it is not the Attorney General who made the orders in question. So I entirely agree with the submissions of the Applicants that the Attorney General cannot be supervised by Court over a decision he did not make.

The House of Lords was confronted with almost a similar issue in **Re M on appeal from M v Home Office [1994] AC 1 377** and held that: The prerogative remedies could not be obtained against the Crown directly as was explained by Lord Denman C. J in **Reg vs. Powell [1841] 1 Q. B 352, 361**.

"both because there would be an incongruity in the Queen commanding herself to do an act and also because the disobedience to a writ of mandamus is to be enforced by attachment."

The key question at all times in this case is whether it is the Inspector General of Government or Attorney General who made the decision sought to be reviewed. Counsel for the Attorney General has submitted that in line with the decision in the case of **Fort Hall Bakery Supply Co. LTD vs. Fredrick Muigai Wangoe [1959] E. A. 474**, the Applicants are nonexistent in the eyes of the law.

I respectively disagree with the submissions of the Attorney General in that regard and hold that the case of Fort Hall Bakery Supply Co. Ltd was quoted out of context as far as this case is concerned. In the Fort Hall Bakery Supply Co. Ltd case, the Plaintiffs were a group of persons with legal existence.

How can the learned Attorney General equate a group of persons with the Inspector General of Government who was created under the Constitution and the Inspectorate of Government Act of 2002? Such a comparison in the circumstances is not only Naïve but Absurd in my view.

Secondly, Judicial Review is different from Civil Suit or Civil proceedings to which a Government is a Party and which falls under the exclusive mandate of the Attorney General as provided under Articles 119 (4) (c) and Article 250 (2) of the Constitution. The Government proceedings Act, Cap 77 comes into play by virtue of Article 250 (3) of the Constitution. And S. 1 (1) (b) of the Government proceedings Act defines Civil proceedings to include proceedings in High Court or Magistrates' Court for recovery of fines or penalties, **but does not include proceedings corresponding or analogous to proceedings on the crown side of the Queen's Bench Division of the High Court in England.**

In Uganda, proceedings in Judicial Review are provided for by the Judicature Act as “**prerogative remedies.**” They are for purposes of the Government proceedings Act the proceedings that are analogous to the proceedings on the crown side of the Queen's Bench Division. They are therefore excluded from proceedings where the Attorney General is sued as the representative of Government. In **Miscellaneous Cause No. 53 of 2010, Wakiso Transporters and Tours & Travel Ltd & 5 others vs. Inspector General of Government, Wakiso District Council and others**, Justice Bamwine as he then was, while departing from his earlier opinion in **Major Roland Kakooza Mutale vs. Attorney General, Misc. Application No. 655 of 2003** quoted by the Attorney General in their present submissions, held:-

“it is trite law that Judicial Review lies against inferior Courts, tribunals and other bodies or persons who carry out judicial or Quasi judicial functions or who are engaged in a performance of public duties e.g. administrative duties.”

His Lordship went on to state:-

*“I am unable to give a restrictive scope to the remedy of judicial review – I have indicated in many authorities, especially **John Teira & Another vs. Makerere University Council HCMC No. 49/2010** that any person, natural or artificial, bound to explain and defend in any Forum the decision he or she makes in the performance of his/her duties is answerable to judicial review.”*

I entirely agree with the reasoning of Justice Bamwine as he then was. And as far as the present case is concerned, since there were preliminary investigations which were carried out by the Inspector of Government and Inspectorate of Government, and an order/directive was made to the Accounting Officer of UNRA not to allow 2nd Respondent to participate in the bids in the recommended procurement, then the Applicants are answerable in the Court in an application for judicial review.

I respectively disagree with the submissions by the Attorney General that the Applicants are merely interested persons who cannot be Parties in judicial review. How can they be treated as mere interested Parties when it is the same Applicants who made the decision to exclude the 2nd Respondent?

And it is that decision which is being challenged. To hold that they (Applicants) should not Parties would be condemning them unheard, which would violate the rules of Natural Justice. Both Counsel for the Attorney General and for the 2nd Respondent relied on the Ruling of Justice Musota in **Misc. Application No. 536 of 2014, Inspectorate of Government vs. UVETISO and others dated 17th November 2014**.

In my view, the Ruling of Justice Musota is distinguishable from the facts and circumstances of the present case. In the UVETISO case, the Inspectorate of Government was the sole Applicant unlike in the present case where there are two Applicants, including the Inspector General of Government. The true test is whether the person of the Inspector General of Government is an adult of sound mind who in the performance of public duties is answerable in Judicial Review. The difference therefore is that my Brother Judge Musota dealt with the Inspectorate of Government as an Institution, but in the present case, I am handling both Inspectorate of Government and Inspector General of Government as a personality. The other distinction as I have already held is that actions in Judicial Review are not Civil Suits in the context of this particular case. The two, Civil Suits which are the exclusive mandate of the Attorney General and actions in Judicial Review are different to be handled in its own peculiar circumstances. I have no doubt whatsoever in my mind that given the special powers of the Inspector General of Government under Article 230 (2) of the Constitution, which powers are of Public Domain, his/her decisions are subject to Judicial review thereby making him or her a Party to explain his/her decisions in the High Court.

Lastly, both Counsel for the Attorney General and for the 2nd Respondent have emphasized that the issue of corporate status and/or legal capacity to sue and be sued with regard to the Applicants has been settled by the Supreme Court in **S. C. CA 6/2008, Gordon Sentiba & others vs. The Inspectorate of Government**.

However, not all cases are the same and each case has to be handled in its own peculiar facts and circumstances. I find that case of Gordon Sentiba distinguishable in that it was involving a Civil Suit and not an application for Judicial Review. I have already held that an application for judicial review does not fall within the ambit of civil proceedings within the meaning of the Government proceedings Act. The second distinction is that whereas in the Sentiba case the Inspector General

of Government sought to be joined in a matter that was not under investigation by the Inspectorate, in the present application, the directive/order being challenged was made by the Inspector General of Government after preliminary findings in a report made by the same IGG to the Accounting Officer of UNRA and copied to 1st Respondent. And that is why I have ruled that since it is the IGG who made the decisions, it should be a Party. And as submitted by the Applicants, in **Constitutional petition No. 10/2012, Kikondwa Butema Farm Ltd vs. Attorney General**, it was held:-

“*Under the Constitution of Uganda the IGG is not an ordinary ombudsman. The Constitution itself clearly sets out general functions of the IGG under Article 225. However the Inspectorate of Government is granted special jurisdiction under Article 226 as an independent body not subject to the direction or control of any person or authority and only responsible to Parliament under Article 227. We hasten to add here that Article 227 makes it independent of the office of Attorney General*.”

But more fundamentally is **Civil Appeal No. 35/2009 American Procurement Co. Ltd vs. the Attorney General and Inspectorate of Government**, while dealing with an argument that the Inspectorate of Government was wrongly joined to a Civil Suit since it is not a body corporate by applying the principles in **SCCA No. 6/2008 – Gordon Sentiba vs. IGG**, their Lordships unanimously had this to say at pages 22 and 23 thereof.

*“The **Gordon Sentiba case (Supra)** was an appeal to the Supreme Court from this Court. The proposition that the Inspector General of Government has corporate status was set out by the Constitutional Court in the **Constitutional petition No. 14 of 2007 Inspectorate of Government versus Kikondwa Butema Farms Ltd and the Attorney General**.*

The Supreme Court cannot set aside a decision of the Constitutional Court. It is only the Constitutional Appeal Court that has the power to set aside such a decision. The learned Chief Justice **B. Odoki CJ** rightly in my view did not set aside the decision of the Constitutional Court in the **Kikondwa Butema Farms case (Supra)** but rather refused to follow it. At page 19 of his Judgment he states as follows:-

“For these reasons, I am of the view that Kikondwa Butema case regarding the legal capacity of the Respondent was arrived at in error and I would decline to follow it”

“I do not agree therefore with the submissions of both Mr. Wandera Ogala and Mr. Martin Mwambutsya that the issue of legal capacity of the Inspector General of Government has been finally settled. The only Court that can settle this issue is the Supreme Court sitting as Constitutional Appeal Court.”

“I am therefore unable to hold or find that the Inspector General of Government has no corporate status on account of the conflicting decisions in both cases cited above. I also find that the Sentiba case (Supra) the decision in respect of the capacity of IGG was made obiter as it was not one of the grounds of Appeal. This conflict in my opinion can only be settled by the Constitutional Appeal Court, when the opportunity arises.”

Their Lordships further held that since the Inspector General of Government started investigating the matter long before the Appellant instituted any matter in any Court of law, then S. 19 (1) of the Inspectorate of Government Act was not applicable. They concluded that the Gordon Sentiba authority was not applicable to that case in that regard.

I find the holding and conclusion of the Court of Appeal Justices on all fores with the circumstances of this case. This is because the Inspector General of Government started investigations and made preliminary findings in a report to UNRA before the 2nd Respondent came to this Court. In the same vein, the Gordon Sentiba case is distinguishable and not applicable. And the holding of the Court of Appeal Justices **in Civil Appeal No. 35 of 2009**, (ibid) delivered on 04th April, 2014 justifies my finding and holding that the Applicants ought to be Parties to the present Application. They have **locus standi** and so the first preliminary objection by the Attorney General and the 2nd Respondent fails.

I now turn to the 2nd objection with regard to the doctrine of **issue estoppel** raised by Counsel for the 2nd Respondent. Counsel for the 2nd Respondent submitted that the doctrine of issue estoppels is applicable to this case because Justice Stephen Musota made a decision in **Misc. Application No. 536 of 2014, Inspectorate of Government vs. Uvetiso Association Ltd & Three others**. They added that Justice Musota conclusively determined the issue as to whether the Inspectorate of Government had a legal capacity to sue or to be sued?

However, I have not only distinguished the holding of Justice Musota as not applicable to the facts and circumstances of the present case, but also held that the capacity of the Inspectorate of Government to sue or be sued is different from Judicial Review Applications like in the present case. Counsel for the 2nd Respondent also quoted the case of **Fidelitas Shipping Co. Ltd vs. V/O Exportchleb 1965 2 All E. R 4** Lord Denning MR. as he then was stated the following in respect of the doctrine of issue estoppels.

“The rule then is that, once an issue has been raised and distinctly determined between the Parties, then, as a general rule, neither Party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings.”

He went on to say;

*“*It is in the interests of commerce that issues, once decided, should not be re-opened because *one side or the other thinks of another point. If we were to allow the issue of waiver to be raised now it might well mean another journey up to this Court on another special case. That would never do. There must be an end of litigation sometime.*

In my view, the Fidelistas case above was concerned with Arbitration and payment of demurrage. And that is how the doctrine of issue estoppels was invoked.

Secondly, Lord Denning MR. in that case was emphasizing the interests of commerce, which is different from the right to be heard in Judicial Review. **The right to be heard cannot be waived. It is a cardinal principle of Natural Justice** as I have already emphasized that it would be condemning the Applicants unheard. Let them be accorded the opportunity to be heard over a decision they took and whether they followed the proper procedure or not.

I therefore agree with the submissions of the Applicants that the doctrine of estoppels cannot arise in the present case as the set of facts and Parties are not the same as the facts of **UVETISO case**. Furthermore, there is nothing binding in decisions of Courts of equal Jurisdictions because each case is determined on its own merits. And as such, Court decisions cannot be said to be final as Courts have a discretion not to follow or to depart from an earlier decision, depending on the circumstances. I accordingly reject the 2nd preliminary objection on issue estoppel.

The third and last preliminary objection was raised by the 3rd Respondent, Uganda National Roads Authority, **it is on the legality of the interim order.**

Counsel for the 3rd Respondent's submissions were that the Interim Order issued on 06th November 2014 by the Deputy Registrar was illegal and should be vacated and/or set aside. They added that the order was issued against a person who was not a Party and neither was the Party heard. Reference was made to 0.41r.3 of the Civil Procedure Rules which mandates that the Court **SHALL** in **ALL** cases before granting an injunction, direct notice of the application for the injunction to be given to the opposite Party. An interim order of injunction is a form of injunction and such an application should have been served. This is a mandatory provision, it was submitted.

They added that the right to be heard is a cardinal principle of our judicial system and a right that every Court should jealously protect, as **"No man should be condemned unheard*."**

Counsel for 3rd Respondent emphasized that the same need for adherence to natural justice is found in the case of **Ridge v. Baldwin (1963) 2 WLR 935 (1964) AC 40** that; **"A decision given without due regard to the principles of natural justice is void."**

Their prayer was that, in the final analysis, the order was issued without jurisdiction, and **condemned the Appellants unheard for no justifiable reason. The order is to that extent illegal and as such cannot be allowed to stand they concluded.** Reference was also made to the case of **Makula International v. Cardinal Nsubuga [1982] HCB 11** – where it was held that once an illegality is brought to the attention of Court it cannot be allowed to stand.

I have carefully considered the submissions by Counsel for the 3rd Respondent as summarized above. I have also considered and internalized the Ruling of my brother Judge **Vincent T. Zehurikize** as he then was the case of **Husseini Badda Vs Iganga District Land Board & 4 Others, HCT-00-CV-MA-0479-2011**, also an application for Judicial Review. Since the facts and circumstances of that case were similar to the present case, I shall reproduce the relevant portions of the ruling in that case, which have also been quoted extensively by Counsel for the 3rd Respondent. On pages 5-7 of the Ruling, Justice V. T. Zehurikize held as follows:-

“It has become common practice and indeed a fashion for parties to file an application for Judicial Review together with an application of a temporary injunction arising from it, which in turn carries another application for an Interim Order to be heard and granted *ex parte*. At the end of the day the applicant goes home armed with an Interim Order issued against the respondent.

In quite a number of cases the respondent gets to know that there is a suit against him or her when served with summons for an application for disobedience of the Interim Order. In majority of cases the respondents are confronted with Interim Orders before they are aware of any case against them.

It is for this very reason that the Rules Committee had to intervene under Statutory Instrument No. 217 of 1994, by amending the Civil Procedure Rules in Order 37 by substituting the said Rule 3 the following new rule:

‘3. The Court shall in all cases before granting an injunction, direct notice of the application for the same to be given to the opposite party’

The amendment in effect abolished applications for interim orders... In my view this Court can only invoke its inherent powers in clear critical and deserving situations to prevent abuse of the process of the court. But the danger of abuse of interim orders appears to be creeping back especially in cases brought by way of judicial review. It should be noted that it is not in every application for a temporary injunction that one must seek an interim order. It should be in clear, critical and deserving cases...”

I entirely agree with the above ruling in the Hussein Badda case. Issuance of notice of the application was necessary in the circumstances. **To the extent that no notice of the application for an Interim Injunction Order was issued by the Deputy Registrar of this Court which is a mandatory requirement under O.37 Rule 3 of the Civil Procedure Rules, then the order was null and void and cannot be allowed to stand.** This is indeed in line with the principle of the law as held in **Makula International Ltd Vs His Eminence Cardinal Nsubuga & Another [1982] HCB 11.** A Court of law cannot sanction what is illegal, and an illegality once brought to the attention of the Court overrides all questions of pleading, including admissions made thereon. In the premises, and in view of what I have outlined above, I do hereby allow preliminary objection by Counsel for the 3rd Respondent.

Accordingly I do hereby set aside and/or vacate the Interim Order issued by the Deputy Registrar of this Court on 6th November, 2014. Since the main Application for Temporary Injunction and Judicial Review are still pending, I order that costs be in the cause.

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W. M. MUSENE

JUDGE

9/01/2015

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Prepared on 14 October 2026 · Esheria