

The Managing Director National Social Security Fund and 196 Others (Civil Appeal No. 285 of 2016) [2022] UGCA 223 (8 August 2022)

[2022] UGCA 223

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AND

CIVIL APPEAL NO. 076 OF 2018

UGANDA TELECOM LIMITED: ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

THE MANAGING DIRECTOR,

NATIONAL SOCIAL SECURITY FUND 25

NATIONAL SOCIAL SECURITY TRUST: ::::::::::::::::::::::::::: RESPONDENTS

AND

STANDARD CHARTERED BANK UGANDA LIMITED

STANBIC BANK (UGANDA) LIMITED

CITI BANK UGANDA LIMITED

(Appeal from the decision of the High Court of Uganda at Kampala (Execution Division) before Muhanguzi J. (as he then was) dated the 1st day of April, 2017 in Miscellaneous Application No. 786 of 2017)

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA HON. MR. JUSTICE STEPHEN MUSOTA, JA HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF CHEBORION BARISHAKI, JA

These two consolidated appeals follow the decision of the High Court (Mugambe, J.) in judicial review application No. 68 of 2017 where she allowed the application filed by the respondent against the 1st and 2nd appellants in Civil Appeal No. 285 of 2016. The appeal also challenges the ruling and orders of Muhanguzi, J. (as he then was) in Civil Appeal No. 76 of 2018 where he granted a conditional stay of execution of the decision of Mugambe J.

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5 Background

The judicial review application with which Civil Appeal No. 285 of 2016 is concerned, was filed by Uganda Telecom Ltd (UTL) against the Managing Director, National Social Security Fund ("The M. D NSSF") and National Security Fund (NSSF). In the application, UTL challenged certain actions by which NSSF collected monies as statutory contributions for certain UTL employees

under the NSSF Act. The exact amount of the monies collected by NSSF was not determined by Mugambe, J. but from the record it was at least Ug. Shs. 14,239,357,797 = in respect of over 900 UTL employees.

UTL was incorporated under the Companies Act, Cap. 110 pursuant to directions contained under Section 82 (1) of the Uganda Communications Act, Cap. 106. It was intended to offer telecommunications services, including local, long distance and international services, cellular, pay phones, rural telecommunications, terminal apparatus provisions and value added services. It is a successor to the Uganda Posts and Telecommunications Corporation (UPTC), a statutory corporation which offered similar services. Upon incorporation, the employees of UPTC, by operation of statute, had their contracts of service transferred to UTL and most of the UTL employees with which the judicial review application was concerned were former UPTC employees. 15 20

UTL's primary case was that the relevant employees were not some of the ²⁵ employees envisaged therefore, NSSF had to make contributions under the relevant law, and wrongfully collected the monies in respect of those

- 5 employees. UTL sought an order compelling NSSF to refund the monies it had paid to it. NSSF's case was that monies were rightly collected from the relevant employees, as they were persons envisaged to make statutory contributions. There were other issues that arose during the judicial review proceedings which I will consider later.
- 10 In her judgment, Mugambe, J. found that the UTL employees were exempted from making statutory contributions and therefore NSSF had wrongly collected monies in their regard. She therefore, allowed the judicial review application and granted the following remedies; 1) A declaration that the demand, collection and continued retention of contributions in respect of the UTL's ineligible and 15 exempted employees is ultra vires, illegal, null and void; 2) An order of injunction prohibiting the M. D NSSF and NSSF from demanding, collecting arrears or retaining contributions in respect of ineligible and exempted employees of UTL; 3) An order of mandamus for the M. D NSSF and NSSF to refund to UTL, the monies illegally and erroneously collected as contributions in the proportions 20 they made the erroneous and illegal contributions; 4) An order of mandamus for the M. D NSSF to issue to UTL a clearance certificate under S.7 (5) and (6) of the NSSF Act. The learned trial Judge further ordered that the refunded monies were to be paid with interest at the statutory rate. She awarded the costs of the suit to UTL.
- 2s The M. D NSSF and NSSF were dissatisfied with the decision of the learned trial Judge and appealed to this Court on the following grounds:

⁵ 1. The learned trial Judge erred in law and fact when she found that Ex-UPTC employees are in exempted employment under the NSSF Act.

2. The learned trial Judge erred in law and fact when she found that UCEPS members are in exempted employment.

3. The learned trial Judge erred in law and fact when he found and held that this was a proper case for judicial review.

The M. D NSSF and NSSF prayed that this Court allow the appeal, set aside the decision of the lower Court and award them costs of the appeal.

In Civil Appeal No 76 of 2018 the appellant UTL alleges that the learned trial Judge Muhanguzi J. (as he then was) determined Miscellaneous Application No. 786 of 2017 without hearing the parties which in its view amounted to no hearing. That the respondents in that application filed miscellaneous application No. 466 of 2015 seeking for an order of stay of execution and the parties consented to grant of a conditional stay where the respondents were to provide security for due performance of the decree by way of a bank guarantee for the decretal sum of UGX 14,239,357,797, costs of UGX 1,500,000,000 and issuance to UTL of a clearance certificate by NSSF as provided in the NSSF Act. According to UTL, NSSF defaulted on all the conditions which prompted it to commence garnishee proceedings. In April 2017 court issued a garnishee order nisi attaching NSSF's accounts in the garnishee banks and reserved the hearing of the application for making the order absolute to 11th April 2017. In the meantime, the respondents filed Misc. Application No. 786 of 2017 to set aside 15 20 25

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the garnishee order nisi. When the application came up for hearing on 7th April 2017 an amended notice of motion was filed in which the applicants sought for an order for extension of time to deposit bank guarantees in court and setting aside the execution proceedings among others. The Judge deferred making the decree nisi absolute and adjourned the hearing to 11th April 2017. On that date the application was not heard but the Judge read out his ruling. UTL was aggrieved with this decision and filed civil appeal no. 76 of 2018 on the following grounds; 10

1. The learned trial Judge erred in law and fact by determining Misc. Application No. 786 of 2017 without hearing the parties on the matters placed before him.

2. The learned trial Judge erred in law and fact in entertaining and determining Misc. Application No. 786 of 2017 during garnishee proceedings against the respondents
3. The learned trial Judge erred in law and fact when he entertained and determined Misc. Application No. 786 of 2017 in disregard of a pending similar Misc. Application No. 572 of 2016 by the respondents in the same court.
4. The learned trial Judge erred in law and fact in entertaining and determining Misc. Application No. 786 of 2017 that was barred in law by judicial estoppel. 5. The learned trial Judge erred in law and fact in staying execution against the respondents. 20

At the commencement of the hearing of the appeal, court in the interest of justice granted orders sought in Misc. Application No. 20 of 2020 by allowing the 25

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5 applicants in that application to be joined as parties to civil appeal no. 76 of 2018. With consent of the other parties civil appeals no. 285 of 2016 and no. 76 of 2018 were consolidated.

The 4th and 5th appellants, and some 193 other persons are some of the UTL employees in respect of whom NSSF collected monies as statutory contributions. 10 The 3rd appellant Uganda Communication Employees Union, is stated to be a labor organization which represents the over 900 UTL employees in respect of whom the monies were collected by NSSF. None of the UTL employees were party to the suit determined by Mugambe, J. and they were added to this appeal as stated earlier as interested parties, by order of Court. I will refer to the interested 15 parties jointly as "the UTL employees". They filed a memorandum of appeal setting out the following grounds of appeal, in addition to adopting the grounds relied on by M. D NSSF and NSSF:

1. The trial Judge erred in law when she decided that the employees of UPTC who transferred their services to UTL are not entitled to both pension and NSSF benefits under the UPTC terms and conditions of service.
2. The trial Judge erred in law when she held that the clauses in the UTL employees' contracts/terms and conditions of service providing for NSSF membership and contribution are not valid contractual provisions.
3. The trial Judge erred in law when she decided that employees who did not transfer from UPTC are also in exempted employment under Item 7 of the NSSF Act, First Schedule.

5 UTL Employees sought for the appeal to be allowed, a finding that they are entitled to membership and contributions to NSSF, for costs of the appeal and those of the proceedings in the Court below.

UTL opposed the highlighted appeals.

I find that resolution of grounds number 1 in Civil Appeal No. 76 of 2018 and 10 ground number 3 in Civil Appeal 285 of 2016 will determine the consolidated appeal. The two grounds read;

> 1. Ground No. 1 in Civil Appeal No. 76 of 2018; The learned trial Judge erred in law and fact by determining Miscellaneous Application No. 786 of 2017 without raising the parties on the matter placed before him.

1s 3. Ground No. 3 in Civil Appeal no. 285 of 2016 ; The learned trial Judge erred in law and fact when she found that Miscellaneous Cause No. 68 of 2015 was a proper case for judicial review.

Representation

At the hearing, Mr. Barnabas Tirmusinguze and Mr. Allan Wanyara, both learned counsel jointly appeared for M. D NSSF and NSSF. Professor Jean John Barya appeared for the employees of UTL. Mr. Kaboyo Alex and Mr. Paul Kawesi, both learned counsel jointly appeared for UTL.

The parties relied on written submissions which have been considered in this judgment.

25 Analgsis

5 The law enjoins this court on a first appeal to review and re-evaluate the evidence as a whole , scrutinize it , draw its own infercnecs and come to its own conclusion on the matter. This dury is set out in Rule 30(1)(a) of the Rules of this Court. See also Pandya V. R [1957] EA 336

Under ground No. 1 in Civil Appeal No. 76 of 2018; The learned trial judge is 10 said to have erred in law and fact by determining Miscellaneous Application No. 786 of 2017 without hearing the parties on the matter placed before him.

Counsel for UTL submitted that when Misc. Application No. 786 of 2077 carr,e for hearing on the ¹ I 4 12017 , none of the parties was called to say anything and without hearing the parties court read a prepared ruling. That this course 15 ofaction which court took was not proper because the same court had previously endorsed an order of stay and had adjourned the application to 111412077 for hearing. Counsel submitted that this was a contested matter and the Judge erred by not hearing the parties which violated their right to a fair hearing guaranteed under Articles 28(1) and 44 of th,e constitution.

20 It was submitted for MD NSSF and NSSF that there was no legal requirement that parties have to make submissions before court reaches a decision. That the only legal requirement was for parties to provide evidencce in support of their case and in this case evidence was provided by affidavit.

The right to a fair hearing is an absolute right guaranteed under Articles 28(1) 2s and 44(c) of the constitution. Fair hearing is one of the principal pillars of natural justice because it guards among others against bias. In Bakaluba Peter 91Page

⁵ Mukasas V Nambooze Bettg Baklreke Electlon Petition Appeal No. 4 oJ 2009 Katureebe JSC had this to say on the right to fair hearing;

"Fair trial.. ,. is one of the fundamental ights guaranteed bg the constitution. This ight is so fundamental that it is giuen in Article 44 of tle constitution as one of those ights that are non-derogable. Because of its very importance, allegations of denial of the right to fair hearing or trial arc very serious and should not be made lightlg or merelg in passing because theg impact on the uery core of our tial sgstem"

Black's Laut Dictlonary 6th Edlton defines a fair and impartial trial as;

"A leaing bg an impartial and disinterested tribunal ; a proceeding uich hears before it condemns , uich proceeds upon inquiry , and renders judgment onlg afier tial ,consideration of evidence and facts as a whole"

Although the right to a fair trial is provided under the constitution, the procedure to be followed in its application is spelt out in the statutes, rules and regulations. The right to present evidence, to cross-examine witnesses and to have findings supported by evidence are some of the main tenets contemplated in fair hearing.

UTL argued that court should have granted the parties an opportunity to be heard before determining and disposing of the application because on the 7th I 4th/2017 when adjourning hearing of the application the Judge had made the following statement;

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5th I am informed the garnishee nisi in this same matter is to be made absolute on 11/4/2017. For that matter the making of the garnishee absolute is hereby deferred till hearing and final disposal of this application.

At pages 131 and 132 of the record of appeal, when the matter came up on the 11/4/2017 court noted the names of the parties representations and read out its ruling. None of the parties was called upon to address court on any of the matters before court. This did not conform to the order court had made on 7/4/2017 that the adjournment it had made on that date was to enable hearing on 11/4/2017. To the appellant, this violated its right to be heard and the right to a fair trial.

The court of appeal of Kenya dealt with a similar matter in the case of Kenneth Stanelg Dlatlba V Attorneg General Ctutl Appeal N. 42 of 7994 where counsel for the appellant argued that he had not been granted an opportunity to address court on the application in particular on the prayer for stay which court had declined to grant without any representation being made. It held that the rule that no man shall be condemned unless he has been given a fair opportunity to be heard is a cardinal principle of natural justice and since the rule had been breached the court could not sustain an order that flows from such a^a fundamental breach. 15 20

The African Union Principles and Guidelines On The Right To Fair Trial And Legal Assistance In Africa provide under principle (2)(e) essential elements of fair hearing as providing adequate opportunity to prepare a case, present arguments, 25

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5 evidence and to challenge and respond to opposing arguments or evidence. Principle No. 2(f) requires that there should be effective representation at all stages of the proceedings.

On the 11/4/2017 when the case was called the Judge stated that "upon carefully perusing the application(EMA No. 786 of 2017) and the supporting affidavits sworn by Isaac Oguong and Richard Adonga including all annexures thereto as well as the supplementary affidavit sworn by Patrick Agota and all the annexures thereto as well as the affidavit in reply sworn by Irene Nuutahine and all annexures thereto and the supplementary affidavit submitted by Dorothy Ochola and its annexures , ^Ifind and hold as follows"

15 20 Clearly, this was a departure from the order the learned Judge had made on ⁷14/2017 because he had not adjourned the matter to make a ruling but for hearing. Because of this, the parties were denied opportunity to present arguments in support of their cases which tainted the trial because the principle of fair hearing had been breached . A hearing includes making presentations on the affidavits filed in court. The lawyers representing the parties were not able to effectively make arguments in support of their clients cases thus denying the parties effective legal representation.

I am persuaded by the decision of my brother Egonda Ntende . J. in *Rebecca Nagiddi V Charles Steuen Muasa* CACA No. 160 of 2014 when he held that;

"Both the constitution and the rules of natural justice under the common law, require that the courts of law or any other bodies charged with the duty of

5 adjudicating upon disputes between parties should act fairly , in good faith and without bias to give each party the opportunity to adequately state their case , correct or contradict any relevant testimony prejudicial to their case. The right to be heard includes the right to appear and present one's case"

I differ from decisions which have held that submissions are only to elucidate and explain the evidence on record . One such decision referred to is *Daniel Toroitich Arap Moi and Anor. V. Muangi Stephen Murithi and Anor.* eKLR [2014] where court said submissions were generally parties marketing language where each side endeavored to convince the court that its case was better than the other sides. I would find that although submissions are not evidence , failure to present one's case can occasion a miscarriage of justice because it is at submissions where counsel apply the law to the facts . It is procedurally wrong to deny parties opportunity to make submissions in support of their cases. The trial Judge in Misc. Application No. 786 erred when he denied the parties opportunity to make their submissions when he had adjourned the matter on 20/4/2017 for hearing. The ruling he made on the 11/4/2017 was therefore premature and this court cannot sustain orders arising from such proceedings. Having found so, it is then not necessary to resolve other grounds in Civil Appeal No. 76 of 2018.

This ground succeeds.

In ground No. 3 in Civil Appeal no. 285 of 2016; the learned trial Judge is said to have erred in law and fact when she found that Miscellaneous Cause No. 68 of 2015 was a proper case for judicial review.

Counsel for the appellant submitted that the learned trial Judge erred in entertaining UTL's application as a proper case for judicial review, yet the case was not fit and proper for judicial review, for two reasons. First, the nature of the dispute with which the case was concerned, did not fall within the purview of judicial review. Judicial review is envisaged as an audit of the decision making process and not a determination of the merits of the decision. Counsel relied on the authority of *Attorney General vs. Tinkasilnilre*, Court of Appeal

Ctutl Appeal No, 208 of 2013 (unreported) in support of his submissions on this point. He contended that the learned trial Judge was conscious that the dispute between the parties involved determination of rights when she stated that UTL had a legal right to the monies improperly collected by NSSF, yet she overlooked that and proceeded to entertain the matter. That the learned trial Judge wrongly based her decision on the need to have a quick trial, which was an improper consideration. 15 20

It was further submitted that there was no decision challengeable under judicial review but the learned trial Judge erroneously found that there was a decision by NSSF embodied in a letter of 6s February, 2015 in which NSSF ignored the advice of the Attorney General and refused to refund monies it had collected from UTL. Counsel referred to the definition of a "decision" under the Black's Law

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- s Dictionary 86 Edition as "a judicial or agency determination after consideration of the facts and the law." He contended that the letter by NSSP was not a decision as envisaged by law. It was merely a communication about the reconciliation process with UTL and not a decision to pay out any monies. The letter also did not set out a decision arrived at after consideration of the facts and the law. 10 Counsel submitted that NSSF was not bound to follow the Attorney General's advice as such advice was held to not be binding in the case of *Kabagambe Asol and 2 Others vs. Electoral Commission and Another*, Constitutional Petition No. 1 of 2006 (unreported). Moreover, even if the Attorney General's opinion was taken as binding, such opinions were not envisaged to determine 15 the rights of the parties which can only be done by a Court of law.
- It was further submitted that the learned trial Judge erred in determining UTL's judicial review application without hearing evidence from the parties. The learned trial Judge was determining the merits of the dispute, namely, whether or not NSSF should refund monies collected from UTL as statutory contributions. 20 Counsel contended that it was not possible to determine some of the issues arising in the case, merely by looking at the attachments on the parties' pleadings. Such issues that required calling evidence included, 1) whether all employees of UTL on whose behalf the contributions were made were transferred from the defunct Uganda Posts and Telecommunications Corporation (UP&TC). 25 If not how many were not 2) whether former UP&TC employees were public servants entitled to pension under the Pensions Act; 3) what was the source of the monies paid by the Government to UCECPS? This would enable Court 15 lPage

5 determine the character of the terminal benefits - whether it was pension or contribution outside the Pensions Act; 4) what were the terms in the contracts given to the employees of UTL who did not transfer from UP&TC. This would enable Court determine whether they were members of UCECPS or not and 5) what was the amount of money due to UTL - was it Ug. Shs. 14,000,000,000/ ⁼ 10 as claimed by UTL.

Counsel further submitted that the judicial review application should not have been entertained as it was an abuse of court process. In *Uganda Land. Commission and. Another vs. James Mark Kamoga and. Another*, Supreme Court Civil Appeal No. 8 of 2014 (unreported), 'abuse of Court process' was defined as process involving the use of Court process for an improper purpose or a purpose for which the process was not established. The Court further cited with approval, the definition of abuse of process set out in the *Black's Law Dictionary* as "a malicious abuse of legal process which occurs when the party employs it for some unlawful object not the purpose which it is intended by the law to effect; in other words, a perversion of it." Counsel pointed out that UTL's judicial review application was filed after a suit touching similar issues (Labour Reference Claim No. 26 of 2015) had been filed in the Industrial Court. The parties had also consented to a temporary injunction halting NSSF from remitting funds to UTL until disposal of the suit.

25 Counsel further contended that in proceeding with hearing the judicial review application, the learned trial Judge undermined the orders of the industrial

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⁵ Court contrary to the legal principle stated in the case of *Housing Finance Bank Ltd and Another vs. Edward Jufusli*, Civil Appeal No. 158 of 2010 (unreported) that Court orders should not operate in vain. Moreover, applying for judicial review when a suit addressing similar issues had been filed in the Industrial Court amounted to forum shopping, a practice generally discouraged by the courts.

In view of the above submissions, counsel urged this Court to allow ground 3 of the appeal and find that the learned trial Judge erred to entertain UTL's application for judicial review.

UTL's Submissions in reply

- In reply, counsel for UTL submitted that the present case was proper for judicial review. Counsel referred to Rule 3 (1) of the Judicature (Judicial Review) Rules, 2009 which provides that a person seeking orders for mandamus, prohibition or certiorari should proceed by an application for judicial review. Counsel referred to the authority of *Council of Civil Service Union vs. Minister for the Civil Service* 15
- *Serfaty* [1985] AC 2 for the grounds of judicial review, namely, illegality, irrationality and procedural impropriety. and contended that UTL's application raised the necessary grounds for judicial review. 20

Counsel sought to draw a distinction between two questions 1) whether a person is justified to seek judicial review, and 2) whether that person's pleadings and evidence support grant of prerogative orders, and to find that it is the second question which is vital in determining whether a case falls within the purview of

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⁵ judicial review. Counsel submitted that UTL's pleadings and evidence supported grant of prerogative orders as rightly found by the learned trial Judge, as the evidence showed that NSSF erroneously collected and continues to hold UTL's monies. The evidence also showed that NSSF unlawfully caused UTL to rely on an undertaking that the relevant monies would be refunded upon receiving advice from the Solicitor General, but this was not done, instead NSSF remained silent. Counsel contended that the continued retention of UTL's monies was illegal and ultra vires the NSSF Act and this constituted sufficient material for judicial review. 10

It was further submitted that an applicant for judicial review only needs to show that the respondent is a public body, has taken a decision or acted in a manner tainted with illegality, irrationality and procedural impropriety. UTL's evidence sufficiently demonstrated all those factors. 15

In relation to the submission that there was no challengeable decision taken by NSSF, counsel cited Council of Clull Service Unions case (supra) for the proposition that judicial review can be based on a decision or a refusal or omissions to make a decision, and submitted that the NSSF's submission that only a decision was challengeable under judicial review was misconceived. It was contended that UTL's case was based on NSSF's part to make a decision to refund UTL's monies; a breach of statutory duty to issue to UTL a clearance certificate; and NSSF's failure to communicate whether it would refund UTL's monies after receipt of the Solicitor General's opinion. 20 25

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- ⁵ With regard to the submission that UTL's application called for hearing of evidence and thus it was not a proper case for judicial review, counsel submitted that it was untrue that hearing of evidence was required. UTL's case was mostly hinged on interpretation of the law and interpreting whether or not a particular course of action was illegal, as there was no contention on the evidence.
- As for the appellant's submission that UTL's judicial review application was an abuse of court process because it was entertained while there existed an order of temporary injunction issued by the Industrial Court, counsel replied that the Industrial Court was then a subordinate Court and its decisions are not binding on the High Court. In addition, existence of an order issued by the Industrial Court did not fetter the inherent, unlimited and original jurisdiction of the High Court to entertain a judicial review matter. Counsel asserted that there was no abuse of court process. 10 15

MD NSSF and IISF's submissions in rejoinder

In rejoinder, counsel for MD NSSF and NSSF maintained that there was no decision by NSSF that was challengeable under judicial review. It was further submitted that even, assuming that there was a decision by NSSF, that decision would still not be amenable to judicial review for the reason that errors of fact or law, do not as of themselves call for judicial review. Counsel cited the authority of *Regind os. Iard. President of the Prtuy Council* Ex parte Page [1993] AC 682 for the proposition that errors of law arising out of misconstruction of a statute cannot be subject to an application for judicial review. 20 25

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⁵ Counsel also submitted that it was erroneous to base on the Solicitor General's advice to support UTL's application for judicial review as that advice was not a binding directive.

On the allegation that UTL had a clear right that was violated by NSSF, counsel rejoined that the alleged right was not established and had to be adjudicated upon by a Court in a normal suit.

It was further submitted that in any case, in the period before institution of UTL's application, NSSF had been restrained from refunding monies to UTL by an order of the industrial Court.

Counsel maintained that UTL's application was filed in abuse of Court process. At the time of filing that application, a suit touching on the same subject matter had already been filed by the Uganda Communication Employees Union, although the suit was subsequently transferred to the Industrial Court. In addition, counsel submitted that the argument that the Industrial Court was subordinate to the High Court was erroneous as the Constitutional Court's decision in the case of *.ft.stice Asaph Ruhlnda Ntengge and. Another as. Attonteg General, Constlrrtltlonal Petltlon AIo. 33 of 2076* clarified that the Industrial Court had concurrent jurisdiction as the High Court. It was further submitted that even if the Industrial Court was taken as a subordinate court, there is a principle in law that higher courts will obey orders issued by lower courts until they are set aside. In entertaining the UTL judicial review application, the High Court undermined the powers of the Industrial Court. For 15 20 25

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⁵ those reasons, counsel maintained that UTL's application was filed in abuse of court process.

Furthermore, it was submitted that NSSF was restrained from refunding the relevant monies to UTL by order of the Uganda Retirement Benefits Regulatory Authority.

In all other respects, counsel maintained the submissions in support of the appeal 10

Resolution

Counsel for the appellant submitted that at the time of filing the application for judicial review, a suit touching on the same subject matter had already been filed by the Uganda Communication Employees Union which suit was subsequently transferred to the Industrial Court and bringing up the same albeit under judicial review was barred by law.

The law is that where there is a pending matter before another court touching on the subject matter of the suit which is filed after the pending matter, the suit filed afterwards is supposed to be stayed under section 6 of the Civil Procedure Act which provides that;

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly or substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where

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⁵ the suit or proceeding is pending in the same or another court having jurisdiction in Uganda to grant the relief claimed.

An application for judicial review is a civil proceeding as provided for under section 2 (x) of the Civil Procedure Act which defines "suit" to mean all civil proceedings commenced in any manner prescribed.

- The industrial court had jurisdiction over the matter which had been filed before it prior in time. The subject matter of the proceedings in the industrial court is the same as the subject matter of the application for judicial review. Further, there was an order for temporary injunction issued by the industrial court which was defied. 10
- I agree with the submission by counsel for the respondent that the Industrial Court has concurrent jurisdiction as the High Court see *Justice Asaph Ruhinda Mengge and Another vs. Attorney General, Constitutional Petition No. 33 of 2016*. 15

I therefore, find that the orders issued in the Judicial review application were in defiance of section 6 of the Civil Procedure Act and ought therefore, to be set aside. Because the said application was not lawfully heard, it may not have been necessary to determine whether the matter was amenable for judicial review however, in order to bring this matter to a meaningful conclusion, I will determine this issue set out in ground 3.

The case for the appellants is that the dispute between the parties should not have proceeded as a suit for judicial review. I note that judicial review 22 Page 25

⁵ originated at common law and was intended as a proceeding by which courts would exercise control over the decision making process of administrative bodies. In *Council of Civil Service Unions and Others vs. Minister for the Civil Service* [1985] AC 374 at 470 (per Lord Diplock), it was stated:

"Judicial review, it provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I shall call the decision maker or else a refusal by him to make a decision."

It must be stated that judicial review is not concerned with the correctness of the decision. At common law, there were analogous proceedings such as appeals for addressing the correctness of the decision. In *ChleJ Constable of the North Wales Police v Euans* [1982] 3 ALLER 747, [Lord Brightman 15

stated

- "I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed (119631 2 All ER 66 at 91, [1964] AC 40 at 96). His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to- 20
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'a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice . . . I do observe

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again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present there is need for giving to the party dismissed an opportunity for putting his case.'

Judicial review is concerned, not with the decision, but with the decision-making process."

Lord Brightman further stated:

"Judicial review, as the Lords imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

In my view, therefore, the principle is that judicial review proceedings are concerned with the manner of making the decision and not the correctness of the decision, which should be challenged in an appeal or a similar mechanism. In *Attorney General v. General Services, Civil Appeal No. 796 of 2016*, Madama Justice JA further stressed this distinction and stated:

"Ordinarily, judicial review is concerned with the legality, rationality and reasonableness of a decision. In contrast of judicial review with appellate jurisdiction, H. W. R. Wade in *Administrative Law*, 5th Edition, Oxford University Press at page 34-35 states that:

The system of judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of the decision under appeal. When subjecting some administrative act

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⁵ or order to judicial review, the court is concerned with its legality. On appeal the question is 'right or wrong'. On review, the question is 'lawful or unlawful'.

> Rights of appeal are always statutory. Judicial review, on the other hand is exercise of the court's inherent power to determine whether action is lawful or not and to grant suitable relief. For these no statutory authority is necessary; the court is simply performing its ordinary functions in order to uphold the rule of law.

In Attorney General vs. Tanaka and Others, Court of Appeal Civil Appeal No. 208 of 2013 (unreported), this Court quoted with approval the following passage from the ruling of the High Court (Mwangusya, J.) about the nature of judicial review: 15

> "The purpose of judicial review is concerned not with the decision but the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality . "

The Court then stated:

'As rightly observed by the trial Judge, in judicial review proceedings, the Court is not required to vindicate anyone's rights but merely to 25 | Page

examine the circumstances under which the impugned act is done to examine whether it is fair, rational and arrived at in accordance with rules of natural justice. "

In the present case, despite UTL's counsel's submissions otherwise, I find that at the heart of UTL's judicial review application was a complaint regarding the correctness of the decision to collect the relevant monies, and it was the incorrectness of that decision that sparked off the dispute between the parties. It was because UTL felt that the decision was incorrect that it approached NSSF seeking a refund. Further, the Solicitor General's involvement was because the parties wanted an opinion on the correctness of UTL's decision to collect the monies. Upon consideration of all the circumstances of the case, it is clear that until filing of the suit, UTL asserted that it was entitled to a refund of the monies as they had been collected from employees who were exempted from making statutory contributions under the NSSF Act. NSSF maintained that those employees were not exempted from making contributions under the NSSF Act. In order to settle the dispute, a Court would need interpretation of the applicable provisions of the NSSF Act, and it would not be determining any question on illegality. I therefore accept the submissions of M. D NSSF and NSSF that UTL's application in the High Court was wrongly instituted as an action for judicial review yet in substance it challenged the correctness of the NSSF's decision to 10 15 20

collect statutory contributions from certain UTL employees.

This ground also succcds

The resolution of ground 3 renders it academic to deal with the remaining grounds of appeal raised for the MD NSSF and NSSF as well as the unresolved grounds raised by the interested parties.

For the above reasons, I find that the learned trial Judge erred in entertaining UTL's application as a case for judicial review. I would allow Civil Appeal 285 of 2016, and set aside the ruling and orders of the High Court in Miscellaneous 30

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⁵ Cause No. 68 of ²⁰I 5, and substitute instead an order dismissing UTL's application for judicial review.

UTL's judicial review application having been dismissed, it follows that Civil Appeal No. 76 of 2018 concerning execution of the of the High Court arising from UTL's judicial review application, must also be dismissed.

The respondent shall pay the costs here and in the Court below. 10

It is so ordered.

Dated at Kampala this {R^}- day of Aug 2022.

Chcborion Barishaki

Justice of Appeal

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA****CIVIL APPEAL NO. 285 OF 2016**

1. THE MANAGING DIRECTOR NSSF
2. NATIONAL SOCIAL SECURITY FUND
3. UGANDA TELECOMMUNICATIONS EMPLOYEES UNION
4. SARAH TAMUGERWA
5. SAMUEL BAZIMBE AND 193 ORS ::::::::::: APPELLANTS

VERSUS

UGANDA TELECOM LIMITED ::::::::::: RESPONDENT

AND

CIVIL APPEAL NO. 076 OF 2017

UGANDA TELECOM LIMITED

VERSUS

NATIONAL SOCIAL SECURITY FUND

(DATED)

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE CHRISTOPHER IZAJIIRA MADRAMA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Cheborion Barishaki, JA.

I agree with his analysis, conclusions and orders he has proposed.

Dated this 01st day of August 2021

James Lun?

Stephen Musota JUSTICE OF APPEAL

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THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MUSOTA AND MADRAMA JJA)

CIVIL APPEAL NOS 285 OF 2016 & 76 OF 2018

- r. THE MANAGING DIRECTOR) NATIONAL SOCIAL SECURITY FUND)
- 2. NATIONAL SOCIAL SECURITY FUND)
- 3. SARAH NAMUGERWA}

- 4. SAMUEL BAZIMBYE)
- 5. JOHN MAGALA & 193 OTHERS)
- 6. UGANDA COMMUNICATIONS EMPLOYEES UNION... APPELLANTS

VERSUS

UGANDA TELECOM LIMITED) "RESPONDENT

(Appeal against the ruling and orders of the High Court before Mugambe' J dated 2/h september 2015 in Miscellaneous cause No. 68 of 2015)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Cheborion Barishaki, JA

I concur with his judgment on the consolidated appeals and the orders he has proposed together with the reasons he set out in the judgment and I have nothing useful to add.

Dated at Kampala the day of August 2022

Christopher Madrama

Justice of Appeal

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Prepared on 12 October 2026 · Esheria