

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANEOUS CAUSE NO.326 OF 2018

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW BY KIBOGA TWEGATTE
CO-OPERATIVE SOCIETY**

KIBOGA TWEGATTE CO-OPERATIVE SOCIETY----- APPLICANT

VERSUS

- 1. ATTORNEY GENERAL**
- 2. THE REGISTRAR OF CO-OPERATIVE SOCIETIES**
- 3. THE AUDITOR GENERAL----- RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Section 38 of the Judicature Act as amended, Rules 6, of the Judicature (Judicial Review) Rules, 2009 seeking orders that;

- a) That the respondents be prohibited from further carrying out directives and orders that are geared towards usurping the powers of the Board of Directors of the applicant and that are contrary to the laws governing Co-operative Societies in Uganda.
- b) That this court issues an injunction against the 2nd and 3rd respondent from making further investigative audit of the applicant, which is a private Co-operative Society and which has already complied with the Audit requests of the 2nd respondent.

- c) That this court issues an order of Certiorari, quashing the decision, proceedings and all work of the 3rd respondent in as far as making investigative Audits on the applicant is concerned without first following the enabling laws of audits of that nature.
- d) That this court makes a declaration that the 3rd respondent's work is only limited to the statutory work as assigned by the enabling laws of audits and further audits on the applicant that is commenced by the 3rd respondent with directives of the 2nd respondent is ultra vires her duties and as such must be stopped.

The grounds in support of this application were stated in the supporting affidavit of the applicant-affirmed by Ssendagire Hudhair Chairperson of the Executive Board but generally and briefly state that;

- I) The applicant is a private organisation and the alleged audit to be done by the 3rd respondent are out of ambit of the 3rd respondent since the bulk of them involve private members funds, shares and have nothing to do with government agencies.
- II) That the society received a report about finances of the applicant and the police wrote a report to the Permanent Secretary of Ministry of Trade, Industry and Cooperatives requesting that an audit of the applicant be carried out.
- III) The 2nd respondent appointed M/s FEL Bright & Co Certified Public Accounts to do an investigative audit of the applicant but before the completion of the said audit within 60 days it was interrupted.
- IV) That in November 2018 the applicant received a letter from the 2nd respondent alleging that the investigative audit as earlier ordered had been stopped because the 3rd respondent had been instructed to carry out the same audit.

The respondent opposed this application and averred that the Auditor General's office is mandated under the Constitution to conduct investigations and audits in respect of all expenditure of public funds in any projects, by all public offices including the applicant.

That the Auditor General is Currently undertaking a forensic audit of the Applicant ,with specific regard to the 3,000,000,000/= received by the applicant from Government, for rebuilding, resettling and improving livelihood of the evicted families from Luwunga Forest Reserve who regrouped and formed the applicant Co-operative Society.

That the investigations/audit has not been concluded and the Auditor General has not prepared or submitted a report of his opinion to Parliament or any other relevant Government Authority arising from his findings.

The respondents also challenged the institution of the present application for lack of authority through a resolution of the AGM since the applicant's elected Executive term of office expired in October of 2018.

That on the 16th day of August 2018 a Board Resolution was passed by the Executive Committee of the applicant passing a vote of no confidence against Ssendagire Hudhair, the Chairperson of the Applicant-for failure to account for monies spent allegedly for cooperative work and also withdrawing monies from the cooperative bank account without board approval.

The said Ssendagire Hudhair is the one personally against the audit by the 3rd respondent whereas the Cooperative Society members and its executive are not opposed the auditing of accounts.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Three issues were proposed for court's resolution;

- 1. Whether the applicant's chairperson has authorization to institute a suit against the respondents.**
- 2. Whether the 3rd respondent has legal mandate to make audits against the applicant.**
- 3. What remedies are available to the parties?**

The applicant was represented by *Mr Mulindwa Ian* whereas the 3rd respondent was represented by *Mr Okello Oryem Alfred* and 1st & 3rd respondent was represented by *Ms Nabaasa Charity*.

ISSUE ONE

Whether the applicant's chairperson has authorization to institute a suit against the respondents.

Counsel for the applicant submitted that the chairperson's term of office was extended by the Magistrates Court of Kiboga and this is basis of their authority to continue in office and authorize institution of the proceedings.

The respondents counsel argued that the applicant is a registered cooperative society under Cap. 112 of the Laws of Uganda. It follows that without a resolution of the applicant no action could be sanctioned and filed in court. The instant application was not sanctioned by the applicant.

LUTALO DENIS who is a member of the applicant deponed to this in paragraphs 5 and 6 of his affidavit in reply. The application is thus incompetent because it only represents the whims of SSENDAGIRE HUDAIR, who used to be the Chairperson of its Executive Committee. SSENDAGIRE HUDAIR himself admits in paragraph 3 of his affidavit in rejoinder, that the term of office of his Executive Committee expired in October of 2018, a month before the instant application was filed in November, 2018. The application is simply incompetent.

SSENDAGIRE HUDAIR and his lawyer advanced the argument that although the term of the applicant's Executive Committee was to expire in October of 2018, it did not expire because he had obtained an Interim Order of some Court staying elections of the applicant in August of 2018. Neither SSENDAGIRE HUDAIR nor his counsel bothered to attach a copy of the purported Interim Order. That does not really matter because the Interim Order of Court could not stop the expiry of the term of office of the Executive Committee or extend its term.

It is certainly not purported to have done so. If it did, it would be illegal because a Court of Law cannot impose leadership on the applicant. In any case the sanction to file a suit could not be issued by the Executive Committee. It would have been issued by the applicant's membership and not the Executive Committee in any case.

Counsel for the applicant argues that because of the mysterious temporary injunction, the applicant's old Board had mandate to file the case, when it was filed in November. Where did they get the mandate from?, certainly not from sections 53 and 55 of the Companies Act, because those sections protect third parties doing business with Companies and not a sword for Companies to sue without sanction. This argument is, with respect bankrupt.

Resolution

Section 28 of the Cooperatives Societies Act provides that;

A society on registration shall become a body corporate by the name under which it is registered, with perpetual succession an a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purpose of its constitution.

The above law envisages suit being instituted and defended accordingly. However it must be a decision of the entire board and not merely a Chairperson who institutes suits without the resolution of the entire board.

The Executive Committee/on the 16th day of August passed resolutions of a vote of no confidence against the Chairperson. This meant that the actions of the Chairperson of instituting suits in the names of the Cooperative society became personal decisions/actions and not Executive Committee or the Board.

It is also clear from the evidence on record that the rest of the members were okay with the audit by the 3rd respondent but it was Ssendagire Hudhair-Chairperson who was against the audit. Therefore he took personal decision to protect himself through institution of the suits.

The Chairperson wrongly filed the suit without authority since there is no resolution by the Executive Committee/Board and this therefore makes the suit/application incompetent. The application is struck out with costs against the Chairperson- Ssendagire Hudhair.

Be that as it may, this court shall proceed to determine the other issue if this court is wrong on the above issue.

Whether the 3rd respondent has legal mandate to make audits against the applicant.

Section 38 of the National Audit Act, 2008, expressly protects and provide the Auditor General full immunity from court proceedings to all his reports published for the benefit of Parliament which are treated as Parliamentary reports and enjoy all privileges accorded to Parliamentary reports. Invariably, the Auditor General cannot be sued for undertaking an audit.

That the Constitution of the Republic of Uganda in Article 163 (4) and (5) requires the Auditor General to submit to Parliament annually a report of the accounts audited by the Auditor General for the financial year immediately preceding and requires Parliament, within six months of submission of the report, to debate and consider the report and thereafter take appropriate action.

The Office of the Auditor General is a Constitutional institution created under Articles 154 (3) and 163 (3) of the Constitution of the Republic of Uganda and the National Audit Act No. 7 of 2008. The function of the Auditor General is to conduct

investigations and audits in respect of all expenditure of public funds in any projects, by all public offices including the courts, the central and local government administrations, universities and public institutions of like nature, and any public corporation or other bodies or organizations established by an Act of Parliament.

Under sections 18 and 19 of the National Audit Act, 2008, the Auditor General may inquire into, examine, investigate and report, as he or she considers necessary, on the expenditure of public monies disbursed, advanced or guaranteed to a private organization or body in which Government has no controlling interest, for the purpose of expressing an opinion on the accounts based on the results of each audit.

The 3rd respondent is duly mandated to act under the constitution and any suit that tries to restrain the performance of the constitutional mandate should be subjected to thorough scrutiny.

The 3rd respondent in their evidence they have stated that; *“the Auditor General is Currently undertaking a forensic audit of the Applicant ,with specific regard to the 3,000,000,000/= received by the applicant from Government, for rebuilding, resettling and improving livelihood of the evicted families from Luwunga Forest Reserve who regrouped and formed the applicant Co-operative Society.”*

The office of the Auditor is mandated to investigate any money that comes from government and they cannot be curtailed in the execution of their duties.

For one to succeed under Judicial Review it trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The respondent as a public body is subject to judicial review to test the legality of its decisions if they affect the public.

In the present case the applicant has not shown any illegality committed by the 3rd respondent and on the other hand they have admitted to receiving

3,000,000,000/= which public money and the Auditor General is mandated to audit.

This issue of the applicant is therefore resolved in the positive. The Auditor General is mandated to investigate the public monies given to private entities like the applicant.

In the result this issue is resolved in the positive against the Applicant.

ISSUE THREE

Whether the applicant is entitled to the remedies sought in the application.

In the result I find this application to be lacking in merit and it's hereby dismissed with costs to the respondents. The same be borne by the Chairperson-Ssendagire Hudhair who instituted proceedings in the name of the applicant without mandate or authority or resolution of the Executive Committee/Board.

I so Order

SSEKAANA MUSA

JUDGE

21st/06/2019