THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO.149 OF 2016

MARVIN BARYARUHA---------- APPLICANT

VERSUS

ATTORNEY GENERAL---------- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for judicial review under Section 36 of the Judicature Act as amended, Rules 3, 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 and Section 98 of the civil Procedure Act and for the following judicial review reliefs by way of judicial review;

i) An order of prerogative order of Certiorari to quash the findings and recommendations of the commission of inquiry into Allegations of Mismanagement, Abuse of Office and Corrupt Practices in the Uganda National Roads Authority contained in the said Report in so far as the said findings and recommendations affect him.

ii) An order of Prohibition restraining the Government of Uganda and all its agents, servants, agencies, departments, authorities and or officials from enforcing the findings and recommendations of the commission of Inquiry into Allegations of Mismanagement, Abuse of Office and Corrupt Practices in the Uganda National Roads Authority, contained in the said Report in so far as the said findings and recommendations affect him.

iii) A permanent injunction do issue restraining the Government of Uganda and its agents, servants, agencies , departments, authorities and or officials from implementing the findings and recommendations of the said Commission of Inquiry, in so far as the said findings and recommendations affect him.

iv) Costs of the Application to be provided for.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavits in support of the applicant-Marvin Baryaruha but generally and briefly state that;

1) The members of the Commission particularly the Chairperson Lady Justice Catherine Bamugemereire were biased towards the applicant and should not have taken part in the inquiry process.

2) The applicant was not afforded a fair hearing by the Commission of Inquiry to respond to the various allegations raised against him in several instances recommendations and findings were made without obtaining his side of the story.

3) The findings and recommendations reached by the Commission were unreasonable and irrational in as far as they affected the applicant and could not have been reached at by an impartial body with regard to all the evidence adduced.

4) The Commission report was made in complete disregard and or breach of the provision of Legal Notice No. of 2015 and the Commission of Inquiry Act Cap 166

5) The applicant's main contentions are the Commission of Inquiry made a report which adversely affects my rights, in particular;

a) The Commission of Inquiry's report contains and is based on falsehoods against him.

b) The alleged findings of the Commission of Inquiry against the applicant are unsubstantiated by any credible evidence;

c) The Commission of Inquiry's recommendations against the applicant have no factual or legal basis at all;

d) The Commission exhibited bias especially the Chairperson who hurled personal attacks, insults and abuses against the applicant.

e) The Commission of Inquiry acted unfairly and did not afford the applicant a fair hearing;

6) That the report accuses the applicant of having been negligent in executing his duties in procuring the Consultant for the resettlement plan, land acquisition and titling for Hoima-Kaiso-Tonya Road. The applicant's legal counsel was never sought and he was not a member of the Contracts committee at the time of the award of the contract in 2011 as alleged in the report.

7) The report recommends the prosecution of the applicant on account of variation of prices on Mbarara-Kikagate Road Project and yet during the inquiry the applicant was never asked any questions on the said project nor was he summoned to make any explanation about the same.

8) The report further recommends the prosecution of the applicant and other over the Lake Kyoga Ferry and yet he was never given a chance to explain his role in the procurement process.

9) That the applicant was denied a chance to explain or adduce evidence on whether the person who signed on behalf of the Consultant (Mc Donald) had powers of Attorney or Authority to do so. This lead to the applicant being depicted as incompetent and negligent.

10) That the report recommends for the prosecution of the applicant for causing financial loss and abuse of office and yet he never participated in the procurement of the UNRA office space neither was legal advice sought from him. He was neither asked any questions about the procurement of office space when he appeared before the commission.

11) The report accuses the applicant for misadvising/wrongly advising the contracts committee on the price adjustment clause on the Kamuli – Jinja Road and yet when he appeared before the commission he was never asked any questions about that project and was not a member of the contracts committee.

12) That the applicant was never involved in the change of name of the consultancy from Africon to Aurecon Amei between 2009-2010. But rather the change of name of the consultancy was made where the applicant was not a member.

13) That the different members of the commission had a direct conflict of interest by the nature of their work or activities of UNRA and this compromised their impartiality in the handling of the matter before the inquiry.

14) That while appearing before the commission on 25th August 2015, the applicant was attacked, insulted and abused by the chairperson when she stated *" we have all along been discussing about you in the commission and we are going to deal with you seriously….just answer the way we want"* .

and this showed that the applicant's fate had been predetermined by the commission.

15) The applicant contends that he was insulted, abused and attacked when the Chairperson stated that; you were a fat cat in UNRA living beyond your salary of five million and who could afford to build apartments in Luzira, Nakawa, Naguru and houses in Entebbe; that even your father warned that your amassing of wealth would one day lead you to prison" and this is why the report mentions his name several times as a person who was responsible for causing financial loss on matter he never participated in at all.

16) That the applicant lodged a complaint against the chairperson to the Chief Justice seeking protection from rants, insults, personal attacks and abuses. The said letter of complaint is the reason why the report contained the falsehoods, bias, lies, unsubstantiated findings and recommendations.

The respondent opposed this application and filed about six affidavits of Daniel Rutiba, Mary Kamuli Kuteesa, Richard Mungati, Abraham Nkata and Eng Rusogoza Patrick Kusemererwa who were all members of the Commission.

1) The 1st witness-Rutiba Daniel was an Assistant Secretary to the National Roads Authority Commission of Inquiry contended that the commission was made up of persons of high morals, wide ranging knowledge and specialisation, extensive experience, were persons of impeccable repute and paid attention to detail and were meticulous, rigorous and fair throughout the process of carrying out their investigations.

2) The Commission was chaired by Hon. Lady Justice Catherine Bamugemereire, other Commissioners included Mr. Okello Luwum, Eng Patrick Kusemererwa Rusongoza, Mr. Abraham B Nkata and Mr. Richard Ivan Nangalama Mungati. They were assisted by His Worship Charles Emuria and Daniel Rutiba as Secretary and Assistant Secretary respectively, while

Mr. Andrew Kasirye was Lead Counsel and Mrs Mary Kamuli Kuteesa was Assistant Lead Counsel.

3) That the applicant is challenging the findings and recommendations allegedly made against him contained in the report of the Commission which was submitted to His Excellency the President of Uganda and has never been debated or made public.

4) The Commission carried out investigations which it did with strict adherence to the principles of natural justice. It compiled a report of its findings which were handed over the President of Uganda on 26th May 2016.

5) That the application is premature, speculative, misconceived and bad in law for the following reasons;
    - The recommendations have not been discussed by Cabinet and have never been made public nor acted upon and therefore no decision has been concerning them.
    - The findings and recommendations are merely proposals of the Commission which are neither binding on the appointment Authority nor any government Ministry, Department or Agency.
    - The findings and recommendations in the UNRA Report are opinions of the Commission based on its findings and are not orders or decisions and should not be open to Judicial Review.
    - That this application for Judicial review is aimed at frustrating and obstructing the exercise of the functions of the UNRA and Commission of Inquiry and it amounts to abuse of process.

6) The applicant appeared before the Commission after several attempts to summon him to appear were neglected by him. He properly defended himself and was granted an opportunity to return to the Commission but was dismissive and adamantly declined such opportunities.

7) The Chairperson or Commission members were not confrontational or accusatory as alleged by the applicant and he was accorded a fair hearing like all other persons who appeared before the commission.

8) The applicant was granted sufficient time to prepare and to appear on diverse days and was given more time to present additional evidence on any new matters that may have arisen which he sometimes took and in some he declined.

9) The Commission recommended sanctions against several individuals and organisations according to the gravity of the findings against them and it is not true that the sanctions against the applicant were motivated by malice.

10) The members of the Commission were each required to declare all possible conflict of interest before the commencement of proceedings and therefore the commission made determinations on a case by case basis.

The 2nd affidavit was sworn by Mary Kimuli Kuteesa who was former Assistant lead Counsel to the Commission of Inquiry into Uganda National Roads Authority and is currently employed as Director legal Services at Uganda National Roads Authority.

1) The applicant like all other persons who appeared as witnesses were given an opportunity to explain to the commission their various roles and never at one time was she or the commission go out of their professional duty to depict the applicant as incompetent. The examination of the applicant was professional, never abusive, confrontational and or accusatory in nature as alleged by the applicant.

2) That as Assistant lead Counsel, she was never involved in the determination of the nature and identity of witnesses to be invited, or the nature and lines

of inquiry to be conducted by the Commission and the kind of evidence or information that the Chairperson or the Commissioners deemed material.

3) That she was never involved in the deliberations of the Chairperson and Commissioners nor did her make any input to the deductions, conclusions, decisions and recommendations of the Chairperson and the Commissioners. She was not involved in the making of the interim and final reports of the Commission.

4) She denied having used her position as Assistant Lead Counsel to gain the current position at UNRA or influence any recommendations for hiring and firing any one at UNRA nor did she victimize or tarnish the applicant or tarnish the applicant's or any person's name in order to gain the current position.

5) The 3rd affidavit was by Richard Mungati a former Commissioner to the Uganda National Roads Authority Commission of Inquiry and made a specific reply to paragraph 46 of the applicant's affidavit.

6) He admitted having worked for UNRA on various contracts and positions as a consultant, a situation he made clear at the time of appointment. He never personally held any contracts but advised at various positions. He was not aware of any failures in any advice given to UNRA at any time.

7) That the Commission did not inquire into all the roads run by UNRA but restricted itself entirely to the roads which showcased the highest level of incompetence, maladministration and loss of public funds.

8) The Members of the Commission executed their mandate into the allegations of mismanagement, abuse of office and corrupt practices in UNRA without partiality and or bias but on the weight of the evidence adduced before the Commission.

The 4th affidavit in reply was by Abraham Nkata a member of Public Procurement and Disposal of Public Assets Appeals tribunal and a Former Commissioner to the Uganda National Roads Authority Commission of Inquiry.

1) That upon commencement of the assignment, each member disclosed to the Commission Chairperson any areas of conflict of interest arising from previous or current dealings with UNRA and signed an Oath of Secrecy.

2) He contended that he was nominated by and participated in UNRA's several bid evaluation process between December 2008 and March 2010. In 2010, he was appointed on a Panel by UNRA to conduct interviews on its behalf for the recruitment of a Procurement Consultant.

3) That in March 2014, the Public Procurement and Disposal of Public Assets Authority recommended the said Nkata to support UNRA Board Committee during the interview process for the UNRA Director, Procurement and Disposal.

4) The nature of work of evaluation functions, technical advisory roles during interviews for recruitment of Procurement Consultant to UNRA and above all his role in the bid evaluation Committees did not influence the outcome of the procurement process since decisions of the bid Evaluation Committees are unanimous.

5) That his participation in the inquiry did not prejudice the applicant and he executed his mandate without bias but on the weight of the evidence adduced before the Commission.

6) That the applicant has not shown in anyway how my previous engagements in UNRA have affected my involvement in the Commission of Inquiry.

The 5th affidavit was by Eng Dr. Rusongoza Patrick Kusemererwa, a long serving Independent Engineering /Technical/Value for Money Consulting Auditor and a

former Commissioner to the Uganda National Roads Authority Commission of Inquiry.

1) That in specific reply to the affidavit of the applicant, he contended as follows;
    a) The office of the Auditor General was housed in UNRA House but he was never an employee of UNRA nor of Auditor General but an Independent Consulting Auditor hired occasionally by Auditor General to support his team and other hired Consultants to conduct technical/ engineering audits of UNRA.

    b) All procurement anomalies where the applicant is cited were never in the Auditor General's technical/ Engineering Audit reports of which he participated as an Independent Technical Auditor.

    c) The Commission performed a more detailed inquiry into the selected roads than the Auditor General Report and methodologies employed by the Commission were far more broad and inclusive.

    d) That although he had knowledge how UNRA operated, he was never biased, partial or had any conflict of interest against UNRA staff.

    e) That the allegations that the Auditor General's reports were relied on to make conclusions against the applicant are baseless and intended to distract the process of implementing the Commission's recommendations.

    f) The evidence adduced in the Commission report are hard facts either in form of recordings, hard papers and evident on the roads.

2) The members of the Commission executed their mandate into the allegations of mismanagement, abuse of office and corrupt practices in

UNRA without partiality and or bias but on the weight of the evidence adduced before the commission.

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.

Six issues were proposed for court's resolution;

1) ***Whether the Members of the Commission and in particular the Chairperson of the Commission were biased towards the Applicant.***

2) ***Whether the Applicant was accorded a fair hearing on the various allegations made against him.***

3) ***Whether the Commission followed principles of natural justice in making its findings and recommendations in relation to the Applicant***

4) ***Whether the findings and recommendations of the Commission in respect to the Applicant were unreasonable and irrational.***

5) ***Whether in making its findings and recommendations, the Commission complied with the relevant law, specifically the provisions of legal Notice No. 4 of 2015 and the Commission of Inquiry Act Cap 166.***

6) ***What are the remedies available to the parties?***

THE LAW ON JUDICIAL REVIEW:

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case my fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said

orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***See; John Jet Tumwebaze vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd vs Attorney General Misc Cause No.125 of 2009, Balondemu David vs The Law Development Centre Misc Cause No.61 of 2016.***

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.

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 case of ***Commissioner of Land v Kunste Hotel Ltd [1995-1998] 1 EA (CAK)*** ,Court noted that;

"Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he is being subjected."

Issue No. 1

Whether the Members of the Commission and in particular the Chairperson of the Commission were biased towards the Applicant.

The law governing the proceedings before the Commission is well stated in ***Section 6 of the Commission of Inquiry Act Cap 166*****.** The section mandates the Commissioners inter alia to make a full, faithful and impartial inquiry into the matters specified in the Commission. The said section is to be read in conjunction with ***Article 21 the Constitution*** which provides entitlement to equality and equal protection of the law in favour of all persons. This, we submit is regardless of the person appearing before the Commission. See ***High Court Misc. Cause No. 137 of 2016 Dott Services & Anor Vs. AG Misc. Cause No.137 of 2016***.

In the absence of any statutory definition of bias, recourse is had to *Black's* ***Law Dictionary 9th Edition at page 183****,* which defines bias as inclination, prejudice or predilection. Bias may be either actual bias or implied bias.

The applicant's counsel submitted that the tests applicable in the determination of whether or not there bias is;

- *Whether a reasonable person in the in possession of the relevant information would have thought that bias was likely and whether the person concerned was likely to be disposed to decide the matter only in a particular way.* ***: HCT-00-CC-CA-128/2011 Seyani Brothers & Co. Ltd versus Cassia Limited) at page 4***

- *Whether there was a real likelihood of bias to ascertain whether the judicial officer labored under an interest, pecuniary, proprietary or of kindred?*

- *Whether there was a reasonable suspicion of bias. The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless if fair minded persons would think that, in the circumstances, there was a likelihood of bias, then he should not sit, and if he does, his decision cannot stand.* ***; EPA No. 04/2011 Obiga Mario Kania versus Electoral Commission at paragraphs 240-270 citing SC Crim. Appeal No. 33/91, Professor Isaac Newton Ojok versus Uganda***

- *The second application of the principle of bias is that where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to suspicion that he is not impartial, for example because of his friendship with a party. It is of fundamental importance no man should be a judge in his own cause and that justice should not only be done but should be manifestly and undoubtedly be seen to be done.****House of Lords Session 1998-99 Re Pinochet Session Pages 13 & 17***

The applicant's counsel contended that in determining whether or not, there is actual or implied bias, the position of the law is that each case must be examined on its own merits. It is necessary to verify whether the particular judicial officer's act or conduct satisfied reasonable persons that the court was impartial or

unbiased;***: Professor Isaac Newton Ojok versus Uganda [1993] KALR pages 93 at page 94.*** We, thus invite your lordship to consider the law and evidence in this matter, taking into account the peculiarity of the facts of this case in so far as they relate to the applicant.

The Applicant adduced evidence to prove the actual and implied bias exhibited by the Commissioners, which impacted on their impartiality not only during the proceedings of the commission but also in so far as the findings and recommendations against the Applicant are concerned as enumerated herein after;

The Applicant in his affidavit in support testified that the Commission especially the Chairperson who *hurled very strong personal attacks, insults and abuses against him and made conclusions on his character and even family*. The Applicant states that when his lawyers requested for time to prepare, they were *rudely told off* by the Commission Chairperson. The affidavit of the applicant enumerates verbatim, the personal attacks made by the Chairperson of the Commission. The applicant through his lawyers even lodged a complaint with the Chief Justice, highlighting the personal attacks.

The applicant's counsel contends that the affidavit by Mr. Daniel Rutiba who was the former Assistant Secretary to the Commission made a general denial that the Chairperson or Commission members were not confrontational and accusatory. According to counsel, his evidence does not controvert the applicant's testimony on the bias exhibited by the chairperson to wit;

- He does not specifically deny the contents of *the Applicant's affidavit.*
- He participated and was present during the proceedings where the Applicant appeared but does not deny ever hearing the Chairperson uttering the verbal attacks and insults against the Applicant as set out in *the Applicant's affidavit.*
- He does not deny the fact that the Applicant formally complained to the Chief Justice about the demonstrated bias and insults hurled against him by the Chairperson of the Commission.
- He does not deny ever seeing or being served with the Applicant's complaint to the Chief justice**,** which was evidently copied to the Secretary of the Commission.

- He does not state whether the Commission or the Chairperson thereof ever responded to the contents of complaint to Chief Justice *denying them as being false;*
- He has not adduced any evidence controverting the contents of the said letter neither has he alluded to any statement or information from the Chairperson of the Commission or the Secretary to the Commission, His Worship Charles Emuria, denying the contents of applicant's affidavit as being false.
- No such evidence to contradict the Applicant's averments in his affidavit in support has been adduced by any of the other deponents who deponed affidavits on behalf of the Respondent.

It was the applicant's counsel's submission that, where the Applicant adduces evidence sufficient to raise a presumption that what he asserts is true, the burden of proof shifts to the Respondent; i.e. the Applicant's allegation is presumed to be true unless his opponent adduces evidence to rebut the presumption. (***See; Prof. George W. Kakoma versus AG (supra)***

Additionally, in relation to affidavit evidence, the Respondent had the opportunity to contradict or rebut the Applicant's evidence by adducing a response to the Applicant's averments in applicant's affidavit and the complaint to the Chief Justice. None has been adduced; rendering the Applicant's liable to be presumed to be true. (***See; HCCS No. 197/2008. Prof. George W. Kakoma versus AG at page 3-4 (supra)***

Further, it is now settled law that where certain facts are sworn to in an affidavit, the burden to deny them is on the other party and if he does not, they are presumed to have been accepted.***: HC OS No.09/2005; Basajjabalaba Hides & Skins Limited versus Bank of Uganda & Anor.***
Counsel invited court to find that the Applicant has made out a case of bias.

It is a notorious fact that the Respondent and the Commission is the custodian and has custody of both the electronic and transcribed proceedings, upon which the report was prepared. Mr. Rutiba has even alleged that the Report has not yet been made public. In order to controvert the Applicant's averments in his affidavit, the Respondent ought to have produced the proceedings to demonstrate that the Chairperson never made those person attacks on the

Applicant. ***Section 106 of the Evidence*** Act places the burden on the Respondent to produce the proceedings, and more so in this case where even the Court order issued by this Honourable Court to the Respondent to produce the report was ignored by the Respondent. See ***EPA No. 44/2011 Kikulukunyu Faisal versus Muwanga Kivumbi page 11 (supra)***

In the premises, we invite your lordship to find that the Applicant has adduced sufficient and uncontroverted evidence to prove that the Chairperson of the Commission exhibited actual bias against him. The utterances, insults and verbal attacks made against the Applicant constituted conduct *or behavior that gave rise to suspicion that the learned Judge and Chairperson of the Commission was not impartial. The impression which the utterances would give to any fair minded person in the circumstances is that there was a likelihood of bias*. That renders the findings and recommendations against the Applicant legally untenable. (***See EPA No. 04/2011 Obiga Mario Kania versus Electoral Commission at paragraphs 240-270 (supra)***

The Applicant led further evidence in his affidavit in support that Eng. Patrick Rusongoza who was a Member of the Commission of inquiry was a Member of the Auditor General's team that had audited some of the roads inquired into by the Commission and whose reports were relied on by the Commission to make its findings hence he was both a witness and commissioner in his own cause and therefore he had preconceived opinions on the matters under investigation and he was biased against the Applicant.

The Commission relied on inter-alia; the Audit reports of the Auditor General in respect of road projects in respect of which findings and recommendations were made against the Applicant. ***See pages 518-524 and 540-609. See also documents listed in Chapter 1, clause 1.3.3 at page 150 of the Report*****.** In **para 7 (a) (b), (d) and (f)** of his affidavit in reply, Eng. **Dr. Rusongoza** essentially admits the applicant's averments, save for his contention that the Commission did not solely rely on the audit reports to make its findings and recommendations.

The applicant's counsel submitted that *Eng.* Eng. **Dr.** Rusongoza had preconceived opinions on the matters under investigation and he was definitely biased against the Applicant. He had a conflict of interest and could hardly be said to be impartial. It was irrelevant that whether Eng. Rusongoza was part of the team as

an independent Consulting Auditor or not. The bottom line is that by being part of that audit team, he was privy to intricate detail of the matters under investigation in respect of the road projects cited by the Applicants in their complaint. Counsel relied upon***: HCT-00-CC-CA-128/2011 Seyani Brothers & Co. Ltd versus Cassia Limited)*** at page 4 and invited court to find that actual or implied bias is proved. The report does not show any of the said deponents declaring any such conflict of interest

The Applicant further led evidence on Ms. Mary Kamuli Kuteesa another of the Members of the Commission in of his affidavit in support, she having been the Assistant Lead Counsel, whose approach was abusive, accusatory and confrontational , had a conflict of interest as she was eying the Applicant's job of Head legal UNRA. The said Mary Kuteesa, does not deny having got the said Job after UNRA had released its report and was head hunted. In her affidavit in reply, Ms. Mary Kuteesa does make a bear denial of being abusive, confrontational and accusatory. However, as already submitted, ***Section 106 of the Evidence*** Act places the burden on the Respondent to produce the proceedings, and more so in this case where even the Court order issued by this Honourable Court to the Respondent to produce the report was ignored by the Respondent. ***See; EPA No. 44/2011 Kikulukunyu Faisal versus Muwanga Kivumbi page 11 (supra).***

The Applicant further adduced evidence in his affidavit in support against **Mr. Abraham Nkata** who had participated in several evaluation committees in procurement in UNRA between 2008 to 2010 and he was the lead consultant in the procurement and appointment of past director of UNRA Eng. Godfrey Ssambwa and hence he could not serve as the investigator, prosecutor in his own case. Further evidence was led in of the affidavit in support against ***Mr. Richard Mungati*** who had worked as a valuation consultant in many projects at UNRA.
It was applicant's counsel submission that these Commissioners had a preconceived opinion on the matters under investigations against the Applicant, could not act fairly and were thus impartial, which impacted on the findings and recommendations against the Applicant. He invited court to apply the test in the case of ***Re Pinochet Session Pages 13 & 17 ; House of Lords Session 1998-99*** and be pleased to find that actual or implied bias is proved.

Counsel contended that in so far as the effect of bias is concerned, *the position of the law is that with regard to bias in relation to a judicial tribunal, the test that is*

applied is not whether in fact a bias has affected the judgment but whether the litigant could reasonable apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. **See *Seyani Brothers & Co. Ltd versus Cassia Limited) at page 4 (supra)***

It was further their case that that the Applicant has adduced sufficient evidence to prove that the Commission and its Commissioners or members exhibited actual or implied bias. Their participation, behavior and or conduct during the proceedings could make any litigant or fair minded person to reasonably apprehend that a bias attributable to them might have operated against them in the final decision of the tribunal. They prayed that court answers Issue No. 1 in the affirmative.

The respondent's counsel in his submission noted that, the principle to be applied in regard to bias was stated in the case of **Lawal v Northern Spirit Ltd [2003] UKHL 35** where it was held that "…..*the question is whether the fair minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased"*. (**See Porter v Magill (2002) 2 AC 357**

It was further stated in the case of **Gilles v Secretary of State for Work and Pensions [2006] 2 UKHL** that **'**we have to take the view of a reasonable and well-informed observer'. What can confidently be said is that one is entitled to conclude that such observer will adopt a balanced approach. This idea was succinctly expressed in **Johnson v Johnson (2000) 200 CLR 488**, by **Kirby J** when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"

In the case of **Locabail (UK) Ltd V Bayfield Properties Ltd & Anor [2000]2 WLR 870** as highlighted it was stated that;

- the judge's disqualification applies where a judge has a particular and substantial personal interest in the outcome of the cause before him.
- the interest must be direct in the sense that it is not too remote.
- While it was restricted to a direct pecuniary and propriety interest, extensions may however, be limited to the situation where the judge is

committed to the wellbeing of a charitable organization which is a party to the proceedings. Any further extension of the principle would be un desirable.

In **R (Island Farm Development) v Bridgend County Bc (2006) EWHC 2189** Collins J stated……the reality is that councilors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should unless there is positive evidence to show that there was indeed a closed mind. I do not think that prior observations or apparent favoring of a particular decision will suffice to persuade a court to quash a decision.

In the case of Obiga Mario Kania v Electoral Commission(supra). *It is also worth noting, that the above case further held that to determine bias, there must appear to be <u>real likelihood of bias, Surmise or conjecture is not enough.</u>*

Important to point out is **section 106 of the Evidence Act** alluded to by the Applicant which states as follows:

> "In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person".

The allegations against the Chairperson are that she is biased and that she hurled abuses, and verbal attacks to the Applicant. The burden of proof under section 106 of the Evidence Act lies on the Applicant to prove that it is what exactly happened.

It was upon the Applicant to demonstrate or provide parts of the proceedings that the Chairperson of the Commission said those utterances, abuses and verbal personal attacks against him. See Ruling of Justice Basaza in the case of Eng. Luyimbazi SSali & Others Vs AG Misc Cause No.156 of 2016 at page 30-31.

The Applicant cannot seek refuge under section 106 of the Evidence Act that it was within the knowledge of the Commission that it was biased. The allegations of

bias were made by the Applicant and he had to discharge that duty that those facts existed. In any case, he has not made allegations anywhere that the Commission made a finding that it was biased.

My Lord, Section 106 of the Evidence Act is being misapplied. The allegations of bias are within the knowledge of the Applicant and cannot shift.

Based on the foregoing, the question to be answered is; - were the Members of the Commission biased against the Applicant? The answer is NO. The Respondent adduced evidence to show that the Commission Members were not biased by relying on the affidavits in reply filed in Court on 9th July, 2018.

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE/THE CHAIRPERSON

The Respondent submits that all the allegations raised in the application were replied to by the Respondent. According to the affidavit in reply of Daniel Rutiba, the former Assistant Secretary to the Uganda National Roads Authority Commission of Inquiry specifically stated that the Commission Members carried out their inquiry meticulously and were fair throughout the process of carrying out their investigations. Further he specifically denied that the Respondent was confrontational and accusatory and contends that the Applicant was accorded a fair hearing like all other persons who appeared before the Commission.

It is the Respondent's submission that the letter/complaint was addressed to the Chief Justice. It was within the mandate of the Chief Justice to act upon it. The Chairperson of the Commission had the duty to respond to the Chief Justice in case she was required to do so.

In any event, the contents of the letter to the Chief Justice did not form part of the proceedings. Therefore, they do not form a basis upon which the Applicant is challenging the Report.

Further still, there was no need to controvert such evidence as it was moot. It was not part of the Commission's findings and recommendations.

The Applicant further contends that where the Applicant adduces evidence sufficient to raise a presumption that what he asserts is true, the burden shifts to the Respondent.

It is the Respondent's submission that the letter to the Chief Justice having not been part of the Report which the Applicant wants quashed, it is of no evidential value to these proceedings. Therefore, the burden of proof to show that the letter was relevant lies on the Applicant to show where it forms part of the Report he seeks to be quashed by this honorable Court.

This bias is an allegation of the Applicant against the Respondent. The Applicant cannot shift the burden to the Respondent of proving bias by way of insults, abuses and verbal attacks. The duty remains upon the Applicant by evidence to demonstrate that the Chairperson or any other Member of the Commission was biased.

According to the respondent's counsel, the Applicant has failed to prove the utterances, insults and verbal attacks and has instead attempted to shift the burden to the Chairperson to prove that she was biased through those alleged utterances, insults and verbal attacks. The Applicant having failed to prove the aforementioned allegations, he cannot say that he has adduced uncontroverted evidence against the Chairperson. The knowledge of bias is upon the Applicant as noted before. It would be peculiar to find that the Commission was biased.

The Respondent further submits that complaints of bias are not determined merely by surmise or conjecture. Therefore, the Applicant's allegations of bias are baseless and the same should be ignored by this Honourable Court.

We are fortified in the case of **Ojengbede Vs Esan & Anor () 8NSCQR 461 at page 471;** for cases involving allegations of bias or real likelihood of bias;

> "*There must be cogent and reasonable evidence to satisfy the court that there was in fact such bias or real likelihood of bias as alleged. In this*

regard, it has been said, and quite rightly too, that mere vague suspicion of whimsical and unreasonable people should not be made a to standard to constitute proof of such serious complaints"

It was the respondent's submission that the above the allegations of bias against the Chairperson are baseless and the same should be ignored by this Honourable Court.

ENG.RUSONGOZA PATRICK KUSEMERERWA

The gist of the Applicants' written submissions in respect of Eng. Rusongoza Patrick Kusemererwa is that he was a member of the Commission on Auditor General's team that audited some roads inquired by the Commission and whose reports were relied on by the Commission in its finding. The Applicant further contends that Eng Rusongoza was both a witness and a commissioner in his own cause and therefore he has preconceived opinions on matters under investigation and therefore he was biased against the Applicant.

In response to the allegations above, the affidavit in reply of Eng Rusongoza Patrick Kusemererwa adduces evidence to show that he was never biased in his participation in the inquiry.

Eng Rusongoza specifically in paragraph 7(a) states that he was never an employee of UNRA nor of the Auditor General but an independent Consulting Auditor hired occasionally by the Auditor General to conduct Technical/engineering audits of UNRA.

It was the Respondent's submission that the Auditor General relies on several sources of information to come up with findings where upon he comes up with his own opinion. The opinion the Auditor General comes up with is his own as independent body.

It was counsel's submission that Eng Rusongoza deponed that all the procurement anomalies where the Applicant was cited were never part of the Auditor Generals Technical/Engineering audit reports where he participated as an Independent Technical Auditor. (See paragraph 7(b) of the affidavit in reply.)

Eng Rusongoza deponed in his affidavit that the Commission performed a more detailed inquiry into the selected roads than the Auditor General's report and the methodologies employed by the Commission were far broader and more inclusive.

The Commission was comprised of a number of Commissioners and Eng Rusongoza was one person.

The Applicant's allegations that Eng Rusongoza could not be a judge in his own cause have no merit because he was not aggrieved by the acts of the Applicant. He was part of the Commission whose findings and recommendations were for the attention of the President.

There is no part of the Report which has been cited by the Applicants to show that Eng Rusongoza made a decision of personal interest.

The Applicant has not demonstrated that Eng Rusongoza had conflict of interest in the outcome. Therefore, there was no connection between the findings and the Applicant's allegations to have been made by the Commission and the allegation of conflict of interest of Eng. Rusongoza.

Therefore, the allegations of bias against Eng Rusongoza have no merit. The Respondent is fortified by the decision of Justice S. Musota in the case of **Dott services Ltd & Anor vs Attorney General** Miscellaneous Cause No.137 of 2016 where he held that;

> "I also do not agree that just because a person who had earlier on audited the Applicants' contracts with UNRA was made a member of the Commission it amounted to bias.''

Based on the foregoing, the allegations that Eng Rusongoza had earlier on audited UNRA and then participated in the inquiry means that he was biased is unfounded.

MS MARY KAMULI KUTEESA.

It is submitted by the Applicant that Ms Mary Kamuli Kuteesa who was the Assistant Lead Counsel of the Commission was abusive, accusatory and

confrontational. Further, that she had a conflict of interest as she was eyeing the Applicant's job. It is also the Applicant's submission that Mary Kuteesa got a job after UNRA had released a Report and was head hunted.

In response to the aforementioned allegations, the Respondent adduces evidence relying on the affidavit in reply of Ms Mary Kamuli Kuteesa in her affidavit in reply, she states that as the Assistant Lead Counsel to the Commission of the Inquiry, her role was to assist the Lead Counsel to lead the witnesses invited before the Commission and where necessary to cross-examine them.

In her affidavit in reply she gives evidence that in her cross examination of the Applicant, she was at all times professional, never abusive, confrontational and or accusatory in nature as alleged by the Applicant in his affidavit.

She further states in paragraph 13 that neither did she make any input to the deductions, conclusions, decisions and recommendations of the Chairperson and the Commissioners nor participate in making of interim and final reports of the Commission.

In her affidavit in reply she explains the nature of her employment at UNRA. She gives evidence that she did not use her position at the Commission to gain her current position or influence any recommendations for hiring or firing anyone at UNRA. She further states that employment at UNRA is through a process conducted by the Board of Directors of UNRA through an approved process of recruitment and she was not privy to it.

The Respondent further submits that the Commission of inquiry could not either recruit or recommend for recruitment of any persons given that its mandate was strictly limited to investigate and inquire into the procurement and contract management processes by which UNRA awarded contracts for national road works among others.

The allegations that Ms Kuteesa got the job of Head Legal in UNRA after UNRA had released its report and was head hunted are responded to in her affidavit in reply.

The respondent's counsel submitted that Mary was an assistant Lead Counsel to the Commission of inquiry, therefore, the claim that she wanted the Applicant's job is too remote as she did not have powers to dissolve the UNRA employees or influence UNRA Board of Directors on whom to recruit or not.

Further, the Applicant had ceased being the employ of UNRA in 2010 long before the Commission was established. Therefore, there is no way Ms Kuteesa could have been eyeing his job as alleged.

In any case, complaints of Mary being headhunted by UNRA can better be raised in another forum but not in the present application for judicial review.

Further still, Ms Kuteesa was not a Commissioner and hence she was not bound by the Commissions of Inquiry's Act.(see section 4 and 6 of the Commissions of Inquiry Act)

Counsel submitted that, there is no evidence adduced by the Applicant to show that Ms Kuteesa would have benefited from the Applicant losing a job.

ABRAHAM NKATA

The applicant's counsel contended that Mr Abraham Nkata participated in several evaluation committees in procurement in UNRA between 2008 to 2010. That he was the lead consultant in the procurement and appointment of the past Director of UNRA Godfrey Ssambwa and that therefore he could not serve as the investigator and prosecutor in his own case.

In response to the foregoing allegations, the affidavit in reply of Mr. Abraham Nkata adduces evidence that he was recommended (by PPDA) to support UNRA Board Committee during the interview process for the UNRA Director, Procurement and Disposal position where upon following the interview process, the UNRA Board appointed Engineer Godfery SSambwa.

Further, the Respondent affidavit of Mr. Nkata gives a detailed account of how he was nominated by and participated in UNRA's several bid evaluation processes between December 2008 and March 2010.That he was appointed on a panel by

UNRA to conduct interviews on its behalf for the recruitment of a Procurement Consultant.

Mr Nkata deponed that the valuation functions have no bearing or effect to the roles and functions of the Commission of inquiry. He further states that the technical advisory role during the interview process for the recruitment of the Procurement Consultant and that of the Director, Procurement and Disposal have no bearing or effect to the roles and functions of the Commission of Inquiry.

It was the Respondent's submission that Mr Nkata supporting the UNRA Board Committee during the interview process for the Director, Procurement and Disposal where the Board appointed Godfery Ssambwa to the position of the Director, Procurement and Disposal does not disclose any bias against the Applicant.

It was the respondent's contention that there is no evidence adduced by the Applicant that the participation of Mr.Nkata disentitled the Applicant either to winning a tender or contracts or to getting a job nor was the Commission of inquiry conducting a tender process or job interviews.

The Respondent contends that there was no connection between the evaluation and the Commission of inquiry and its objective and purpose was different. The terms of reference (TOR) which dealt with the investigation had no connection with Mr. Nkata's prior engagement with UNRA.

Mr. Nkata was appointed on a panel by UNRA to conduct interviews for recruitment of procurement consultant between 2008-2010. The Commission of inquiry was established in 2015 which makes it moot.

Therefore, the allegations against Mr Nkata are misplaced and we pray that Court finds that there is no bias.

RICHARD IVAN NANGALAMA MUNGATI

The Applicant has submitted that Richard Mungati had worked as a valuation consultant in many projects in UNRA. That this compromised his impartiality rendering him biased.

Mr. Mungati states in his affidavit in reply that he has never personally held contracts but advised at various positions. That he is personally not aware of any failures in advice he has given to UNRA at any time in the past.

It was the submission of the Respondent that what was under inquiry was not linked to Mr. Richard Mungati prior work with UNRA as a valuation consultant and other projects handled by other consultants or Applicant if any.

Further the Applicant has not adduced any evidence to show how the presence of Mr. Richard Mungati on the Commission of Inquiry prejudiced him or how he was biased against him.

The respondent's counsel submitted that this court finds that the involvement of Mr. Richard Mungati in the Commission did not in any way affect the rights of the Applicant. Therefore, the above allegation of bias against Mungati are misconceived and the same should be rejected.

The respondent contended that that the Applicant has not demonstrated by way of evidence that the Commission Members/Chairperson of the Commission had an interest in the outcome of the investigation and their participation in the inquiry was prejudicial and impeded justice to the Applicant. Mere suspicion that lacks cogent evidence should not be made a standard to constitute proof of such serious complaints.

The respondent's counsel submitted that the Applicant is simply aggrieved with the findings and recommendations of the Commission but not that the Commission was biased.

He prayed that this issue be resolved in the negative.

Resolution

An inquiry is generally inquisitorial in character, and often takes place in a blaze of publicity. Very damaging allegations are made against persons who may have little opportunity of defending themselves and against whom no charge is preferred.

In ***George vs McIntyre AG 2003 HC 10***; the court noted that the exceptional inquisitorial powers conferred upon a Commission necessarily exposes the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private, and to the risk of baseless allegations made against him, causing distress and injury to reputation.

Although an object of these inquiries is to assuage the feelings of the citizen, and to give his objections the fairest possible consideration, they have given rise to many complaints. They are a hybrid legal- and- administrative process, and for the very reason that they have been made to look as much possible like judicial proceedings, people grumble at the fact that they fall short of it.

It is the nature of such complaints of bias or failure to follow rules of natural justice that the indeed led the applicant to seek orders of judicial review to quash the report or part of the proceedings.

The High Court has no jurisdiction to adjudicate on any factual questions which were committed to the Commissioners for inquiry and report; this is not an appeal against the decisions reached-there is no right of appeal against reports of Commissions of Inquiry; Commissions may greatly influence public and government opinion and have devastating effect on personal reputations; that is why in appropriate proceedings the courts must be ready if necessary in relation to Commissions of Inquiry just as to public bodies and officials to ensure that they keep within the limits of their lawful powers and comply with any applicable rules of natural justice. *See* ***George vs Mc Intyre*** *(ibid)*

Section 6 of the Commissions of Inquiry Act provides;

The Commissioners shall, after taking oath or making affirmation as provided, make a full, faithful and impartial inquiry into the matter specified in the

commission; conduct the inquiry in accordance with the direction, if any, in the commission; in due course report to the President in writing, the result of the inquiry; and also when required, furnish to the President a full statement of the Proceedings of the commission and of the reasons leading to the conclusions arrived at or reported.

The conduct of proceedings of the Commission of Inquiry should be guided by principles of fairness which include impartiality. It is a matter of prime importance that judges, tribunals and all decision-making bodies should be free from bias while discharging their duties.

Impartiality; is a principle of justice holding that decisions should be based on objective criteria rather than on the basis of bias, prejudice or preferring the benefit to one person over the other for improper reasons.

'Bias' means an operative prejudice, whether conscious or unconscious in relation to a party or issue.

Where there is reason to suspect bias, it is no defence to argue that even a totally disinterested tribunal could have come to the same decision. This is because the rule against bias is a requirement of procedural protection as opposed to matter of substance or merit.

The applicant contends that the members of the Commission particularly the Chairperson Lady Justice Catherine Bamugemereire were biased towards him and should not have taken part in the inquiry process. He further stated in his affidavit;

"That while appearing before the commission on 25th August 2015, the applicant was attacked, insulted and abused by the chairperson when she stated " we have all along been discussing about you in the commission and we are going to deal with you seriously….just answer the way we want" . and this showed that the applicant's fate had been predetermined by the commission.

The applicant contends that he was insulted, abused and attacked when the Chairperson stated that; you were a fat cat in UNRA living beyond your salary of five million and who could afford to build apartments in Luzira, Nakawa, Naguru

and houses in Entebbe; that even your father warned that your amassing of wealth would one day lead you to prison" and this is why the report mentions his name several times as a person who was responsible for causing financial loss on matter he never participated in at all."[emphasis added]

It is the above statements that form the basis of the challenge of the Chairperson of the Commission of inquiry on grounds of bias. The only response to the above statements was made by the 1st witness/deponent -Rutiba Daniel who was an Assistant Secretary to the National Roads Authority Commission of Inquiry contended that the commission was made up of persons of high morals, wide ranging knowledge and specialisation, extensive experience, were persons of impeccable repute and paid attention to detail and were meticulous, rigorous and fair throughout the process of carrying out their investigations.

The Commission carried out investigations which it did with strict adherence to the principles of natural justice. It compiled a report of its findings which were handed over the President of Uganda on 26th May 2016.

The said statements alluded to the Chairperson were never denied or rebutted specifically and this leaves this court with no option but to infer that the same statements were made in the course of the inquiry. The issue then for determination is whether the said statements would indeed be sufficient to constitute the alleged bias against the applicant.

In order to challenge administrative action successfully on personal bias, it is essential to prove that there is a "reasonable suspicion of bias" or "real likelihood of bias". ***See Metropolitan Properties Ltd vs Lannon [1968] 3 All ER 304.***

The 'reasonable suspicion' test looks mainly at the outward appearance, and the 'real likelihood' test focuses on the court's own evaluation of possibilities; In determining biasness, the real question is not whether a person is biased, because it is difficult to prove the state of mind of a person. Therefore, what the courts see is whether there is reasonable ground of believing that the decision maker was likely to have been biased. In deciding the question of bias judges have to take into consideration the possibilities and ordinary course of human conduct.

The apprehension must be judged from a healthy, reasonable and average point of view and not mere apprehension and vague suspicion of whimsical capricious and unreasonable people. The test to be applied is not whether in fact bias has in fact affected the judgment but whether a litigant could reasonably apprehend that a bias attributable might have operated against him in the final decision.

Therefore the real test of 'real likelihood of bias' is whether a reasonable man, in possession of relevant information, would have thought that bias was likely and whether the authority concerned was likely to be disposed to decide the matter in a particular way.

The court should look at the impression which would be given to the other party. Therefore, the test is not what actually happened but the substantial possibility of that which appeared to have happened. Even if the decision maker was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias, then the decision would be affected.

Therefore, the court would not enquire whether there was bias in fact if reasonable people might think that there was bias. The reason is plain enough, writes Lord Denning, "Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; 'The judge is biased' *Lord Denning*; ***The Discipline of Law,*** *(1982) p 87.*

The statements attributed to the Chairperson of the Commission by the applicant if heard by a reasonable person in possession of relevant information, then such person would apprehend that the commission of inquiry is biased.

There is also an important consideration that justice must not only be done but be seen to be done. The presence of one or more persons tainted with bias may leave a reasonable person in doubt as to the impartiality of the collective decision making body. See ***Hannam vs Bradford Corp [1970] 1 W.L.R 937***

In the case of ***Kamlesh Mansukhlal Damji Pattni and Goldenberg International Civil Application No. NAI 301 of 1999(115/99)****(unreported)*; The applicant

requested the Judge to disqualify himself because of what he considered to be the judge's biased conduct towards him. The Judge had said in one such case that "he was a man who had '*stuffed himself from the public resources*' and that he was a '*pilferer and looter*' while a criminal case was still pending before court. The Court of Appeal stated that;

" For a judge or a judicial officer to say publicly of someone in such derogatory terms shows, we have no doubt, an appearance of bias-such a description is not merely injudicious and insensitive but bound to be interpreted as a gratuitous insult. As we have said, the applicants do not allege that the learned Judge is in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that the learned judge might have been biased, that is to say, that it is alleged that there is an appearance of bias, not actual bias. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty unbiased and impartial mind. He must be seen to be impartial"

The statements made by the Chairperson of the Commission would indeed leave a fair-minded and informed observer, having considered the facts, conclude that there was a real possibility that the commission was biased. See ***Re Medicaments and Related Classes of Goods (No.2) [2001] 1 WLR 700.***

The applicant also submitted that some of the members of the Commission were equally biased since they had previous dealing with UNRA in different capacities on different projects.

These members are Eng Patrick Rusongoza Kusemererwa, Abraham Nkata and Richard Ivan Nangalama Mungati. They have all admitted to have worked with UNRA is different private capacities and they have denied being influenced in any way by their previous dealings with UNRA.

The same standard used in respect chairperson of the Commission would be used to determine whether they were also biased in execution of their duties as Commissioner. The Commission of Inquiry into the allegations of Mismanagement, Abuse of Office and Corrupt Practices in Uganda National Roads Authority.

As seen from the title of the commission, it was an inquiry into the mismanagement, Abuse of Office and Corrupt practices in UNRA. The nature of work of the three commissioners in their private capacity would indeed have encountered some information or dealt with the persons directly linked to the allegations which are a subject of an inquiry.

It has been made clear that the 'fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny'. *See* ***Gilles vs Secretary of State for Work and Pensions [2006] UKHL 2, [2006]1 WLR 751***

The respondent's counsel contended that that the Applicant has not demonstrated by way of evidence that the Commission Members/Chairperson of the Commission had an interest in the outcome of the investigation and their participation in the inquiry was prejudicial and impeded justice to the Applicant. Mere suspicion that lacks cogent evidence should not be made a standard to constitute proof of such serious complaints.

The three Commissioners could not be weighed on the same scale for impartiality as Mr. Okello Luwum who had not had any prior private dealings with UNRA. The said commissioners would have been the best witnesses in the said inquiry for Mismanagement, Abuse of Office and Corrupt practices in UNRA because of the nature of work they been involved in as private consultants. It cannot be ruled out that they came across information which could have assisted them to arrive at given decisions or the preparation of the final report. See ***R v Kent police Authority ex p. Godden [1971] 2 QB 662.***

The three commissioners could have applied their minds properly to the matters in the inquiry and made a report that is exemplary save that, because of some prior involvement or connection with the matter-UNRA, the fair-minded observer would apprehend bias.

The applicant's challenge of the Commissioners appointment also points towards there being a possibility of conflict of interest in execution of their duties as members of the Commission of inquiry.

The ***8th Edition of Black's Law Dictionary*** defines a Conflict of Interest as a real or seeming incompatibility between one's private interest and one's public or fiduciary duties.

In the case of ***Uganda vs Patricia Ojangole Criminal Case No. 1/2014*** Justice Gidudu held that;

> *" Conflict of interest has also been generally defined as any situation in which an individual or corporation is in position to exploit a professional or official capacity in some way for their personal or corporate benefit"*

This conflict of interest clearly imputes an element of bias on the Commissioners in execution of their duties.

The applicant also alleged bias against Ms Mary Kamuli Kuteesa who was the Assistant Lead Counsel of the Commission as being abusive, accusatory and confrontational. Further, that she had a conflict of interest as she was eyeing the Applicant's job. That Mary Kuteesa indeed got a job after UNRA had released a Report and was head hunted.

The applicant has not set out the abusive words used by Ms Mary Kuteesa or shown to court how she was confrontational in execution of her duties as Assistant Lead Counsel. In the same vein the allegation of conflict of interest because she was eying the applicant's job is too remote and speculative.

It is important that fanciful and unmeritorious allegations of bias are discouraged and that proper regard is had to the context in which the issue arises. A line must be drawn between genuine and fanciful allegations of bias. Allegation of bias on imaginary basis cannot be sustained. *See* ***Federation of Railway Officers Association v Union of India (2003) 4 SCC 289***

It should be emphasised that no uniform cut and dried formula can be laid down to determine real likelihood of bias. Each case is to be determined on the basis of its facts and circumstances.

This issue is resolved in the affirmative.

Issues ;2,3,& 5

2) Whether the Applicant was accorded a fair hearing on the various allegations made against him.

3) Whether the Commission followed principles of natural justice in making its findings and recommendations in relation to the Applicant

5)Whether in making its findings and recommendations, the Commission complied with the relevant law, specifically the provisions of legal Notice No. 4 of 2015 and the Commission of Inquiry Act Cap 166.

The applicant's counsel submitted that the right to a fair hearing in administrative decisions has now been made constitutional under Article 42 of the Constitution, which provides that any person appearing before any administrative official or body has a right to be treated justly and fairly and a right to apply to a court of law in respect of any administrative decision taken against him. The law requires that a fair hearing must be afforded in all cases and in very clear and unambiguous terms: ***HCCS No. 212/2009 Twinomugisha Moses versus Rift Valley Railways (U) Limited at page 22***

The right to a fair hearing connotes a hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only upon consideration of evidence and facts as a whole. ***Election Petition Appeal No. 04/2009; Bakaluba Peter Mukasa versus Nambooze Betty Bakireke.***

Secondly, the right to a fair hearing connotes the fact that;

- A person must be given prior notice of allegations against him. The principles of a fair hearing to include *prior notice, adjournments, cross-*

examination, legal representation, disclosure of information ***High Court Misc. Cause No. 042 OF 2016 Amuron Dorothy V LDC***

- The fair and reasonable opportunity to meet a prejudicial demand must be afforded in clear terms without it having to be gleaned from or read into correspondence, which itself is silent on the subject. ***Civil Appeal No. 56/1981 Charles Oloo versus Kenya Posts and Telecommunications at page 4***

According to the applicant's counsel, the question for court's determination is whether from the nature of summons issued by the Commission, the Applicant was indeed afforded a prior and reasonable notice of the allegations against him to enable him reasonably answer to the same when he appeared before the commission.

- The Applicant was summoned to appear before the Commission on only two occasions vide; 24th August 2015 and 11th October 2015. The 3rd appearance was to appear before the secretariat to make a statement on 12th September 2015.

- It is a notorious fact that appearance before the Commission was by invitation of the Commission through summons. There could hardly be circumstances of self-invitation. It would thus be expected that the summons would contain sufficient and material information relating to all the allegations against the Applicant. The summons would be expected to highlight the various projects for which the Applicant was required to provide answers relating to his participation if at all, and the areas for which he was required to answer or provide documentation. In that way, the Applicant would be able to know the case against him and prepare to defend himself accordingly or understand which relevant documents to bring.

- However, the copy of the summons issued by the commission on required the Applicant to appear on 22nd September 2015 and make a statement regarding the Tororo Mbale- Mbale-Soroti Road Project. No other project is mentioned at all. No other information is provided. The summons to appear before the Commission itself on 12th October 2015

only requires appearance before the Commission and to bring along, relevant documents pertaining to the inquiry.

- It is evident from the said summons that the particular areas of inquiry, the nature of documents required, the nature of evidence available to the Commission to which the Applicant was required to respond to are all missing. Can it be said that from the summons, the applicant had a fair notice of the case/ allegations against him, for which he would be prepared to answer? Could it be said that there was material disclosure of the information necessary to enable the Applicant to answer questions relating to the undisclosed queries. We submit that obviously from the summons, no reasonable person would assume the nature of inquiry, the scope and subject matter of inquiry to enable them prepare an appropriate response.

- We submit that in their findings the Commission impeached the Applicant's credibility and made adverse findings against him, in other projects like the Consultancy for the Resettlement plan, Land Acquisition and titling for Hoima-Kaiso Tonya Road, Mabarara-Kikagate Road Project, procurement of the Lake Kyoga Ferry, procurement of UNRA office space, yet no summons had been issued to him in respect of those projects, whereof he was condemned unheard.

- The commission failed in its duty to accord a fair and reasonable opportunity to the Applicant to meet a prejudicial demand. The summons could not afford the Applicant in clear terms without it having to be gleaned from or read into them, which itself is silent on the subject on the various projects, the subject of inquiry and failed the test in ***Charles Oloo versus Kenya Posts and Telecommunications at page 4***

Thirdly, contemplated in a fair hearing is a fair opportunity to be heard. One cannot act fairly without giving the victim an opportunity to be heard. This entails;

- The right to present evidence, to cross examine, and to have findings supported by evidence. ***See Applicant's authority No. 12 Election Petition Appeal No. 04/2009; Bakaluba Peter Mukasa versus Nambooze Betty Bakireke.***

- ❖ The right to a party to be given an opportunity to give his or her own evidence if he so chooses in his or her defence and that he should if he or she so wishes call witnesses to support their case. ***See authority No. 7 of the Applicant's bundle of authorities <u>High Court</u> Misc. Cause No. 042 OF 2016 Amuron Dorothy V LDC,*** which lays down the principles of a fair hearing to include *prior notice, adjournments, cross-examination, legal representation, disclosure of information.*

- ❖ There is a duty of giving the person against whom the complaint is made a fair opportunity to make, correct or to controvert any relevant statement brought forward to his prejudice. ***<u>;</u> HCMC No. 441/2004 Annebritt Aslund versus the Attorney General at <u>page 16.</u>***

The question for your Lordship's determination is whether the from evidence on record, the Applicant was denied fair opportunity to give his own evidence, to make, correct or to controvert any relevant statement brought forward to his prejudice, hence denied a right to a fair hearing.

The Applicant contended that he was not afforded a fair hearing by the Commission to respond to the various allegations raised against him and in several instances recommendations and findings were made without obtaining his side.

As herein before noted, the summons issued to the Applicant alluded to an inquiry into the alleged queries regarding the Tororo Mbale- Mbale Soroti Road Project. The other summons did not specify which projects and which areas the Applicant was required to defend himself.

However, when he appeared before the Commission of Inquiry;

- ▪ He was never asked any question in respect of the procurement of a Consultant for the Resettlement plan, Land Acquisition and titling for Hoima-Kaiso Tonya Road. He was thus denied an opportunity to be heard, yet findings were made against him. See

- ▪ He was never asked whether he was a Member of the Contracts Committee at the time of award of the contract in 2011. A finding

was made that the Applicant was a Member of the contracts Committee, yet he was not given an opportunity to be heard, the Applicant would clearly have explained this fact. The Commission nonetheless made a finding and faulted him as a Member of the Contracts Committee for not giving proper legal counsel to the Committee, thereby rendering the Commission's finding false.

- The Applicant was never questioned on his suitability for his job as a legal –Counsel of UNRA, yet he would have justified his competence. He was equally faulted by the Commission regarding legal counsel was never sought in respect of the queried Hoima-Kaiso-Tonya Road Project, and was found culpable. The Applicant was never given an opportunity to be heard on the allegation, yet his legal counsel was never sought for that project. He had no duty to volunteer legal counsel under the procedures of UNRA at the time. All this should have been explained, given the opportunity.

- The Applicant was never questioned about his role if any in the variation of prices for the Mbarara-Kikagate Road Project. He was offered no opportunity to explain, yet an adverse finding was made against him and he was recommended for prosecution on account of the variation of prices. The Report at accuses the Applicant to have wrongly advised the Committee on the price adjustments, yet he was not asked any questions on the same. He was thus condemned unheard.

- The Applicant was never asked any questions regarding the procurement of the Lake Kyoga Ferry, yet the Commission in its report recommended action against him and found him culpable. He was once again condemned regarding the said procurement without any opportunity to defend himself.

- The Applicant was never asked to explain his role if any, in the procurement of UNRA office space. He was never afforded an opportunity to be heard. However, the Commission's Report at recommended the prosecution of the Applicant for causing

financial loss and abuse of office, yet he never participated in the procurement of UNRA office space.

- That the Applicant was also gagged by the commission and was not allowed explaining or adducing evidence on whether the person who signed on behalf of the Consultant (McDonald) had powers of Attorney or Authority to do so. This contravened the requirement that a party be given an opportunity to give his or her own evidence if he so chooses in his or her defence.

- The Applicant was thus denied a fair opportunity to make, correct or to controvert any relevant statement brought forward to his prejudice in respect of all the allegations for which no question was asked. ***HCMC No. 441/2004 Annebritt Aslund versus the Attorney General at page 16.***

The applicant's counsel submitted that the applicant was never questioned on his participation if at all in any of the projects highlighted herein, was never afforded an opportunity to explain his role if any but the Commission nonetheless proceeded and made its findings against the Applicant.

It is our submission that the foregoing constituted a violation of the Applicant's constitutional right to be heard. The position of the law is that where a decision is arrived at without affording the victim an opportunity to be heard, such decision cannot stand. This is regardless of whether the same decision would nevertheless have been made. The procedure adopted by the Commission offended the rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard.***; HCMC No.053 /2014 Kampala University versus National Council for Higher Education at page 22.***

The applicant further contended that his right to a fair hearing was sabotaged when he was denied a copy of the report in order understand the findings and recommendations against him or him to enable him challenge the same if aggrieved therewith. In his affidavit in support, he states that on several occasion he had requested of the report but in vein and hence he was not aware of the impugned findings and recommendations made against him.

Issue 3. ***Whether the Commission followed principles of natural justice in making its findings and recommendations in relation to the Applicant..***

Issue 4: ***Whether in making its findings and recommendations, the Commission complied with the relevant law, specifically the provisions of Legal Notice No. 4 of 2015 and the Commissions of inquiry Act Cap 166.***

The law governing the proceedings before the Commission of Inquiry is very clear under ***section 5 of Legal Notice No. 4 of 2015*** that states that the Commission of Inquiry shall comply with the provisions of the Commission of Inquiry Act Cap 166. Section 6 thereof states that the Commission shall make a full, faithful and impartial inquiry into the matters specified in the commission.

The law governing the establishment of the Commission of Inquiry is the **Commission of Inquiry Act Cap 166 Laws of** Uganda under **section 6** where the duties of the commission inter-alia make a full, faithful and impartial inquiry into the matters specified in the commission. ***Annebritt Aslund versus the Attorney General at page 16.***

It is a known principle of law that it is a statutory requirement of the commission of Inquiry to be fair and there is no need to have it implied and the failure to do so may render the Commission's findings, determinations and recommendations ultra vires***,*** where the Commission recommended the Applicant's prosecution on matters he was never asked about when he appeared before the commission. ***Dott Services Limited versus AG (Supra).***

The Applicant has led that since his appearance at the commission of inquiry, the commission failed to act in accordance to the minimum standards of the law. The commission flouted the constitutional safeguards to a fair hearing and principles of natural justice.

The respondent's counsel submitted that he was in agreement with the principles of law and cases cited by the Applicant. However, the cases cited do not apply in the case at hand. The cases cited are applicable in a trial where parties would

adduce evidence, call witness, cross examine etc. The cited cases do not apply to Commission of inquiry as in this instance case.

The Commission of inquiry accorded the Applicant a fair hearing during the course of their investigations. This was a Commission of inquiry not a trial court.

The respondent's counsel contended that the inquiry is not equivalent to a civil or criminal trial. In an inquiry, the Commissioners are allowed a wide range investigative powers to fulfil their investigation mandate. The rules of evidence and procedure are therefore considerably less strict for an inquiry than for court. (See the case of ***Beno v Canada (Commissioner and Chairperson, Commission of Inquiry into the Department of Canadian Forces to Somalia,) [1997] 2 F.C at para 23;***. We further submit that the Commission of inquiries Act gives the commission of inquiry wide powers and discretion on how to conduct, regulate and manage their proceedings. (See section 8 and 9 of the Commission of Inquiry's Act)

The Respondent submitted that the summons is not a hearing. The hearing commences when you appear before the Commission.ie attendance of the Commission. It was never a trial, its an inquiry which was fact finding and the summons were to secure attendance of the Witnesses/ Applicant and give information.

The Commission of inquiry was seeking information and no where has the Applicant said that he was not aware of the facts being inquired but he wanted prior notice to prepare for his defence as if he was going for trial.

Mr. Daniel Rutiba in his affidavit deponed that the Applicant was summoned on several occasions to appear before the Commission. The Applicant appeared before the Commission, he was given other opportunities to return to the Commission but he was dismissive and adamantly declined.

The witness further contended that the Commission members accorded the Applicant a fair hearing like all other persons who appeared before the Commission.

The Applicant was granted sufficient time to prepare and appear on diverse days. The Applicant was given more time to present additional evidence on any new matters that may have arisen. He The Applicant was granted several opportunities to be heard some of which he himself declined.

The Respondent further submitted that the Applicant admits that he appeared before the Commission on 24th August 2015, 12th September 2015, 22nd September 2015 and 11th October 2015.He further admits that the summons issued by the Commission to appear before the Commission to make a statement on 22nd September 2015 indicated the project being investigated (Tororo-Mbale-Mbale-Soroti Road).

The Commission also relied on documents in the public domain, such as reports, Hansards, documents tendered in by witnesses and desk reviews of original contract documents in possession of UNRA.

The Applicant alleges that he was not asked questions in respect of particular projects and /or matters. It's our submission that the Commission has discretion on the kind of evidence/ information and questions that the Commission deems material.

It is further the Respondent's submissions that it was upon the Commission of inquiry to make inferences, deductions depending on the information received by the Commission from the various sources regarding the subject of the inquiry. It is not necessary that the Applicant had to be called and asked questions for each and every project as if it was a trial.

The Applicant cannot determine what the Commission should inquire and which questions it should ask. The Commission does not rely only on the Applicant's evidence but also on other sources before making findings and recommendations. In any case, the Commission of inquiry makes recommendations for further investigations. Its findings and recommendations do not determine liability.

The Applicant's contention that his hearing was sabotaged when was denied a copy of the report in order to understand the findings and recommendations to

challenge the same if aggrieved has no merit. First, the findings and recommendations (the Report) were given to the President. The President has yet to exercise his prerogative to publish the report. Therefore, it is premature that he needs to go to court to challenge the Report. The Applicant should have waited for the Report to be published and challenges it if so wishes as he will still be within time for judicial review.

It was the submission of respondent's counsel that the Respondent did not refuse to release the Report. The Applicant has prematurely complained that he was not given the Report. The order of court is yet to be implemented. The Report is with the President. The procedure is that is taken to Cabinet, it is discussed, the Cabinet paper (white paper) is prepared to determine the points upon which the Executive arm of Government will act on. That is when the Report can be actionable.

Therefore, it is premature to contend that the order has not been complied with by the Respondent.

The Commission of Inquiry was investigative and not adjudicative. The Commission of inquiry is inquisitorial in character. The Commission of inquiry while carrying out investigations, it required any person whom it has any reason to believe has relevant information about the matter under investigation to answer questions or otherwise furnish relevant information. The Commission of inquiry observed the principles of natural justice before arriving at their findings and recommendations.

He prayed that the above issue be resolved in the negative.

Resolution

The Commission of inquiry under this challenge was titled ***"The Commission of Inquiry into allegations of Mismanagement, Abuse of office and Corrupt Practices in the Uganda National Roads Authority".***

The terms of reference for the Commission were;

a) To investigate and inquire into the procurement and contract management process by which the Uganda National Roads Authority awarded contracts for National Road Works.
b) To generally examine, investigate the procurement of works, services and supplies by the Uganda National Road Authority.
c) To investigate and inquire into the management, supervision and administration of National road works by the National Road Authority.
d) To generally examine and inquire into the legal and corporate governance structures of the Uganda National Road Authority.
e) To investigate and inquire into the financial management systems of Uganda National Road Authority.
f) To investigate and inquire into the acquisition of land by Uganda National Road Authority/ and generally examine the basis and methodology employed by the Authority to compensate land owners and persons affected by national road works.
g) To investigate and inquire into the management, supervision and administration of public weigh-bridges by the Uganda National Road Authority.
h) Generally to inquire into any other matter which appears to the Commission, to be reasonably related to the matters above or to be in the Public Interest.
i) To make appropriate recommendations based upon findings for remedial actions or such other action against persons found to have acted improperly in the discharge of their public duties and those persons who benefitted from the impugned actions of the public officials.
j) To make appropriate recommendations upon their findings for criminal prosecution or other action against any person found to have engaged in criminal or improper conduct.
k) To make any other recommendations as it may consider appropriate in the Public Interest.

The primary function of all commissions of inquiry is to inform governments. Commissions of inquiry have been classified into two groups, based on the

methods used to ascertain the facts .The first category of commissions are those charged with gathering information which is to be used for policy formulation or review, or the assessment of the functionality of a public entity. These are referred to as investigatory inquiries. These types of commissions play the same function as a researcher.

The second category of commissions is those charged with ascertaining the facts of a particular matter or issue. Their role has been equated with that of an inquisitor and they are referred to as inquisitorial inquiries. This category of inquiry usually investigates the facts surrounding a scandal or allegations of wrongdoing.

This Commission of inquiry falls in the latter category since it was about mismanagement, abuse of office and corrupt practices.

It should be noted that Commissions of inquiry that focus on retrospective allocations of fault and blame run the risk of being little more than poor imitations of our civil or criminal justice systems. Inquiries that focus on "who did what to whom" invite due process challenges from those under review.

The effectiveness of a commission of inquiry depends largely on whether it can produce a credible and objective report, which in turn requires due attention to the soundness of a commission's structure, methodology and procedures.

Commissions of Inquiry are generally subject to judicial review and are under a general duty of fairness, so the principles of administrative law are engaged in this way. The courts will intervene where there is 'very good reason' and among such reason is to secure fairness in the inquiry procedures or challenge the findings of the inquiry. See ***Annebritt Aslund versus the Attorney General HCMC No. 441/2004, Mahon Air New Zealand [1984] AC 808***

The applicant's counsel contends that he was never afforded a prior and reasonable notice of the allegations against him to enable him reasonably answer to the same when he appeared before the commission.

The Applicant was summoned to appear before the Commission on only two occasions vide; 24th August 2015 and 11th October 2015. The 3rd appearance was to appear before the secretariat to make a statement on 12th September 2015.

The summons would be expected to highlight the various projects for which the Applicant was required to provide answers relating to his participation if at all, and the areas for which he was required to answer or provide documentation. In that way, the Applicant would be able to know the case against him and prepare to defend himself accordingly or understand which relevant documents to bring.

However, the copy of the summons issued by the commission on required the Applicant to appear on 22nd September 2015 and make a statement regarding the Tororo Mbale- Mbale-Soroti Road Project. No other project is mentioned at all. No other information is provided. The summons to appear before the Commission itself on 12th October 2015 only requires appearance before the Commission and to bring along, relevant documents pertaining to the inquiry.
The Witness summons sent to the applicant was as hereunder;

WITNESS SUMMONS

(Under S.9 of the Commission of Inquiry Act Cap 166)

To; Mr Marvin Baryaruha
Legal Counsel-Formerly UNRA
Kampala

You are hereby summoned to come and record a statement in respect of your role in the Tororo-Mbale-Mbale-Soroti Project before the Commission appointed by the President of Uganda to inquire into Allegations of Mismanagement, Abuse of Office and Corrupt Practices in the Uganda National Roads Authority on 22nd September 2015 at 0900hrs in Equator Conference Hall level 5, Imperial Royale Hotel.

You are entitled to bring a lawyer of your choice at your cost.

Failure to appear before the Commission without sufficient cause is an offence under the Act.

GIVEN UNDER MY HAND this 16th day of September 2015

SECRETARY TO THE COMMISSION

WITNESS SUMMONS

(Under S.9 of the Commission of Inquiry Act Cap 166)

To; MR MARVIN BARYARUHA
FORMER LEGAL COUNSEL
UNRA

You are hereby summoned to appear before the Commissioners appointed by the President of Uganda to inquire into Allegations of Mismanagement, Abuse of Office and Corrupt Practices in the Uganda National Roads Authority on 12th October 2015 at 0900hrs in Equator Conference Hall level 5, Imperial Royale Hotel.

You are required to bring along with you for submission to the Commission relevant documents pertaining to that inquiry.

You are entitled to bring a lawyer of your choice at your cost.

Failure to appear before the Commission without sufficient cause is an offence under the Act.

GIVEN UNDER MY HAND this 29th day of September 2015

SECRETARY TO THE COMMISSION

It is evident from the said summons that the particular areas of inquiry, the nature of documents required, the nature of evidence available to the Commission to which the Applicant was required to respond to are all missing.
The summons as indicated did not avail the applicant a fair notice of the case/ allegations against him, for which he would be prepared to answer.

There was material non-disclosure of the information necessary to enable the Applicant to answer questions relating to the undisclosed queries.

The question for determination is whether the from evidence on record, the Applicant was denied fair opportunity to give his own evidence, to make, correct or to controvert any relevant statement brought forward to his prejudice, hence denied a right to a fair hearing.

The Applicant contended that he was not afforded a fair hearing by the Commission to respond to the various allegations raised against him and in several instances recommendations and findings were made without obtaining his side.

It is true the law allows the commission to regulate proceedings and the manner of conducting proceedings under the Commissions of Inquiry Act, the nature of the inquiry should determine the procedures adopted subject to an overriding duty of fairness.

Section 12 of the ***Commissions of Inquiry Act*** provides that;
Any person whose conduct is the subject of inquiry under this Act, or who is in anyway implicated or concerned in the matter under inquiry, shall be entitled to be represented by an advocate at the whole of the inquiry, and any other person who may consider it desirable that he or she should be so represented may, by leave of the Commission, be represented in the manner aforesaid.

The above provision envisages any person under investigation to be afforded an opportunity to prepare and cross-examine the witnesses who would be testifying against such a person. During the proceedings of the Commission of inquiry there is a '*duty to act fairly*' which simply means that the Commission must act justly and fairly and not arbitrarily or capriciously.

The respondent's counsel submitted that the summons is not a hearing. The hearing commences when you appear before the Commission.ie attendance of the Commission. It was never a trial, it's an inquiry which was fact finding and the summonses were to secure attendance of the Witnesses/ Applicant and give information.

The Commission of inquiry was seeking information and nowhere has the Applicant said that he was not aware of the facts being inquired but he wanted prior notice to prepare for his defence as if he was going for trial.

It is clear the law envisages acting fairly by allowing a person whose conduct is subject of inquiry to appear and be represented by an Advocate at the whole of the inquiry. This would not be merely without a purpose but rather to allow such a person to be advised on the nature of allegations being made against him/her.

Giving a party notice is the starting point of any hearing. Unless a person knows the formulation of subjects and issues involved in the case, he/she cannot defend himself or herself properly. The test of adequacy of notice will be whether it gives

sufficient information and material so as to enable the person concerned to put up an effective defence.

The Witness summons given to the applicant as the notice fall short of the test and this should be considered in light of the nature of the Commission of Inquiry and the terms of reference upon which it was operating. The adequacy of notice must be decided with reference to each case. This was a very wide investigation that involved all projects of the commission and it would be near to impossible for the applicant to be prepared to answer and defend himself at all times with proper and concrete facts/evidence without adequate notice on all the areas of investigation.

This court is equally alive to the fact that, the requirement of notice will not be insisted upon as a mere technical formality, when a party concerned clearly knows the case against it and is not thereby prejudiced in any manner in putting up an effective defence.

The commission of Inquiry among its terms of reference where;

- *To make appropriate recommendations based upon findings for remedial actions or such other action against persons found to have acted improperly in the discharge of their public duties and those persons who benefitted from the impugned actions of the public officials.*
- *To make appropriate recommendations upon their findings for criminal prosecution or other action against any person found to have engaged in criminal or improper conduct.*

These gave the Commission wide powers to recommend prosecution of any person found culpable and this is the basis for requiring the commission to act fairly and come up with concrete and cogent evidence to sustain possible charges upon their recommendations.

The applicant contends that he was not informed of the evidence against him during the hearing neither was he given an opportunity to present his case and

evidence and at the end of it all he was denied the right to rebut adverse evidence the commission had against him.

Article 42 of the Constitution provides;

Any person appearing before any administrative official or body has a duty to be treated justly and fairly and shall have a right to apply to court of law in respect of any administrative decision taken against him of her.

'Acting fairly' is a phrase of such wide implications that it may ultimately extend beyond the sphere of procedure. It includes a duty to act with substantial fairness and consistency. See ***HTV Ltd vs Price Commission [1976] ICR 170***

Every person appearing before an administrative authority has the right to know the evidence against him or her. Therefore nothing should be used against the person which has not been brought to his or her notice. *See* ***R v Thames Magistrates' Court ex p Polemis [1974] 1 WLR 1371***

In the same vein, the administrative authority should afford reasonable opportunity to the party to present his/her case. However, it does not mean that a person can be allowed to unnecessarily prolong and confuse the administrative proceedings by adducing irrelevant evidence.

The right to rebut adverse evidence presupposes that the person has been informed about the evidence against him. It is not enough that a party should know the adverse material/evidence against himself/herself but it is further necessary that he is given an opportunity to rebut the evidence.

What is essential is substantial fairness to the person adversely affected? The applicant as a person who was under investigation, deserved to be informed of the case/allegations he had to meet and disclosing the precise evidence or the sources of information.

The applicant as a person who was adversely affected or likely to be adversely affected should have been accorded a fair hearing and the argument of the respondent's counsel that the Commission of Inquiry was investigative and not

adjudicative or that the Commission of inquiry is inquisitorial in character cannot suffice when the rules of fairness are violated.

In sum therefore, the applicant was not afforded a prior and reasonable notice of the allegations against him to enable him reasonably answer or respond to them when he appeared.

Secondly, the applicant was not given an opportunity to be heard on the different areas of mismanagement, abuse of office & corrupt practices in the projects that were under investigation save for the ***Tororo-Mbale-Mbale-Soroti Project*** which was specifically set out in the Witness summons that had been served him.

Whether the Commission followed principles of natural justice in making its findings and recommendations in relation the applicant.

This issue is resolved in the negative. This is because the rules of natural justice are strictly applicable in judicial and quasi-judicial bodies with a "*duty to act judicially*" i.e to follow the principles of natural justice in full. But in cases which are classified administrative like the Commission of inquiry, there is only a *'duty to act fairly'* which simply means that the administrative authority must act justly and fairly and not arbitrary or capriciously. *See* ***Article 42 of the Constitution.***

The Commission of inquiry should only ensure that there is procedural fairness in the conduct of its proceedings. *See* ***Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System), [1997] 3 S.C.R. 440***

Whether the findings and recommendations of the Commission in respect to the Applicant were unreasonable and irrational.

Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing its mind to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. ***HCMC No. 142/2018 Apiima Abel Onyancha versus KIU citing Bismillah Trading Ltd & Anor versus KCCA HCMC No.23/2015 at page 11***

The principle of irrationality is explained to mean a decision which is so outrageous in defiance of logic or of accepted moral standards that no sensible person, who had applied his mind to the question to be decided, could have arrived at it. ***HCMC No. 137/2016 Dott Services Limited & Anor v AG at page 11 citing Council of Civil Service Union & Ors vs Minister for Civil Service [1985] 1AC 374***

Unreasonableness arises where a body has taken into account matters which ought not to be taken into account, or conversely has refused to take into account or neglected to take into account matters which it ought to take into account and has come to a conclusion so unreasonable that no reasonable authority could ever come to it, in such a case, the court can interfere. ***See Dott Services Limited & Anor Vs. AG at page 12 citing Re- An Application by Bukoba Gymkhana Club [1963] EA 478 at 489***

The respondent's counsel contended that the applicant's counsel's submission that he led evidence to prove that the commission of inquiry at arriving at its recommendations and findings was irrational was baseless. The Commission of Inquiry failed to take into consideration of the fact that in some contracts that were under inquiry particularly the one of October 2011 he was not a member of the Contract Committee that further advised for his prosecution on contracts where my legal advice was never sought and areas where he was not cautioned when he appeared before the commission.

The Applicant asserts that he led evidence to prove that the Commission of Inquiry made recommendations and findings which were irrational. However as already submitted earlier the Commission relied on witness statements and other sources to make its findings and recommendations.

Therefore, the finding of the Commission was neither outrageous nor defiant of any logic or accepted moral standards but were as a result of reasonable logical conclusion available to the Commission.

Resolution

The applicant's counsel contended that the findings and recommendations were unreasonable and irrational. The applicant has not shown how the findings or

recommendations are irrational. The failure to take into account the evidence of the applicant which was not sought would not render the decision irrational.

The Commission of Inquiry made its findings on the evidence that was available to them. It could be unfair to have arrived at the said decision without considering the applicant's evidence in rebuttal but that *per se* would not render the same irrational. The courts are not willing to categorise a decision as unreasonable merely because it was inconvenient, unwise or unjust. See ***Redman vs Gaskin (1964) 8WIR 22, AG vs Independent Broadcasting Authority [1973] 1 QB 629***

In determining the question of irrationality or unreasonableness, the court is concerned with whether the power under which the decision maker acted had been improperly exercised or insufficiently justified.

In considering unreasonableness, the court is not confined to simply examining the process by which the decision maker arrived at the decision, but must consider the substance of the decision itself to see whether the criticism of it was justified.

The courts are reluctant to interfere with the exercise of administrative discretion on the ground of unreasonableness save where the court is satisfied that the decision is beyond the range of responses open to a reasonable decision maker

Unreasonableness, in the *Wednesbury* sense, requires overwhelming evidence. It is necessary for court to look at the evidence when considering reasonableness or rationality of the decision and after full and proper consideration of the evidence that the court would find that the public authority had acted unlawfully.

In this case, the court does not have any evidence to evaluate or interrogate in order to determine the unreasonableness or irrationality of the findings and recommendations of the Commission of Inquiry.

This issue is resolved in the negative.

What are the remedies available to the parties?

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas *certiorari* was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558, R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652***.

This court in granting the remedies or making different orders it should be guided by the case of ***Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System), [1997] 3 S.C.R. 440*** in which court noted as follows;

"*Several basic principles are applicable to inquiries. A commission of inquiry is not a court or tribunal and has no authority to determine legal liability; it does not necessarily follow the same laws of evidence or procedure that a court or tribunal would observe. A commissioner accordingly should endeavour to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability for the public perception may be that specific findings of criminal or civil liability have been made. A commissioner has the power to make all relevant findings of fact necessary to explain or support the recommendations, even if these findings reflect adversely upon individuals. Further, a commissioner may make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference. In addition, a commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the*

standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to criminal or civil liability. Finally, a commissioner must ensure that there is procedural fairness in the conduct of the inquiry."

In addition, the effect of decision rendered in violation of the rule against bias is that it is merely voidable and not void. The aggrieved party may thus waive his right to avoid the decision; as where timely objection is not made even though there is full knowledge of the bias and the right to object to it. See ***Metropolitan Properties Co. (F.G.C) Ltd v Lannon [1968] 3 All ER 304***

Lord Diplock said in the House of Lords that the right of a man to be given "*a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement.*" See ***O'Reilly v Mackman [1983] 2 AC 237 at 276, A-G v Ryan [1980] 718***

This court issues a Declaratory Order that the Findings and Recommendations contained in the Commission of Inquiry Report into Allegations of Mismanagement, Abuse of Office and Corrupt Practices in the Uganda National Roads Authority against the applicant arrived at in breach of the right to be treated justly and fairly are null and void.

The applicant is awarded costs of the application.

I so order

SSEKAANA MUSA
JUDGE
29th /03/2019