

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(CIVIL DIVISION)**

**MISCELLANEOUS APPLICATION NO. 210 OF 2020**

**(ARISING OUT OF MISCELLANEOUS CAUSE NO.91 OF 2020)**

**CENTRE FOR PUBLIC INTEREST LAW LIMITED-----APPLICANT**

**VERSUS**

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

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

This application is brought by way of chamber summons against the respondent under Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act Order 41 rule 1 and 9, and Order 52 rule 1 of the Civil Procedure Rules for orders that;

1. A temporary Injunction doth issue, restraining the Minister of Energy and Mineral Development or any person or authority acting under *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* from enforcing the provisions therein until the determination of the application for Judicial Review seeking to quash Statutory Instrument No. 62 of 2020 on the basis of illegality, irrationality and procedural impropriety, as *ultra vires* the Electricity Act 1999, Cap 145 and other existing laws.
2. The costs be provided for.

The grounds in support of this application are set out in the affidavit of SUKY LUCY a legal researcher of the applicant which briefly states that;

1. The Applicant is a public Interest organisation incorporated in Uganda as a company limited by guarantee whose main objectives are to promote respect for human rights, constitutionalism, rule of law and good governance in Uganda; to engage in public interest litigation; and actively participates in matters of public accountability and is clothed with sufficient interest in the management of the Rural Electrification Fund as a public resource.
2. The applicant has filed a main application for judicial Review seeking to quash the Electricity (Establishment and Management of *the Rural Electrification Fund*) Instrument, S.I No. 62 of 2020 as ultra vires the Electricity Act 1999, Cap 145 and other existing laws, and for illegality, irrationality and procedural impropriety.
3. That the Rural Electrification Fund has been managed under the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I. No. 75 of 2001 since November 20<sup>th</sup>, 2001.
4. The Minister of Energy and Mineral Development made and passed *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* which was published in the Uganda Gazette on 30<sup>th</sup> April 2020, revoking *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I. No. 75 of 2001*
5. The composition of *the Rural Electrification Board under Paragraph 7(2) of the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* is ultra vires the Electricity Act 1999, Cap 145 as it falls short of meaningful private sector participation by key players as it does not take into consideration the role of the Non-Governmental Organisations in ensuring accountability of public funds, and

it closes the window to meaningful participation of Non-Governmental Organisations on the Rural Electrification Board.

6. Paragraph 13 of *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* is *ultra vires* the recommendations of the Rural Electrification Strategy and Plan 2013-2022, approved by Cabinet under Section 63 of the Electricity Act 199, Cap 145 which envisages a new autonomous body as opposed to the Rural Electrification Agency.
7. The administration of the Rural Electrification Fund by the Minister of Energy and Mineral Development under the impugned *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* when implemented would be *ultra vires* Section 64(3)(a) of the Electricity Act 1999, Cap 145 which obligates the Minister to administer the Rural Electrification Fund in accordance with the Act.
8. The process of making and passing of *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* by the Minister of Energy and mineral Development did not comply with the constitutional requirement to consult and involve people in the formulation and implementation of development plans and programs pursuant to Article 8A(1) and Principle X of the National Objectives and Directive Principles of State Policy of the Constitution of the Republic of Uganda.
9. The applicant has a *prima facie* case in seeking to quash *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* and its implementation will occasion irreparable injury to public interest management and accountability of the Rural Electrification Fund.

10. The balance of convenience lies in favour of public interest in restraining the enforcement of *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* as it threatens the independence, accountability and efficacy of the Rural Electrification Management Fund.

In opposition to this Application the Respondent through Abdon Atwine The Assistant Commissioner in Charge of Electrical Supply at the Ministry of Energy and Mineral Development deposed and filed an affidavit in reply wherein he opposed application for temporary injunction briefly stating that;

(1) The Minister was acting within the scope of delegated powers under Article 79(2) of the Constitution when she made new Statutory Instrument- *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* and that the said instrument is neither ultra vires the Electricity Act or any other existing law nor is it illegal, irrational or procedurally improper.

(2) The Minister under the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020 reconstituted the Rural Electrification Board as follows-

- (a) One person with expertise in public administration, energy or community development;
- (b) One person with expertise in economics or business development;
- (c) One representative of the Ministry responsible for Electricity;
- (d) One representative with expertise in finance;
- (e) One person with expertise in local government;
- (f) One representative of the private sector nominated for appointment by the Private Sector Foundation; and
- (g) One electrical engineer nominated for appointment by Engineers Registration Board.

- (3) The constitution of the board is a policy issue and the guiding principles of constitution of boards include expertise of members to effectively achieve the goals of the board, availability in terms of time, e.t.c
- (4) The changes to the Rural Electrification Board were necessary because while the Permanent Secretaries were required to kick start the inaugural board, over the years it became apparent that their busy schedules do not permit them to give sufficient dedicated time to matters of the Board.
- (5) The donors declined to nominate a representative to the Board because it would be a conflict of interest for donors to be represented on a board which they would hold accountable for their funds.
- (6) The Rural Electrification Strategy and Plan recognized the need for the Minister to revisit the Statutory Instrument with a view of reconstituting Rural Electrification Agency as an autonomous entity of Government which was not possible with an incomplete Board and an instrument that was not consistent with the provisions of the law.
- (7) The applicant has no prima facie case in judicial review seeking to quash the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020 and has no chances of success.
- (8) The granting of an Order for temporary Injunction to the applicant will deeply paralyze the activities of the rural Electrification Fund, the Rural Electrification Board and the Rural Electrification Agency.
- (9) The Rural Electrification Board and Rural Electrification Agency are currently managing loan portfolios from Development Partners on behalf of Government. As a result, a number of contracts and agreements have been executed with private entities for electricity infrastructure development, and disbursement of connection subsidies under the recently approved

Electricity Connections Policy. If the injunction sought by the applicant is granted, Government will be exposed to both financial and legal liabilities.

- (10) The granting of a temporary injunction will negatively impact on the energy sector which affects the country's economy and the citizens' access to electricity.

In the interest of time the respective counsel made brief oral submissions and i have considered the respective submissions. The applicant was represented by *Mr. Gimara Francis (SC) assisted by Mr. Lastone Gulume* while the respondent was represented *Mr. Atwine Jeffrey (PSA)*.

The applicants' counsel submitted that The considerations for a temporary injunction were succinctly summarised **E.L.T. Kiyimba-Kaggwa v Hajji Katende Abdu Nasser, HCCS No. 2109 of 1984** to be as follows: -

- 1) Whether the Applicant has a prima-facie case with a probability of success.***
- 2) Whether the Applicant is likely to suffer irreparable injury if the temporary injunction is not granted.***
- 3) Whether the balance of convenience tilts in favour of the Applicant.***

It is the Applicant's submission that the instant application meets all the above three grounds as illustrated in the affidavit in support of the application and the affidavit in rejoinder. It is submitted for the Applicant that the applicant has a prima facie case which raises triable issues and will suffer irreparable injury since it seeks to enforce the rule of law and it cannot be atoned for by damages. In addition, the balance of convenience in light of the public interest considerations and rule of law that the main application seeks to enforce and promote weigh in favour of the applicant.

That if the injunction is not granted it will render the main application nugatory.

The respondent's counsel submitted that the purpose of the temporary injunction is to preserve the status quo. The current status quo is that *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* came into force and it revoked the old statutory Instrument. Therefore, according to counsel if a temporary injunction is granted it means that Rural Electrification Fund, the Rural Electrification Board and the Rural Electrification Agency would cease to exist or operate and yet they are carrying out functions for all Ugandans

The respondent's counsel further submitted that the applicant has not made out any prima facie case for the grant of temporary injunction and that the regulations have since become law applicable and the prejudices the proper functioning of the electricity sector. It will negatively impact and affect the economy.

### **Determination**

An injunction is by its very nature a coercive order, and compliance with the court order will often have adverse economic as well as institutional consequences for the respondent.

The main question for this court establish is whether in such circumstances the temporary injunction can still be justified. See ***Regent Oil Co Ltd v JT Leavesley (Lichfield) Ltd*** [1966] 1 WLR 1210. The applicant's counsel has submitted that the order of temporary Injunction being sought is to stop the coming into effect or implementation of the *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020*.

The granting of a temporary injunction is an exercise of judicial discretion as was discussed in the case of ***Equator International Distributors Ltd v Beiersdorf East Africa Ltd & Others Misc.Application No.1127 Of 2014***. Discretionary powers are to be exercised judiciously as was noted in the case of ***Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29***.

It should be noted that where there is a legal right either at law or in equity, the court has power to grant an injunction in protection of that right. Further to note, a party is entitled to apply for an injunction as soon as his legal right is invaded ***Titus Tayebwa Versus Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009.***

It is trite law that for an application to be maintained three conditions must be satisfied by the Applicant as was discussed in the case ***Behangana Domaro and Anor vs Attorney General Constitutional Application No.73 of 2010*** that is; - The applicant must show a prima facie case with a probability of success, that the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and if the court is in doubt, it would decide an application on the balance of convenience.

The legal principle upon which Court exercises its discretion to grant a temporary injunction in all actions pending determination of the main suit is now well settled as seen in the wealth of authorities.

The law for granting a temporary injunction is section 64(e) of the Civil Procedure Act and general considerations for the granting of a Temporary Injunction are set out under **Order 41 Rule (1) & (2) CPR.**

For a temporary injunction to be granted, court is guided by the following as was noted in the case of ***Shiv Construction versus Endesha Enterprises Ltd Civil Appeal No.34 of 1992***

1. The Applicant must show that there is a substantial question to be investigated with chances of winning the main suit on his part;
2. The Applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and the *status quo* not maintained; and
3. The balance of convenience is in the favour of the Application.

The Courts should be slow in granting injunction against government projects which are meant for the interest of the public at large as against the private proprietary interest or otherwise for a few individuals. Public interest is one of the



paramount and relevant considerations for granting or refusing to grant or discharge of an interim injunction. See ***Uganda National Bureau of Standards vs Ren Publishers Ltd & Multiplex Limited HCMA No. 635 of 2019***

Injunctions against public bodies can issue against a public body from acting in a way that is unlawful or abusing its statutory powers or to compel the performance of a duty created under the statute.

The courts should be reluctant to restrain the public body from doing what the law allows it to do or to execute its core mandate or function. In such circumstances, the grant of an injunction may perpetrate breach of the law which they are mandated to uphold. See ***Alcohol Association of Uganda & Others vs AG & URA HCMA No. 744 of 2019***

The main rationale for this is rooted in the fact that the courts cannot as matter of law grant an injunction which will have the effect of suspending the operation of legislation. See ***R v Secretary of State for Transport ex.p Factortame Ltd [1990] 2 AC 85.***

In the case of ***Shell Petroleum Development Company of Nigeria Limited & Another v The Governor of Lagos State & Others*** 5 ALL NTC- Lagos High Court ; Rhodes-Vivour, J held that;

*“Suspending the operation of a law that has not been declared unconstitutional is a very serious matter. The grant of this application would amount to just that, and this would be without hearing evidence. Laws are made for the good of the State and the power to tax as quite rightly pointed out by the Attorney General is a power upon which the entire fabric of society is based. A restraining order on the defendants from implementing the provisions of LAW No. 11 of 2001 would seriously impair their responsibilities to residents of Lagos State.”*

The courts should consider and take into account a wider public interest. The public bodies should not be prevented from exercising the powers conferred under the statute unless the person seeking an injunction can establish a prima facie case that the public authority is acting unlawfully. The public body is deemed

to have taken the decision or adopted a measure in exercise of powers which it is meant to use for the public good.

Therefore Courts of law should be loath or slow to grant an injunction when a public project for the beneficial interest of the public at large is sought to be delayed or prevented by an order of injunction, damage from such injunction would cause the public at large as well as to a Government is a paramount factor to be considered. Between the conflicting interests, interest of the public at large and the interest of a few individuals, the interest of the public at large should or must prevail over the interest of a few individuals. See ***ACP Bakaleke Siraj v Attorney General HCMA No. 551 of 2018***

The circumstances of the case are that the Minister of Energy and Mineral Development has made and passed *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* and repealed/revoked *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I. No. 75 of 2001*. This is the current state of affairs existing. Therefore any order made otherwise would be trying to change the status quo or and this would indeed create a vacuum in the Electricity sector before the determination of the main application.

As rightly argued by counsel for the respondent, an order of temporary injunction is intended to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a *fait accompli* before the final hearing.

The court would have to preserve the status quo prevailing at the moment but this would not stop the court from quashing or giving any orders sought in the main application. The main application will not be rendered nugatory as counsel for the applicant has submitted. In matters of judicial review the court is at liberty to grant any remedies that fits the circumstances of the case. It does not mean that since the Statutory Instrument has already come into force, then the court cannot quash it.

There are no hard and fast rules that can be laid down for granting interim reliefs or temporary injunctions in public law matters or judicial review applications. The exercise of the power to grant temporary injunction must be exercised with caution, prudence, discretion and circumspection. The circumstances of each case will determine whether to grant them or not bearing in mind the various existing factors. The grounds for grant may sometimes differ from the grounds in ordinary civil suits and the same are considered with caution and appropriateness of the case.

This court deprecates the practice of granting temporary injunctions which practically give the principal relief sought in the main application for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, public interest and a host of other considerations. Where there is a serious dispute on the facts, it cannot be said that a prima facie case had been made out for the grant of temporary injunction.

The public interest considerations would justify the refusal to grant a temporary injunction and public interest should prevail over the private rights. See *Kennaway v Thompson [1981] QB 88 at 93*. The parties both argued for public interest consideration in granting or refusing a temporary injunction. The respondent represents more public interest than the applicant as a private entity.

In sum and for the reasons stated herein above this application fails and is dismissed with no order as to costs.

I so order.

***Dated, signed and delivered by email at Kampala this 15<sup>th</sup> day of June 2020***

**SSEKAANA MUSA  
JUDGE**