THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO.179 OF 2019

UGANDA HEALTH MARKETING GROUP:::::::::::: APPLICANT

VERSUS

FINANCIAL INTELLIGENCE AUTHORITY:::::::: RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application under Article Section 69 of the Anti-Money Laundering Act, 2013, Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act and Order 51 of the Civil Procedure Rules for the orders that;

a) The freezing order by the Financial Intelligence against the applicant's Account Number, 0108213767600 held at Standard Chartered Bank Uganda be lifted.

b) The respondent pays the costs of the Application.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the applicant of Doreen Asiimwe-The Manager Legal and Board Affairs but generally and briefly state that;

1) The respondent did not have any reasonable grounds to believe that the property/funds held on the applicant's Account No. 0108213767600 in Standard Chartered Bank (U) Limited is tainted property.

2) The Applicant has never been invited to answer to any investigations conducted by Police relating to money laundering or any other such offence to warrant the freezing of its Bank Account.

3) The seizure of the Applicant's account by the respondent has turned out to be a permanent exercise, hindering the activities of the applicant.

4) The respondent ignored the relevant provisions of the law in making the decision to seize the account, the actions of which are illegal, arbitrary and an abstract abuse of discretionary power.

5) That the freezing orders of the respondent have made it considerably difficult for the applicant to perform its duties, incapacitated it and made it difficult for it to meet its obligations to its suppliers and creditors.

6) That the applicant has been exposed to liability from various suppliers whose amounts attract interest daily and yet the funds as frozen do not attract any interest at all.

The respondents opposed this application and the respondent filed two affidavits in reply through the Executive Director of the Respondent-Sydney Asubo and Walter Ochan Assistant Inspector of Police.

1) The applicant is aware of the said charges relating to money laundering and the applicant's former Director Joyce Namirimo Tamale and Joachim Kabaisera-Head of Finance were summoned to the CID headquarters on 6th day of June 2019, were she was informed of the charges relating to fraud, money laundering and embezzlement.

2) That the respondent received reports that suspicious transactions were occurring on accounts held by the applicant specifically:- Account No. 0108213767600 in Standard Chartered Bank (U) Limited. The suspicious activity indicated a possibility of fraud, embezzlement and money laundering.

3) That the actions of the respondent sought to ensure safe custody of the funds and prevent further embezzlement and flight of funds. The funds on the said bank account are funds from donations by USAID which were suspected of being embezzled and fraudulently utilised.

4) That the respondent acted in good faith to preserve the safe custody of the funds as the applicant is under investigations by Uganda Police Force for offences including money laundering, a crime under the Anti-Money Laundering Act.

5) That the applicant is well aware that there are pending cases against it in which the aggrieved party-USAID is seeking recovery of their funds. The investigations are conducted vide GEF 890/2018 after receiving reports from the Federal Investigations Agency from the American Embassy investigating USAID funds in Uganda.

6) That USAID together with Uganda Police Force, contracted KPMG an audit firm to conduct a forensic audit on all the Applicant's bank statement of Account No. 0108213767600 in Standard Chartered Bank (U) Limited and all it accountability documents.

7) That Uganda Police Force and USAID, held a meeting with KPMG, the audit firm doing the forensic audit, where it was indicated that the final report will soon be concluded for submission to them.

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

The applicant's counsel raised two issues for determination by this court;

1. *Whether the respondent acted within its mandate and/ or was entitled to freeze the applicant's bank account.*

2. *Whether the freezing of the Applicant's account pending investigations for almost a year is legally justified?*

3. *What remedies are available to the applicant?*

The applicants were represented by *Mr Bautu Robert & Mr Nyegenye Henry* whereas the respondent was represented by *Ms Nabukeera Margaret and Ms Cynthia Ampaire*.

ISSUE ONE

1. *Whether the respondent acted within its mandate and/ or was entitled to freeze the applicant's bank account.*

The applicant's counsel submitted that the powers of the respondent are derived from the Anti-Money Laundering Act, 2013 as can be deduced from the Long Title to the Act. This is basically to combat the crime of money laundering in Uganda.

Section 19 of the Anti-Money Laundering Act sets the objectives of the Financial Intelligence Authority to include inter alia enhancing and identification of the proceeds of crime and combatting money laundering and ensure Compliance with the Act.

The respondent to exercise any of the powers conferred under the Anti-Money Laundering Act, the same must be aimed at achieving the objectives of the said Act and not otherwise.

The said mandate is limited to combatting the offence of money laundering. It cannot by any stretch of imagination be interpreted to include offences outside the Anti-Money Laundering Act.

According to applicant's counsel, the pending investigations are under the Anti-Corruption Act (misuse of public funds) which is way outside its scope of authority.

The respondent's counsel submitted that the action of ordering the halting of all financial activity on the applicant's account was within its mandate and therefore is not illegal, null and void.

Section 21 of the ***Anti-Money Laundering 2013*** provides that;

" The Authority may do all that is necessary or expedient to perform its functions effectively, and or in particular-

(k) Instruct any accountable person to take such steps as may be appropriate in relation to enforcing compliance with this Act or to facilitate investigations anticipated by the authority;

(o) In accordance with the provisions of this Act, halt any financial activity in the event that a suspicion warning has been reported to the authority.

The respondent contended that received a warning of suspicious activity. The Suspicious Transaction Report involving the applicant and in accordance with Section 20(1)(a)(b) of the Anti-Money Laundering Act processed, analysed and interpreted information disclosed to it and disseminated the results of its analysis to the Criminal Investigations Directorate.

The freezing of the account was based on a suspicion warning reported to the respondent by the bank and was therefore in accordance with section 20(o).

In the case of ***Uganda v Sundus Exchange & Money Transfer Ltd and 8 others Miscellaneous Application No. 27 of 2018*** *His Lordship Gidudu J* held that;

> *" …..at this stage the court is not required to find if there is evidence of proof of money laundering or terrorism financing against the respondent…..what is required is to decide is whether there is reasonable suspicion to believe the allegations of money laundering……the court must be satisfied that reasonable suspicion exists to warrant an investigation. The court is not required to satisfy itself if the suspicion is true or not as the respondents suggest in their affidavits and submissions…."*

It was the respondent's submission that they acted within the provisions of the Anti-Money Laundering Act 2013 and cannot be said to have done otherwise as alleged by the Applicant.

Determination

The basis for the challenge of the applicant is that the respondent acted without authority or contrary to the purpose of the Anti-money Laundering Act.

It is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law-to the extent at least that it expresses this principle of legality-it is generally understood to be a fundamental principle of constitutional law.

Lawfulness thus stands at the core of the general constitutional law principle of legality and applies to all public actions. An analysis of lawfulness in administrative law thus always involves comparing the administrative action to the authorisation for that action in the relevant empowering provision. Therefore lawfulness or lack of mandate provides administrators with the tools to identify specifically what they are entitled to do.

For every action that an administrator takes, there must be a valid authorisation in an empowering provision. In absence of such authorisation the administrative action will be unlawful.

A particularly challenging part of lawfulness relates to the reason, purpose or motive for which the action was taken. This is especially the case where the empowering provision grants a wide discretion to the decision maker/administrator.

The nature of the Anti-Money Laundering Act gives the respondent wide discretionary powers in fulfilling its purpose and it such exercise of discretionary power that a party may be challenging for lack of mandate.

No administrative power is given without a reason or purpose, doing so would breach the principle of rationality which is a requirement for all public action including legislation. See ***Pharmaceutical Manufacturers Association of South Africa & Another: In Re Ex Parte President of the Republic of South Africa & Others*** *2000 (2) SA 674(CC)*

Whatever the administrator's choice may be in exercising his or her (wide) discretionary powers, the administrators purpose in making that choice or his or her reasons for doing so must be aligned to what is authorised in the empowering provision.

Section 21 of the ***Anti-Money Laundering 2013*** provides that;

> *" The Authority may do all that is necessary or expedient to perform its functions effectively, and or in particular-*
>
> *(k) Instruct any accountable person to take such steps as may be appropriate in relation to enforcing compliance with this Act or to facilitate investigations anticipated by the authority;*

The actions of the respondent to trigger investigations in the activities and conduct of transactions by the applicant are well within the mandate and this court would not question the exercise of discretion vested by the empowering legislation. To do so would curtail the execution of functions that the respondent is mandated to do in accordance with the law.

The applicant's counsel tried to dissect the nature investigations being carried out by police through cross-examination but this cannot be used as the yardstick of determining the nature of investigations since the same are still on-going. The nature of investigations of crimes under Anti Corruption Act and Anti- money Laundering Act is in a similar genre. They can easily be substituted for each other depending on the direction of investigations.

The Anti-Money Laundering Act is wide enough and further provides for enhancement of the identification of proceeds of crime and the combating of money laundering. Therefore while Money Laundering is the main offence provided for under the Anti-Money Laundering Act, it is not a stand alone offence as it arises from several predicate offences.

On the other hand, Parliament cannot be supposed to have intended that the power should be open to serious abuse. It must have assumed that the designated authority would act properly and responsibly, with a view to doing what was best in the public interest and most consistent with the policy of the statute. It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion. See ***Sundus Exchange & Money Transfer and 5 Others v Financial Intelligence Authority*** *High Court Miscellaneous Cause No. 154 of 2018*

The respondent has shown court that before the exercise of its discretion to freeze the applicant's bank accounts it was satisfied with the available evidence that there was suspicious activity to open the case for investigation.

The donor of the said fund-USAID complained of embezzlement and money laundering and the respondent as the body mandated to investigate such crimes had to exercise the powers vested in it under the law.

The respondent armed with such information was duty bound to take immediate action by freezing the bank account and any none action would have resulted in removal or withdrawal of the said funds.

Accordingly this issue fails and it is resolved in the positive

ISSUE TWO

Whether the freezing of the Applicant's account pending investigations for almost a year is legally justified?

The applicant's counsel submitted that investigations have been on going since November 2018 and the Investigating officer-Walter Ochan confirmed the position during cross examination and he stated that the same are still on-going.

The applicant contends that the delay is a violation of their right to a speedy hearing .The speedy trial entails a trial within a reasonable time or a trial without undue delay. This violates Article 28 of the Constitution and is an infringement of the applicant's right. See ***Isadru Vicky v Perina Aroma & Others Civil Appeal No. 333 of 2014.***

The same right is also protected under the International Covenant on Civil and Political Rights (ICCPR) which provides in Article 14(3)(c) that; **In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality…(c) to be tried without undue delay.**

It was their submission that the pendency of criminal investigations for a period of almost a year without a charge violates the right to a trial within a reasonable time. By implication, the freeze of the applicant's bank account pending criminal investigations for over a year violates the right of the applicant to access its funds as well as to be tried within a reasonable time.

Conducting proceedings in a manner manifesting an intention not to bring them to an expeditious conclusion is a subversion of the process of the court and will constitute an abuse justifying a stay or dismissal. See ***Birkett v James*** [1978] AC 297; ***Allen v Sir Alfred Mc Alpine & Sons*** [1968] 1 All ER 543

The respondent's counsel submitted that it is not within the respondent's powers to decide when to unfreeze the accounts until investigations have been concluded or completed and CID has submitted its report on whether or not evidence gathered can sustain the charge. Before this the respondent's actions to unfreeze the bank account would be premature and illegal without the guidance from the Criminal Investigations Directorate.

During cross- examination of Mr Walter Ochan, he indicated that, it is in the practice of all officers investigating financial crime to conduct parallel investigation of money laundering.

Determination

The applicant contends that the delay in the conclusion of the investigations has economically affected the operations of the applicant. The period so far taken of almost a year is too long and yet the applicant has financial obligations towards third parties and the same obligations continue to attract financial consequences of interest.

The applicant has attached to their application evidence of third party obligations that have resulted in filing of cases against them for recovery of outstanding sums arising out of supply of stationery: KTM v Uganda Health Marketing Group Civil Suit No. 117 of 2019 at Nakawa Chief Magistrates Court and Wash and Wills Country Home Limited v Uganda Health Marketing Group Limited HCCS No 260 of 2019 at Commercial Court.

The continued freezing of the applicant's bank account has unintended consequences since it is opening up several cases against the applicant and this is exacerbated by the delay to conclude the investigations into the operations of the applicant.

Whenever a decision is reached to do an act that affects the rights of a person, there is a corresponding duty to ensure that such limitation of the parties rights ends as soon as possible. The delay in concluding the investigations for almost a year is clear infringement of other third party rights.

The delay in concluding the investigations has become so unreasonable and this court ought to exercise its supervisory powers to curtail the abuse of the due process through endless ongoing investigations.

The court should consider the competing interests involved before arriving at the decision whether to consider it unreasonable to continue freezing the bank account of the applicant. Since the continued freezing violates a right in the bill of rights, then it probable that the decision or continued delay will attract heightened scrutiny. On the other hand, the nature of the interest pursued by the state agency (FIA) would also be relevant to the degree of respect accorded to the decision maker by the courts.

The decision to continue freezing the bank account of the applicant therefore impacts seriously on the activities of the applicant. Among the activities therein includes meeting financial obligations to third parties who have supplied them with goods and services. There are equally staff of the organisation who derive their livelihood from employment at the organisation and have not received salaries since the accounts where frozen. The applicant is at a risk of closure as it has no funds to run it operational costs.

As a court of justice, I realize the effect of freezing the bank account of the applicant impacts on the lives and well-being of those affected. The delay is so unreasonable and infringes on the rights of those directly affected like employees and innocent third parties who have supplied goods and services to the applicant.

This court in trying to 'balance the boat' between the competing interests ; the state on one hand and the applicant or individual's on the other would be more inclined towards preserving the rights of those who are affected by the continued freezing of the bank account.

Therefore the continued freezing of the applicant's bank account is unjustified in the circumstances of the case.

What remedies are available to the applicant?

The applicant's freezing order by the Financial Intelligence Authority against the applicant's account number 0108213767600 held with Standard Chartered Bank-Uganda is hereby lifted.

The application succeeds and but each party shall bear its costs. Since the respondent was acting lawfully and it is the reason of delayed investigations that could not allow it take a decision whether to unfreeze the bank account of the applicant.

I so Order

SSEKAANA MUSA
JUDGE
1st/11/2019