THE REPUBLIC OF UGANDA

IN THE HIGHCOURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 293 OF 2017

IN RESPECT OF THE REPORT OF THE COMMITTEE ON COMMISSIONS, STATUTORY AUTHORITIES AND STATE ENTERPRISES (COSASE) ON THE INVESTIGATIONS INTO THE REWARD OF UGX.6 BILLION TO FORTY-TWO PUBLIC OFFICERS WHO PARTICIPATED IN THE HERITAGE OIL AND GAS ARBITRATION CASE

AND

IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS OF CERTIORARI AND PROHIBITION.

ALI SSEKATAWA::APPLICANT

VERSUS

1.THE ATTORNEY GENERAL.

2.THE PARLIAMENTARY COMMISSION.

3.THE COMMITTEE ON STATUTORY AND STATE ENTERPRISES(COSASE) OF THE PARLIAMENT OF THE REPUBLIC OF UGANDA. :::::::::::::::::::::::::RESPONDENTS

<u>BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW.</u>

RULING:

Ali Ssekatawa *(hereinafter referred to as the "Applicant")* brought this application against the Attorney General of the Republic of Uganda, the Parliamentary Commission, and the Committee on Statutory and State Enterprises of the Parliament of the Republic of Uganda *(hereinafter referred to as the 1st, 2nd and 3rd Respondent respectively)* jointly and severally, under Section14, 33, 36 and 39 of the Judicature Act Cap 13 (as Amended by Act 3 of 2002); Rule 3, 4,5 and 6 of the Judicature (Judicial Review) Rules 2009 S.I No.11 of 2009 (as Amended); Section 98 of the Civil Procedure Act Cap 71; Order 52 Rules 1 and 3 of the Civil Procedure Rules S.I 71-1; for orders that a writ of certiorari doth issue quashing findings and recommendations (a), (b) and (d) contained in the impugned COSASE report; an order of prohibition against the implementation of findings and recommendations (a), (b) and (d) of the impugned COSASE report; an order expunging the impugned COSASE report from public records of Uganda; general damages and costs of this suit.

The application is supported by affidavits sworn by the Applicant. The grounds of the application are briefly that the proceedings of the COSASE inquiry were conducted in a manner that contravened the

Constitution and the principles of natural justice. Further, that the Applicant and the forty-two (42) Public officers who appeared before the COSASE inquiry were not given a fair hearing in that during their interactions with the committee, the Chairman and members thereof, exhibited apparent bias evident in the manner in which they conducted the inquiry. Further, that the composition of COSASE included Members of Parliament (MPs) who had prior to the beginning of the investigation openly expressed their opinion that the Government officials must refund the reward money that had been paid to them. The members of COSASE included the Chairperson Hon. Abdu Katuntu and Hon. Medard Segoona, who happened to have been members of the Committee on the Legal and Parliamentary Affairs of the Ninth Parliament that summoned the Government officers, queried the expenditures on the arbitration cases and eventually approved the budgets. That it was thus improper for the same members to purport to take part in an inquiry that questioned those same expenditures that they had approved.

In addition, that the COSASE illegally and irrationally arrived at a finding and recommendation that the Inspector General of

Government (IGG) should institute investigations with a view of establishing culpability and possible offenses as against the beneficiaries of the reward regardless of the fact that the IGG had appeared before the same committee and expressed her opinion that the payment of the reward by H.E the President was irregular and illegal and that the President did not have the powers to do so under Article 98 and 99 of the Constitution. That as such, the findings and recommendations (a), (b) and (d) of the impugned COSASE report are illegal and irrational in that they were arrived at without evaluation of the evidence, facts and the law applicable. On that account the Applicant seeks the above stated remedies.

The 1st Respondent filed an affidavit in reply deponed by Hon. William Byaruhanga, the Attorney General, intrinsically not opposed facts as deponed by the Application. He states that on 1st July 2004, Government of Uganda (GoU) entered a Production Sharing Agreement (PSA)with Heritage Oil and Gas Ltd for the exploration of, development and production of petroleum in respect of an exploration area in the Albertine Graben region. That later on Tullow Uganda Ltd acquired the assets of Heritage Oil and Gas Ltd Co. in

Uganda at a cost of US$1.36 billion to which the Uganda Revenue Authority (URA) assessed and demanded US $ 434 million as Capital Gains Tax. That Tullow Uganda Ltd objected to the assessment and filed an application before the Tax Appeals Tribunal which prompted Tullow Uganda Ltd to appeal to the High Court of Uganda which upheld the tax assessment by URA. That being aggrieved by the decision, on 16th May 2011 Heritage Oil and Gas Ltd Co. initiated arbitration proceedings in London against the GoU in accordance with Article 3 of the United Nations Commission for International Trade Law & Arbitration Rules 1976, on the basis of the Arbitration Clauses contained in the PSA, over the amounts to be paid to URA as Capital Gains Tax. That a sum of S $ 434 million was awarded in the arbitration case to GoU against Heritage Oil and Gas Ltd Co.

That following the above mentioned arbitral award which was issued on 24th February 2015, H.E the President in appreciation of their effort and service handling the arbitration case rewarded the team of 42 Public officers with UGX 6 billion, subject to taxation and statutory deductions. That under Article 98 and 99 of the Constitution, the President who is the head of the Executive arm of

Government in accordance with the prerogative of the Crown as enshrined in the Constitution, is empowered to reward exemplary and professional performance, and that the principle is equally entrenched in the Ugandan Public Service Orders.

That the arbitration proceedings between Heritage Oil and Gas Ltd and GoU were very complex as the assessment was disputed by Heritage Oil and Gas Ltd on several grounds, namely; that there had been similar transactions that had taken place elsewhere in Africa, for instance Algeria, South Africa, Tunisia; and that in each of those cases no such tax had been assessed or collected by the respective authorities in those countries. In addition, that around the same time, the oil company CONSNE was finalizing a transfer of interests in a license in Ghana and was making a Capital Gains of up to $ 3.5 billion and no tax had been paid on that transaction and that similar transactions had taken place. Also, that several mineral rights had been transferred in Tanzania and Kenya but no tax had been paid. That many countries in Sub- Saharan Africa had lost cases in different arbitral tribunals and the same had been a subject of enforcement. That notwithstanding the above strong protestations

backed by evidence, the Government team exhibited exemplary and professional performance during the preparations, collection and assembly of evidence and the general conduct of the arbitration proceedings, going beyond what they are ordinarily employed to do.

That the collection of Capital Gains Tax on the transfer had been the largest single tax collection from a single transaction since the inception of the URA and in addition, successful taxation of that transaction was critical for Uganda as it formed an important precedent for such future transactions in the country. That the reward was distributed to the officers in three categories. Category 1 was the core staff and the gross amount to that group was UGX200 million per person. Category II was none- core staff and the gross amount to that group was UGX 100 million per person. Category III was the support staff and the gross sum to that group was UGX 50 million per person. That the reward was granted to the Government team in recognition of this performance by the Executive, and the team was recognized and commended by the Ninth Parliament and Cabinet. That H.E President can make ex-gratia payment on a case by case basis.

That on 19th January 2017, Hon. Michael Tusiime, Mbarara Municipality moved and Hon. Anita Among, Hon. Elijah Okupa and Hon. Wilfred Niwagaba seconded a motion for resolution of Parliament to investigate the circumstances under which a sum of UGX 6 billion was paid to 42 public Officers who participated in the arbitration case between GoU and Heritage Oil and Gas Ltd. That the motion was adopted and referred to COSASE with terms of reference. That on the 22nd June 2017, COSASE tabled and prescribed its report to the House and the report was adopted on the same day.

For their part, the 2nd and 3rd Respondents filed a joint affidavit in reply to the sworn by Ms. Jane Kibirige, the Clerk of Parliament opposing the application. She restates the similar facts of the events of 18th January 2017 as they transpired in the House as stated by the 1st Respondent above. Further, that Parliament is not only a Legislative organ of State but also has an oversight role over all public resources of Uganda including the resources which were the subject matter of the investigation and that COSASE carried out the investigation on behalf of the House in exercise of this oversight role and Parliament did not have to wait for any documentation to carry

out the investigations within its oversight role. She denied that the motion was moved contrary to Article 163 of the Constitution as Parliament not only has the ability, but can through its committees, investigate any matter of public interest that involves public resources out of its own volition.

She further averred that the Auditor General reports to Parliament and throughout the process of investigation, COSASE coopted an officer of the Auditor General who was attached to it together with other professional staff as provided by the Rules of Procedure. That following the adoption of the motion to investigate the circumstances under which UGX 6 billion was paid, the matter became one for the whole House and the Speaker had the mandate within the Constitution and the Rules of Procedure of Parliament to ensure that the investigations were carried out and as such there was nothing irregular when the matter was referred to COSASE with the stated ToR, and the investigations were carried out with due regard to the powers of Parliament and the principles of natural justice.

Further, that Hon. Abdu Katuntu and Hon. Medard Segoona were members of the Sectorial Committee then which was tasked with

considering budget proposals for the concerned entities including the Ministry of Justice and Constitutional Affairs (MOJCA) and URA, among others, within its mandate as provided by the Rules of Procedure. That the committee after considering the budget proposals of the concerned sectors then recommended to the House the named MPs on COSASE during the investigation, which was proper and caused no prejudice.

That COSASE is a standing and accountability committee that is mandated by the Rules of Procedure of Parliament to, among others, monitor the operations and procedures of the Commission or Authority established under the Constitution or any Act of Parliament, and that the impugned investigation was one of such instances of monitoring and oversight.

Ms. Kibirige denied that the movers and seconders of the motion participated in the deliberations and proceedings of the committee during the inquiry and that as such there was no contravention of any provisions of the Constitution as per the report of COSASE following the inquiry. That the movers and seconders only appeared as witnesses during the investigations and also attended the hearing

and they did not sign the report or participate in the debate during the consideration of the report by the House.

That the 42 Public officers were invited and those that attended were accorded a full and fair hearing and as such there was no contravention of the provisions of the Constitution or the principles of natural justice. That the Applicant particularly attended the hearings more than five times, and that the reward beneficiaries were given adequate time and space to present their cases and evidence. That on 22nd June 2017, COSASE tabled and presented its report to the House which was adopted on the same day. That the COSASE considered the provisions of Article 98 and 99 of the Constitution against the submissions from the various persons and entities invited during the investigations and after due evaluation of the evidence and all the documents presented and the laws of Uganda, made its findings as evidenced by the report. That the COSASE conducted the investigation with due diligence and properly evaluated the evidence presented to it in relation to the pertaining law and its conclusions and recommendations were based on law and fact. That COSASE is a committee of Parliament with a specific mandate under the Rules

of Procedure and there was nothing improper when it considered the matter under investigation referred to it by the House. That COSASE was properly mandated by Parliament to conduct the investigations and the report was properly adopted by the whole House. That the Committee is mandated under the Rules of Procedure of Parliament to make any findings and recommendations that are expedient considering the circumstances of the matter under inquiry and the recommendation among others, that the IGG should make further investigations was within that mandate. That appropriation is a function of Parliament on advice and recommendations of the committee duly established. That the Applicant is not entitled to the remedies sought and the same should be dismissed with costs.

Counsel for the parties filed written submissions which court has taken into account in resolving the various issues raised. The issues for determination are as follows;

1. ***Whether the motion to investigate the Presidential reward to the Applicant and other beneficiaries was premature, irregular and in contravention of Articles 163 of the Constitution of the Republic of Uganda***

2. ***Whether the proceedings before COSASE inquiry were conducted in a manner that denied the Applicant of the right to impartial and fair hearing and in contravention Articles 2,20, 28 (1), 42, and 44 (c) of the Constitution of the Republic of Uganda.***
3. ***Whether the proceedings before COSASE were conducted in a manner that contravened the principles of separation of powers and the independence of the Judiciary.***
4. ***Whether the recommendations of COSASE in paragraphs (a), (b) and (d) of the recommendations are irrational and founded on errors of fact and law.***
5. ***Whether the Applicant is entitled to general damages.***
6. ***What remedies are available to the parties?***

Resolution of the issues:

The 2nd and 3rd Respondents raised a preliminary point which court will resolve before the issues framed. They contend that this application was improperly brought before this court. That Article 42 of the Constitution is clear and concerns administrative decisions and that the decisions of Parliament are not administrative decisions

but legislative. That the impugned resolution arose from proceedings of Parliament, which is a Legislative body with a specified mandate, which includes appropriation, monitoring and oversight and very much in line with the doctrine of separation of powers. That Article 42 (supra) and provisions related to review of administrative actions/decisions does not apply to COSASE proceedings. To support their arguments, counsel for the Respondents relied on a Malawi High Court case of ***Nangwale Mary vs. Speaker of the National Assembly, Attorney General & Another (Misc. Civil Case No 1 of 2005)) [2005] MWHC 80 (24 August 2005*** and also on ***Barclays Bank of Uganda Ltd and Another vs. Attorney General HCMC No.227 of 2009***.

The in reply counsel for the Applicant submitted that the 2nd and 3rd Respondents' argument is without legal basis and grossly misconceived. That the cited cases of ***Nangwale vs. Speaker of National Assembly and 2 Others*** (supra) and ***Barclays Bank of Uganda Ltd and Another vs. Attorney General*** (supra) are distinguishable and quoted out of context. That the cases dealt specifically with legislative decisions in the form of enactments such

ns Acts or Resolutions of Parliament or Statutory Instruments, where the affected persons have no right to a hearing before Parliament prior to such enactments or legislative decisions are made. That the ***Nangwale case*** (supra) involved a Parliamentary Resolution to reject the appointment of an Inspector General of Police, and court considered the relevant provision of law on the particular appointment and found that there was no such a right to a hearing before the National Assembly in the particular provision of the law. Counsel argued that the cases cited relate to legislative decisions or enactments/ legislations; and they are not relevant to quasi- judicial processes and/or decisions such as those that constituted COSASE proceedings, findings and recommendations in the instant case. That in its inquiry or investigative proceedings, COSASE presided over the matter where there were allegations made by accusers against the accused, including the Applicant, and that COSASE exercised quasi-judicial powers including summoning of witnesses, taking and recording of witness testimonies and documentary evidence. That COSASE evaluated the said evidence and made its findings and recommendations as they did, before tabling the same to Parliament for a decision in the form of a Resolution that the funds paid as

reward should be refunded and the recipients be investigated by IGG for abuse of office. That quasi-judicial processes or decisions of the Legislature such as the COSASE proceedings, report, findings and recommendations in the instant case, are therefore not immune from scrutiny of court in judicial review.

In determining this issue, regard is first had to 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 shall have a right to apply to a court of law in respect of any administrative decision taken against him or her."***

It is also the settled position of the law that judicial review is not concerned with the decision in issue per se, but with the decision making process through which the decision was made. It is concerned with court's supervisory jurisdiction to check and control exercise of power by those in public offices or bodies exercising quasi-judicial functions. See: ***Marvin Baryaruha vs. Attorney General H.C.M.C No.149 of 2016.***

Court finds merit the Applicant's argument that COSASE, which is ordinarily a committee of Parliament, was specially constituted as an inquiry or investigation committee, into the circumstances under which the payments in issue had been made to the Applicant and others beneficiaries. Certainly, whether or not an action/decision is legislative as opposed to administrative very much depends on the process rather than the action or decision itself. In this regard, COSASE inquired into and determined allegations levelled by accusers against the accused, who included the Applicant, summed witnesses, took and recorded sworn oral and documentary evidence from witness, evaluated the evidence, made its findings and recommendations before tabling the report to Parliament for a decision, in the form of a resolution, that the funds paid should be refunded and the recipients be investigated by IGG for abuse of office. Given the manner and nature of the proceedings, COSASE was without doubt exercising quasi-judicial powers. COSASE was in the circumstances not exercising legislative functions as delegated by Parliament or at all, as was the case in ***Kamba Saleh vs. Attorney General (Const. Petition No 38 of 2012) [2015] UGCC 3 (25 May***

2015); or in ***Barclays Bank of Uganda and Another vs. Attorney General*** case (supra).

This court is persuaded by the India Supreme Court case of ***Kaplana Mehta and Others vs. Union of India and Others (Writ Petition No.921 of 2013, DIPAK MISRA CJI);*** quoting from an earlier in ***Raja Ram Pal vs. Hon. Speaker, Lok Sabha and Others, Writ Petition (Civil) 1 of 2006,*** that the Judicature is not prevented from scrutinizing the validity of the action of the legislature trespassing on the fundamental rights conferred on the citizen. That being the case, the process, decision, report, findings and/or recommendations of the Legislature by its appointed committee, would in the circumstances not be not immune from scrutiny by this court. The objection raised by the 2nd and 3rd Respondents is overruled. Court thus proceeds with the resolution of the substantive issues.

Issue No.1: Whether the motion to investigate the Presidential reward to the Applicant and other beneficiaries was premature, irregular and in contravention of Articles 163 of the Constitution.

The Applicant contends that being part of Public Accounts and from the Consolidated Fund, the funds from which the impugned Presidential reward was paid could not be tabled for debate in Parliament without the Auditor General's authenticated audit and Annual Report in accordance with Article 163(3), (4) and (5) of the Constitution. That in this case, the Public Accounts relating to monies paid in the reward were tabled before the Parliament prematurely and irregularly, through rumored and unauthentic documents from questionable sources rather than on the basis of Annual Audited Report of the Auditor General and in contravention of Article 163 (3), (4) and (5) of the Constitution. That the subsequent attempt by COSASE to patch up that constitutional lapse by belatedly summoning the Auditor General and directing or instructing him to carry out patch work and piece meal audit of the reward payments was in contravention of Article 163 (6) of the Constitution. That it constitutes an illegality which this court cannot sanction. The Applicant prayed COSASE report be entirely quashed, set aside and expunged from public records.

In reply the 1st Respondent submitted that on 19th January 2017, the above named MPs, moved and seconded a motion for resolution of Parliament to investigate circumstances in which a sum of UGX 6 billion was paid out to the Public officers who participated in the arbitration case. That the House chaired by the Speaker unanimously adopted the motion and referred it to COSASE, which was done on 19/01/2017 with eight ToR. That Article 163 of the Constitution provides for the establishment of the office of the Auditor General and spells out the functions, powers and duties thereof, which involve auditing Government expenditure and reporting to Parliament. That the said motion was an exercise of Parliament of its functions and was not irregular nor in contravention of Article 163(supra). That COSASE carried out public hearings and among the Government officials who appeared before the committee was the Auditor General.

For the 2nd and 3rd Respondents, it was argued that Parliament is established under Article 77 of the Constitution with its mandate spelt out in Article 79, and that under Article 90 (1) and (2) Parliament discharges functions though its committees. That the

matter in issue arose from a motion moved in Parliament on 18th January 2017 under the Rules of Procedure of Parliament and accordingly debated and passed. That Parliament adopted the prayer to investigate circumstances under which cash rewards were made to the 42 Public officers who won the tax arbitration case. That Parliament is not only a Legislative arm of the State but also has, under Article 154(1) and (2) a role to appropriate resources and indeed oversee the expenditure of all public resources appropriated, like the funds in issue in this case. That the motion raised accountability issues such as the withdrawal from the Consolidated Fund of monies without the approval of Parliament in contravention of both the Constitution and the Public Finance Management Act (PFMA); hence the intervention and once it was adopted by the House, it became the business of Parliament and the matter was referred to COSASE. For these propositions, they relied on the case of ***Twinobusingye Severino vs. Attorney General Const. Petition No.47 of 2011*** and ***Parliamentary Commission vs. Twinobusingye Severino and Another Const. Appl. No. 53 of 2011***. The 2nd and 3rd Respondents opined that COSASE carried out the investigation on behalf of the House in exercise of that oversight

role and that Parliament through its committees can investigate any matter of public interest that involves public resources out of its own volition. That as such, there was nothing irregular or illegal when the Speaker referred the matter to the committee with specific ToR.

Further, that under Article 90 (3), Parliament through its committees has special powers to facilitate its work including the power to summon both individuals and documents. That Committees perform their functions on behalf of Parliament and do report to Parliament pursuant to Rule 156 (e). That Rule 156 lays out the general functions of committees of Parliament and specifically Rule 56 (f) mandates committees to carry out any other functions as assigned by the House from time to time in addition to their specific functions. That the investigation by COSASE was an assignment by the House to investigate the reward according to the Rules of Procedure of Parliament and Article 90 (3) (supra).

Further, that Article 163 (3), (4), and (5) apply the Auditor General's qualifications, functions, and how to report on his/her to Parliament, among others. That the Article provides guidance for the Auditor General in carrying out his or her functions and does not apply to

Parliament. That Article 163 cannot be used to fetter the Constitutional powers of Parliament in the performance of its functions. That from the ToR COSASE was taken to scrutinize all supplementary requests and other budget allocations provided to the public officers in facilitating the processes in Uganda and abroad. That Auditor General aided COSASE in line with Article 90 (3) (supra) and Sections 13 (3) and 18 of the National Audit Act 2008.

After carefully reviewing the evidence and the law applicable on this issue, this court agrees with the law as having been correctly restated by counsel for the parties in respect to the establishment of Parliament, its mandate and how it discharges its functions through its appointed committees from time to time. Court also agrees with stated position of the law as it relates to the office of the Auditor General, its powers and functions. It is also noted that all the parties seem to agree on the events as they transpired on 18th January 2017 in the House when the named MPs moved and seconded a motion respectively, for a resolution of Parliament to investigate circumstances under which the impugned reward was paid out to the

public officers who participated in the arbitration case. The motion was adopted and referred to COSASE) with eight ToR.

Parliament is indeed not only a Legislative organ of State, but is also seized with oversight role over all public resources including those which were the subject matter of the investigation and COSASE carried out the investigation on behalf of the House in exercise of that oversight role. Court is unable to read into Article 163 (3) (4) and (5) the time imperative alleged by the Applicant within which Public Accounts relating to monies paid in the reward ought to have been tabled before the Parliament before they could be debated. There is nothing in the provisions to suggest that Parliament had to wait for any documentation to carry out the investigation in the exercise of its oversight role stated above.

In addition, Article 163(supra) provides for the duties of the Auditor General which include, to audit and report on the Public Accounts of Uganda and of all Public offices, including the Courts, the Central and Local Governments' Administration, among other, established by an Act of Parliament. The Auditor General conducts financial and value for money audits in respect of any project involving public

funds, among other duties. Evidence adduced by the Respondents shows that the Auditor General was coopted as part of the COSASE hearing. The Applicant himself does not dispute this fact. His only concern is that the Auditor General was belatedly summoned and directed to carry out *"patch work and piece meal audit"* of the impugned reward payments. Apart from this not being true, it only confirms that the hearing before COSASE was carried out with consultation of Auditor General in accordance with Article 163(supra). To that end, the motion to investigate the reward in issue was neither premature nor irregular or illegal. It was well within the mandate of Parliament to so do in so far as it was made within the confines of Article 163(supra). As matters stand, nothing suggests that Parliament overstepped the stated boundaries in that regard. *Issue No.1* is answered in the negative.

Issue No.2: Whether the proceedings before COSASE inquiry were conducted in a manner that denied the Applicant of the right to impartial and fair hearing and in contravention of Articles 2, 20, 28 (1), 42, and 44 (c) of the Constitution.

The right to a fair hearing is considered sacrosanct. It is guaranteed under Articles 2, 20, 28(1) and 44(c) (supra) and it is a fundamental and non-derogable right. The Applicant's complainants, as set out in paragraphs 1,2,3,4,5, and 6; of the grounds of the application in his affidavit in support in paragraphs 7,8, (i),11(vi),17, and 18 and also in paragraphs 8(i) and (iii) 10(iv), 15 and 16 of his supplementary affidavit in support; refer to the *"prejudicial and biased"* statements (at page 17 *Volume 3,* 2nd column *Annexure D2* to supplementary affidavit). Indeed the reading of the statements referred to shows that COSASE Chairman made biased and prejudicial conclusion when he stated that the Applicant and his Uganda Revenue Authority (URA) team had acted irregularly and had failed to follow Uganda Revenue Authority Act.

The Applicant also referred to a transcribed record at page 231 and 232 *Annexture D1* (Vol 2 to supplementary affidavit, for these statements. Again the reading of the same, particularly at pages 234-236 of the record in *Annexture D1 (Vol 2* to the supplementary affidavit dated 13th Feb 2018, manifests that COSASE Chairman uttered yet another biased and prejudicial statement by stating that

the Applicant and others at URA had colluded with the Permanent Secretary / Secretary to the Treasury, to illegally replenish the budget item from which the UGX 6 billion had been paid to the Applicant and other beneficiaries and even warned them against repeating that mistake. When such statements are made by the Chairperson of the committee investigating the issue where the Applicant and other beneficiaries appeared as the "accused", and conclusions made in such statements that there was collusion, it does not in the least give even a semblance of impartiality of the committee in the matter. The statements betray bias where the "mind" of the committee is already formed that there was collusion and the "accused" guilty of the same; even before being heard. Court thus finds merit in this contention by the Applicant.

It is also noted that the movers and seconders of the motion practically and substantially participated in and constituted a part of the COSASE inquiry, thereby acting as a "judge and jury" in their own case. This is more poignant in ground 5 of the application and in the depositions in paragraphs 4, 8(ii), 14 and 17 of the affidavit in support, and paragraphs 8 (ii), 10(vi) and 15 of the supplementary

Affidavit of the Applicant. These were not specifically denied or rebutted by any of the Respondents.

In ***Marko Matovu and 2 Others vs. Sseviri and Another [19791 HCB 174,*** the court guided that duty to act fairly applies to all public decision making process. In the instant case, the *Hansard* of 18th January 2017 (in *Annexture B2* to the Applicant's supplementary affidavit at page 13 – 25) clearly shows that Hon. Michael Tusiime, Hon Elijah Okupa as well as Hon. Anita Among, were among others, the seconders of the motion whose accusations were being investigated and were at the same time witnesses of COSASE. Evidence further shows that the URA Commissioner General who led the Applicant as the principal witness appearing with the Applicant from URA, protested to the committee of this anomaly, but they were ignored. This is quite evident in transcribed record in *Annexture D1 Vol 2* to the supplementary affidavit, at page 476.

Also to note is that Hon. Michael Tusiime, Hon. Elijah Okupa and Hon. Anita Among, unlike the fellow seconders How Niwagaba and Hon. G. Karuhanga, are indeed reflected in the relevant report; not as movers and seconders, but members of COSASE. Further reading

of *Annexture B2* to the supplementary affidavit, at page 148-149, reveals that Hon. Michael Tusiime, a mover of the motion, is recorded in the relevant COSASE report to have travelled for a field investigation trip to London with COSASE inquiry committee. This is fortified in the evidence in *Annexture B2* to the Applicant's supplementary affidavit. Even Hon. Michael Tusiime, Hon. Elijah Okupa and Hon. Anita Among, unlike their fellow seconders Hon. W. Niwagaba and Hon. G. Karuhanga, who were the petitioners attended all proceedings of the inquiry committee as members thereof, and participated in inquiry activities of COSASE, which included meeting with H.E the President and attending a retreat where evidence was considered, evaluated and a report written. In all these, there is nothing to suggest that the Applicant was ever accorded due and sufficient notices. It is quite apparent that the Applicant was subjected to hushed up proceedings and denied even the right to present witnesses. This is born out of the unrebutted depositions in paragraph 13 (i) – (v) of the Applicant's affidavit in support and also in paragraph 10 (i), (ii), (iii), (iv) and (v) of his supplementary affidavit. Court thus finds that the Applicant's right to a fair hearing as

enshrined under Article 28 (1) (supra) was contravened by the Respondents.

It is a constitutional imperative embedded in the very provisions that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. The failure to accord a party a fair hearing has the inevitable effect of vitiating any decision or result arrived at by the institution or tribunal established by law, in the process of the hearing. This is more so given provisions of Article 44 (c) (supra) that there shall be no derogation from the enjoyment of the right to a fair hearing. In that regard this court is persuaded by the decision in ***R. vs. Sussex Justices Ex p. McCarthy [1924] 1 K.B. 256*** at p. 259, where Lord Hewart, L.C.J, observed that;

> ***"It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a suspicion that***

there has been an improper interference with the course of justice."

Needless to emphasize, that it is a cardinal principle of natural justice that one cannot be a judge in his/her own cause. Thus when motion movers and seconders practically and substantially participated in and constituted a part of the COSASE inquiry committee, they denied the Applicant his right to a fair hearing. *Issue No.2* is accordingly answered in the affirmative.

Issue No. 3: Whether the proceedings before COSASE inquiry committee were conducted in a manner that contravened the principles of separation of powers and the independence of the Judiciary.

For ease of following, court will determine this issue starting with whether it was proper for the COSASE inquiry to summon and require the Chairman of the Tax Appeals Tribunal in his capacity as such, to testify before the committee regarding the judicial proceedings he had conducted and the decisions he had made. Article 128 of the Constitution provides that in the exercise of judicial power, the courts shall be independent and shall not be subject to

the control or direction of any person or authority. Further, no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions. Article 129(supra) establishes Courts of Judicature which consist the Supreme Court, the Court of Appeal, the High Court, and such subordinate courts as Parliament may by law establish. The establishment of the Tax Appeals Tribunals is rooted in Article 152(3) of the Constitution which empowers these quasi – judicial tribunals to handle tax disputes. Proceedings before the Tax Appeals Tribunals are treated as "judicial proceedings" and in that context and sense, the Chairman of the Tax Appeals Tribunal could not legally be summoned to appear before COSASE to testify as to judicial proceedings he had conducted and the decisions he had made. The Chairman is accorded protection from any such interference pursuant to Section 14(3) of the Tax Appeals Tribunal Act Cap 345; and by extension Article 128(1) (supra). The COSASE inquiry thus overstepped its mandate and irregularly summoned and required the Chairman of the Tax Appeals Tribunal in his capacity as such, to give testimony regarding judicial proceedings he conducted and decisions he had made in the matter. The particular irregularity and *ultra vires* nature of the COSASE

decision is evident in *Annexture D2, Vol. 3* of the supplementary affidavit, at pages 61 (1st column) and page 62 thereof.

Court underscores the importance of Articles 2 and 128 (1), (2) and (3) (supra) in the protection and guarantees of the independence of Judiciary. In ***Attorney General vs. Walugembe Daniel CA Civ. Appl. No. 390 of 2018,*** the Court of Appeal emphasized that court judgments, and or orders cannot be inquired into, compromised or interfered with by orders issues by any other arm of Government, and to do so would be a gross interference in the doctrine of separation of powers and the independence of the Judiciary. Similar stance was taken in ***Gordon Sentiba and 2 Others vs. Inspectorate of Government Civ. Appeal No.14 of 2007;*** and ***Hon. Mr. Justice Joseph Murangira vs. The Attorney General Const. Petition No.07 of 2014 [2017] UGCC 2 (20 Nov. 2017.*** In that regard, COSASE contravened the doctrines of separation of powers as enshrined under Articles 2,79,119 and 137 (supra) and in particular, it violated the principle of the independence of the Judiciary as it is known under the relevant provisions of the Constitution.

On the second aspect of this issue, court does not find merit in argument that COSASE usurped the powers of the Constitutional Court by interpreting Article 98 and 99 and or relying on the interpretation of the same by the IGG and ULS. It is well established the interpretation of the Constitution is the mandate of the Constitutional Court in accordance with Article 137 (supra). The careful perusal of the record, however, clearly shows that COSASE did not interpret Articles 98 and 99(supra) but rather applied the provisions to the facts and evidence before the committee, and chose to associate itself with the evidence constituted in the opinions preferred by IGG and ULS. The IGG and ULS were summoned as witnesses in the matter and COSASE chose to rely their evidence. COSASE needed not, in the circumstances, to seek the legal opinion of the Attorney General under Article 119 (supra) and similarly, there was no matter as to Constitutional interpretation to be referred to the Constitutional Court under Article 137(1) (supra).

Issue No.4: Whether the recommendations of COSASE in paragraphs (a), (b) and (d) of the recommendations are irrational and founded on errors of fact and law.

After carefully evaluating the evidence and the law applicable in this issue, it clearly emerges that COSASE made errors of law and fact. For instance, the conclusion that the Presidential reward payment was not offered but a solicited the payment, was error of fact. It would appear clearly that COSASE inquiry misconstrued the President's letter dated 16th November 2015 (Annex to COSASE Report, at page 185 of Vol.1 of the supplementary affidavit) as evidence of solicitation for the reward. In coming to that erroneous conclusion, it would seem that COSASE ignored the genesis of the said President's letter which was invariably the Attorney General's letter in first instance to the President, as is apparent from the Annex to the COSASE Report (at page 180 of Vol.1 of the supplementary affidavit). While COSASE interfaced with H.E the President, as indicated in their report, there is no evidence whatsoever that H.E the President never confirmed to have met the team on this date and made the promise in question. This shows that the conclusion of fact by COSASE that the reward payment was not authorized and that it contravened both the Public Finance Management Act (PFMA) 2015 and Section 16 of Uganda Revenue Act (supra), was both an error of law and fact.

In addition, it rather intriguing, that of all the crucial witnesses summoned in the matter, Hon. Gerard Sendawula, the immediate former URA Board Chairman, whose Board had been in charge at the time of the impugned payment and was seized of the goings- on in that regard, was not called to testify even when the committee was prompted by URA Commissioner General. This fact is quite glaring at page 656 of *Annexture D1 Vol2* of the supplementary affidavit. It would appear that the COSASE just applied Section 16 of the URA Act 1991, and ignored Section 11 PFMA 2015; a recent enactment whose provisions ordinarily supersede the law under which the Commissioner General URA, had taken lawful instructions/directive from the PS/ST to make the relevant payment. Had COSASE appreciated the import in Section 11PFMA, they would not have rejected the URA evidence on behalf of the Applicant in *Annexture B2 Vol 1* at page 131-132 of supplementary affidavit. Equally, they would not have wrongly concluded that the payment made to the Applicant and other beneficiaries was in contravention of Section 16 of URA Act 1991. The recommendations are therefore irrational and founded on errors of fact and law. Issue No.4 is thus answered in the affirmative.

Issue No.5: Whether the Applicant is entitled to general damages.

Counsel for the Applicant submitted that the Applicant's fundamental and non-derogable rights and freedoms reviewed herein were blatantly violated by COSASE inquiry proceedings. He Applicant prayed for general damages in the sum of UGX. 500,000,000. For its part, the 1st Respondent submitted that in order to achieve the ends of justice, there are well established principles that govern the award of damages, which are firmly rooted in common law. That by virtue of Section 14(2) of the Judicature Act, the common law and doctrines of equity are applicable in Uganda. He cited ***Hall Brothers SS Co. Ltd vs. Young (1939) 1 KB 748 at 756 (CA)*** where Lord Greene MR, defined damages as pecuniary recompense given by the process of law to a person for the actionable wrong that another had done to him/her. That the claim for general damages in this case has no legal foundation but that if this court deems it fit to award the same it should be at least UGX 1,500,000.

For their part, the 2nd and 3rd Respondents also relied on ***Hall Brothers SS Co. Ltd vs. Young*** (supra) that general damages are the

sums payable by way of damages and are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by general law, or legislation. That Section 33 of the Judicature Act, bestows on this court discretion to exercise jurisdiction vested in it by the Constitution, the Judicature Act or any written law to grant absolutely or on such conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to. That Rule 8 of the Judicature (Judicial review) Rules (supra) empowers court to grant the award of damages to compensate the applicant only in deserving cases.

After carefully evaluating the evidence and the submissions of all counsel on the issue, this court declines to award damages, based on similar reasoning in ***Sundus Exchange & Money Transfer Limited & 8 Others vs. Attorney General H.C.M.C No.61 of 2019;*** also case brought by way of judicial review, that;

> ***"Ordinarily, damages are sought through ordinary suits in civil law actions as it is strictly a matter of private law. Damages can only, but rarely, feature as a form of collateral challenge in proceedings for judicial review. If***

the main purpose of litigation is to seek damages, a party ought to pursue a claim in civil action and not through judicial review, especially where there are complex factual issues to be resolved, such as the assessment of damages. Therefore, the award of general damages in judicial review is an exception rather than the general rule. The instant case is not one such exception."

Issue No.5 is answered in the negative.

Issue No. 6: What remedies are available to the parties?

The application largely succeeds and it is allowed with the following orders;

1. ***An order of Certiorari doth issue quashing the findings and recommendations (a), (b) and (d) contained in the impugned COSASE report.***
2. ***An order doth issue that the COSASE findings in paragraphs 1,2,3 and 4 and recommendations in paragraphs (a), (b), and (d) of its impugned report and any Resolution of Parliament based upon and/or arising from***

same be; and hereby are expunged from Public records of the Republic of Uganda.

3. *An order of Prohibition doth issue against the implementation of the findings and recommendations (a), (b) and (d) of the impugned COSASE report.*

4. *The Applicant is awarded costs of this application.*

BASHAIJA K. ANDREW
JUDGE
14/02/2020.

CERTIFIED TRUE
COPY OF THE ORIGINAL
DEPUTY REGISTRAR DATE