THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

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 Notice of Motion against the respondent under Section 33 and 36 of the Judicature Act and Section 98 of the Civil Procedure Act and rules 3(1)(a) and 6(1) of the Judicature (Judicial Review) Rules, 2009 for orders that;

1. An order of *Certiorari* do issue to quash *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* by which the Minister of Energy and Mineral Development revoked *the Electricity (Electricity and Management of of the Rural Electrification Fund) Instrument, S.I No. 75 of 2001* on April 28th, 2020.

2. An order of prohibition do issue to restrain 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

implementing the impugned instrument and or altering the management of the Rural Electrification Fund.

3. Costs of the application 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. 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 20th, 2001.

3. 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 30th April 2020, revoking *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I. No. 75 of 2001.*

4. The process of making and passing *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 public and private sector participation required under Section 62 of the Electricity Act 1999, Cap 145.

5. 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 Uganda-1995.

6. 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 was done without Cabinet Approval contrary to the law.

7. 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 excludes key stakeholders such as the Permanent Secretary Ministry of Finance,/Secretary to Treasury and Permanent Secretary, Ministry of Local Government, Representatives of the Donors, the Financial sector, the Non-Governmental Organisations from effectively supervising and giving guidance to the fund in public interest.

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 overlooked

other legislation like the Public Finance Management Act 2015 regulating expenditure and accountability of funds drawn from the Consolidated Fund.

9. 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.

10. 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.

11. That *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* should be quashed on grounds of want of legality, procedural irregularities, being ultra vires the parent Act and existing laws, unreasonableness and irrationality.

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 this application 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 in exercise of those powers, on 28th April 2020, issued *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020* which was published in the Gazette on 30th April 2020. The new instrument revoked the Electricity (Establishment and Management of the Rural Electrification Fund) S.I No. 75 of 2001.

(3) That the Minister complied with all legal requirements and the making of regulations for the management of the fund does not require Cabinet approval but the Minister requested the Cabinet Secretariat to have the new SI presented for Cabinet Approval and the Cabinet Secretariat advised that it was not necessary.

(4) That 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) That 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) That the private sector which invariably includes Non-governmental Organisations is represented on the Rural Electrification Board under regulation 7(2) and Public Sector is represented under regulation 7(2)(a) and (c).

(7) That the new Rural Electrification Board takes into account the different interest groups and professional representation as accordingly reflected. Expertise considered for the Board includes Public Administration, Community Development, energy, finance, local government, private sector and electrical engineering. Such expertise could still be drawn from the Ministries of Finance, Local Government and Other Ministries.

(8) That one of the key reasons which necessitated the Statutory Instrument was the need to comply with the requirements of the Public Finance Management Act 2015. The SI fully complies with the Public Finance Management Act and specifically requires monies of the fund to be managed in accordance with the Public Finance and Management Act 2015.

(9) That 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.

10. That S.I No. 62 of 2020 is in full compliance with the powers granted to the Minister under the Electricity Act and was lawfully done in

accordance with those powers and is in no way ultra vires, illegal, unreasonable or irrational.

11. That the quashing of S.I No. 62 of 2020 would deeply paralyze the activities of the Rural Electrification Fund, the Rural Electrification Board, the Rural Electrification Agency and the energy sector.

In the interest of time the respective counsel were directed to file written 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).*

Issues:

a) ***Whether the application raises issues for judicial review.***

b) ***Whether the procedure of making and passing the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I. No. 62 of 2020 was illegal, Irrational or procedurally improper?***

c) ***What remedies, if any, are available to the parties?***

Submissions

The Applicant's counsel submitted that the process of making and passing the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I. No. 62 of 2020* did not comply with the spirit, object and purpose of the parent Act, the Constitution, and other existing laws, thereby rendering it illegal, ultra vires and irrational.

The applicant contended that there was non-compliance with the public and *private* sector participation required under **section 62 of the Electricity Act, 1999 (Cap 145).** The foregoing provision contains an express direction to include private and public sector participation in rural electrification. However, the making *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020, the key governance framework for the management of the Rural electrification programmes was passed into law without such consultations.

The Applicant further faults the Minister for Energy for **failing to comply with the constitutional requirement to consult and involve people in the formulation and implementation of development plans and programs** contrary 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*, 1995 (as amended). The said principle states that the State shall take all necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them**.

In summation, these provisions of the law indicate a mandatory requirement for public and private participation. ***The Minister was duty bound by law to consult key stakeholders, before the enactment of the impugned legislation.***

It was their contention that public and private participation extends beyond inclusion on the Board to consultation in the process of making regulations. The key stakeholders were not consulted or included in any meaningful discussions prior to the enactment of the legislation. It was there submission that *the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 was illegally passed into law in the absence of consultations with stakeholders.

Secondly, the Minister for Energy breached **sections 63 and 64 (3) (a) of the *Electricity Act*, 1999** when she passed the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 in violation of the Rural Electrification Strategy and Plan for 2013-2022.

When the Rural Electrification Strategy and plan is made and approved by Cabinet, its implementation takes course and the sector is obliged to implement it because it is a mandate conferred by the Act. Undertaking any policy or legislative change contrary to it **(without first amending it and having the amendment approved by Cabinet)** would be illegal because such a person would be acting beyond the scope provided for in the parent legislation.

The *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No 62 of 2020 was enacted without respect to the following positions already approved by Cabinet through the approval of the Rural Electrification Strategy and Plan for 2013-2022. Some of the key positions

already provided for in the plan, that have been **overlooked/ ignored by the impugned instrument**.

The applicant submitted that the fundamental and unreasonable changes made to 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 was unjustified and affects the operations of the Agency.

The Applicant contends that the exclusion of the Permanent Secretary/Secretary to the Treasury from 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 a violation of **the *Public Finance Management Act*, 2015.**

The exclusion of the Permanent Secretary of the Ministry responsible for Finance compromises the accountability of the Rural Electrification Fund which is a Vote. The exclusion of the Permanent Secretary for the Ministry of Finance also impedes financial access for the Fund. Such results do not better the operation of the Fund and are unreasonable. As such, the act giving rise to or proposing such a result is irrational.

In addition the exclusion of the Permanent Secretary for the Ministry responsible for Local Government disables effective delivery of services. The Ministry of Local Government is best placed to provide guidance on areas to which subsidies should be afforded since it is aware of the

economic status of various rural communities. Additionally, the decentralised nature of the ministry enables it to assist in coordinating the implementation of rural electrification projects.

As such, excluding the presence of the Permanent Secretary for the Ministry of Local Government only serves to cripple effective service delivery. It is both unjustified and unreasonable, and consequently irrational.

The Minister for Energy did not define the criteria by which private sector nominees are to be appointed to the Rural Electrification Board. The position ought to be occupied by a person who is substantially involved in rural electrification, who is able to offer meaningful contributions to the Board. However, the process has been left to the arbitrary whims of the appointing authority.

The Minister for Energy also excluded the representatives of the financial sector, the donors, and the Non-Governmental Organisations. These are all parties with stakes in the Rural Electrification Fund as service providers, funders, and representatives of the beneficiaries. The vitality of their role in ensuring transparency and accountability is both unquestionable and indispensable. Therefore, their unfounded exclusion is both unreasonable and irrational.

The result of the exclusions and ambiguity in criteria for appointment is that the *Electricity (Establishment and Management of the Rural*

***Electrification Fund) Instrument,* S.I. No. 62 of 2020 falls short of meaningful public and private sector participation on the Rural Electrification Board as the new appointees will only be accountable to the Minister, who is the sole appointing authority**.

It was their submission that the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 is irrational in as far as it excludes the Permanent Secretaries to the Ministries of local government and finance, as well as the representatives of the financial sector, the donors, and the Non-Governmental Organisations and does not stipulate the criteria by which private sector nominees are to be appointed.

In addition, it was submitted that by having the representation of NGOs on the Rural Electrification Board vide S.I. No 75 of 2001, the Minister created a relationship/practice **(a legitimate expectation)** and if this practice was going to be changed, the NGOs would have expected the Minister to consult them before they are adversely affected by any such decision. The Minister should in such circumstances show that there is overriding public interest, which warrants a departure from the promise of representation built overtime...*anything less constitutes unfairness amounting to abuse of power. It should be emphasized that the Rural Electrification Strategy and Plan 2013-2022 was developed in a consultative process with the rural electrification program's principal stakeholders. This act confirms the fact that a legitimate expectation of consultation has always been expected by the stakeholders, and the*

actions of the Minister in unilaterally making the impugned instrument undermines this expectation.

Lastly, the applicant submitted that *all the stakeholders under the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 75 of 2001 ought to *have* been afforded an opportunity to comment on the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 before it was passed into law. However, this was never done. *The* failure to so do amounts to breach of a constitutional and statutory procedural requirement.

The Minister for Energy also refused and/or failed to comply with the set procedure for the preparation of Statutory Instruments when she passed the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 without cabinet approval. **The *Uganda Public Service Standing Orders*, 2010 at Q–b** details the legislative process. At **paragraph 2** it states that:

> *"Before instructions are given to the First Parliamentary Counsel for the drafting of Bills or Statutory Instruments, the instructing Ministry or Department must:*
>
> *(a) seek Cabinet approval authorising the subject legislation; or*
>
> *(b) request through its Minister, the authority of the Attorney General or Solicitor General for the legislation to be drafted*

without prior reference to Cabinet. This approval will be given only in special circumstances."

The Respondent has not furnished this Honourable Court with any such proof of Cabinet approval that was sought and obtained prior to the drafting of the impugned instrument. The Respondent has also not presented proof of leave to draft the legislation without Cabinet approval.

At **page 15, paragraph 3.3.3 of the Cabinet Handbook of 2012**, Ministers are to ensure that all other organizations affected by a proposal are consulted at the earliest possible stage, and that their views are accurately reflected. **At page 16 paragraph 3.4, the Cabinet Handbook** lists items that require consideration and approval by Cabinet before they can be implemented. These include the following:

(i) **when it represents new Government policy;**

(ii) when **it represents a change in existing policy approved in a previous Cabinet decision;**

(iii) when it has significant financial implications for the Government;

(iv) when it has significant implications for other Ministries;

(v) when it requires a new legislation;

(vi) when it is a response to a report of a Committee of Parliament;

(vii) when it is deemed to be an especially politically sensitive matter; or

(viii) **matters relating to the appointment to Boards of statutory bodies.**

These items are also listed at **pages 12–13, paragraph 2.10 of the *Guide to Policy Development and Management in Uganda*.**

The *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 is a new legislation changing a previously approved legislation and relating to the appointment to the Board of a Statutory body. It touches on items i, ii and vii above that require cabinet approval. As such, it should not have been passed without the requisite approval of cabinet.

***In addition, Paragraph 5 of Q–b of the Uganda Public Service Standing Orders,* 2010** provides for scrutiny of draft legislations. It states that;

> *"Drafts of the legislation, when ready, will be provided to the instructing Ministry or Department which will be expected not only to examine them critically but also to circulate them to persons, who in the opinion of the instructing Ministry or Department or Local Government should be given an opportunity to comment on them, for example, the Ministry responsible for Finance and the Auditor General in respect of financial provisions; the Chairman or Managing Director of any particular parastatal body that may be affected by a proposed legislation."*

The respondent counsel submitted that applicant's contention that the Electricity Act requires Government to undertake rural electrification through public and private sector participation is a misconception because the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020, is a legislative Instrument and not a programme as envisaged by section 62 of The Electricity Act for which public and Private sector participation is mandated.

It was counsel's submission that there is nothing in the section that provides for public or private sector participation in the process of making regulations and in what form such participation should take place. Had Parliament intended such 'participation' it should have delegated this power to the Minister or would have expressly stated so.

In the same vein, counsel submitted that Principle X of the national Objectives and Directives of State Policy of the Constitution is about development plans and programs. The *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 is neither a development plan nor is it a programme. The Statutory Instrument is NOT a plan or programme, it is simply a subsidiary legislation.

There was no mandatory requirement for the Minister to consult because the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 is not a plan or programme and (even if it

was) non-compliance with the requirement to consult would not invalidate the legislation.

Similarly, the respondent's counsel further contended that the applicants cannot possibly expect the Minister to consult each and every Non-governmental organization including theirs. It is not practically possible to consult all persons. The Minister can only consult key stakeholders.

The respondent contended that the constitution of the board is a policy decision of the Minister and such decision is a substantive one which is not amenable to judicial review. The decision to exclude the Permanent Secretaries was because of their busy schedules that would not enable them to give sufficient dedicated time to matters of the Board.

The Electricity Act is very clear on areas where Cabinet approval is required for example Section 63 requires Cabinet to approve a new rural electrification strategy and plan and Section 64 of the Act empowers the Minister make regulations for the management of the funds does not require Cabinet approval.

However, it was their contention that indeed the Minister sought Cabinet approval prior to enacting the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020. The Minister was advised that the Cabinet Approval was not necessary since the Act did not provide for submission of Statutory instrument to Cabinet. The

Secretariat instead advised the Minister to seek guidance of the Attorney General.

Determination

Whether the application raises issues for judicial review.

Judicial review is about challenging public bodies for acts which are illegal, irrational and procedurally improper. The making of regulations by the Minister is one of such act which can be challenged for illegality or irrationality or procedural impropriety.

In as far as the argument that this matter is not a grievance to be addressed by the High court as argued by the respondent, this court asserts that Judicial review is 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.

For one to succeed under Judicial Review it trite law that he must prove that the decision or act/omission made was tainted either by; illegality, irrationality or procedural impropriety. In this case, the applicant has proved to this court that the said delegated legislation making process by the Minister of Energy was tainted by illegality against the parent Act-The Electricity Act and the new Rural Electrification Strategy and Plan for 2013-2022.

The respondent's client-Minister of Energy as a public official and body is subject to judicial review to test the legality of her decisions if they affect the public.

A delegate must exercise its jurisdiction within the four corners of its delegation and if she has acted beyond that, his/her action cannot have any

legal sanction and is challengeable by way of judicial review. It is well recognised that a delegated legislation can be challenged by way of judicial review for being *ultra vires* any of the following reasons;

- *Lack of legislative competence,*
- *Violation of fundamental rights guaranteed under the constitution,*
- *Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by parent Act,*
- *Repugnancy to the laws of the land,*
- *Manifest arbitrariness/unreasonableness or vagueness or uncertainty.*

While considering the validity of delegated legislation, the scope of judicial review is limited but the scope and effect thereof has to be considered having regard to the nature and object thereof. See Page 198 ***Public Law in East Africa*** *by Ssekaana Musa: Lawafrica Publishers*

Whether the procedure of making and passing the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I. No. 62 of 2020 was illegal, Irrational or procedurally improper?

The courts are empowered to question the validity of delegated legislation and in challenging a delegated legislation courts are guided by the doctrine excessive delegation which obligates the legislature to state some policies, principles and guidelines in the statute to guide the exercise of delegated discretion to some extent.

This doctrine of excessive delegation strengthens the application of the doctrine of *ultra vires* to assess judicially the validity of the delegated legislation itself. If a statute sets up standards in sufficiently precise terms so as to ensure that the relevant authority receives clear signals as regards

the policy it is expected to carry out, the courts will have a workable standard for reviewing the rules made by the concerned authority.

An important purpose underlying the rule of laying down policy in the delegating Act is that the discretion of the delegate in making regulations/rules would thereby be circumscribed to some extent, thus reducing the chance of misuse of power.

The Minister under section 63 of the Electricity Act is obligated to prepare a sustainable and coordinated Rural and Electrification strategy and plan for Uganda for approval of the Cabinet. There is a Rural Electrification Strategy and Plan 2013-2022. This must guide the Minister in the delegated making process since this derives its authority from the Electricity Act.

The question whether any particular delegated legislation is *ultra vires* or suffers from excessive delegation has to be decided having regard to the subject-matter, scheme, provisions of the statute including its preamble and the facts and circumstances in the background of which the statute is enacted. The question whether a particular delegated legislation is in excess of the power of the parent Act or other laws conferred on a delegate, has to be determined with regard not only to the specific provisions contained in the relevant Statute conferring the power to make rules or regulations, but also the object and purpose of the Act as can be gathered from the various provisions of the enactment.

The Electricity Act under Section 62 provides; The Government shall undertake to promote, support and provide rural electrification programmes through public and private sector participation. It is clear the Ministers powers in execution of her duties are subject to consideration of public and private sector participation. This would invite the Minister to make meaningful consultations in guiding the operations of the Rural Electrification Agency in execution of their mandate. The argument by the respondent that the law does not provide for consultation while making delegated legislation is devoid of merit. There is needto read the other provisions of the Act and it indeed anticipates or expects participation of the public and there is no way a Minister would make meaningful rules and regulations without consultations with stakeholders.

A modern and effective technique of controlling the exercise of power of a delegated legislation is 'consultation of Interests' affected by the proposed regulations/rules. Public participation is what is known as the democratization of administration and the rule-making process is regarded as a desirable safeguard, for it enables the interests affected to make their views known to the rule-making authority, and thus help in framing the regulations. This may serve as a significant safeguard against improper or wrongful exercise of power.

The National Objectives and Directive Principles of State Policy X enjoins the State to take all necessary steps to involve the people in the formulation

and implementation of development plans and programmes which affect them. The Minister has a duty to involve the public by at least consulting some specific interested groups in making regulations affecting the public. The respondent did not adduce any evidence to prove public and private sector participation or consultation. I may indeed agree with the applicant's submission that the Minister hurriedly made the regulations during the period when the country was under lockdown purposely to defeat the intended purpose of the parent Act.

Consultation ensures that delegated legislation is passed with adequate knowledge of the problems involved and that the rule-making agency has before it all relevant materials so that it does not make decisions on insufficient information. Even where no formal consultative procedure is prescribed, the Administration can still resort to informal consultation with the directly interested groups and this enhances democratic administrative process in Uganda to some extent.

In the case of ***Uganda Diary Traders Association v The Diary Development Authority and The Attorney General, Misc. Cause No 113 of 2015, His Lordship Yasin Nyanzi*** *invalidated Regulation 3 (b) of S.I. 2016 No. 17 of the Diary (Marketing and Processing of Milk Products) Regulation 2003 as amended in 2006 for having been made without consultation of key stakeholders. In* ***Regina v Secretary of State for Social Services Exp Association of Metropolitan Authorities [1986] 1 WLR 1****, Webster J opined:* ***"that for there to be***

consultation, there had to be a genuine request for advice and genuine desire to receive that advice; that amount of information given with the request for advice and the time limit within which the advice was given depended on the circumstances of the case, but there could be no degree of urgency which absolved the Secretary of State from his duty to consult"

The Respondent's assertions at paragraph 4 of the affidavit in reply that the requirement for consultation was satisfied through the inclusion of an appointee of the Private Sector Foundation to the Rural Electrification Board cannot stand. It is courts view that public and private participation extends beyond inclusion on the Board to consultation in the process of making regulations. The key stakeholders were not consulted or included in any meaningful discussions prior to the enactment of the legislation.

The duty to consult may also arise out of legitimate expectation based on a promise by the rule-maker to consult the affected persons or interested person in certain circumstances or by an established practice of consultation. The persons earlier consulted before the regulations are made would legitimately expect to be consulted in future over similar issues and problems.

Therefore, since the Rural Electrification Strategy and Plan 2013-2022 was made through a consultative process with the Public and Private Sector participation, the Minister was duty bound to consult the same

stakeholders or even more stakeholders before making any regulations that are likely to affect the Rural Electrification Strategy and Plan.

The Rural Electrification Strategy and Plan attests to the fact that a legitimate expectation of consultation has always been expected by the stakeholders, and the actions of the Minister in unilaterally making the impugned instrument undermines this legitimate expectation.

Laws L.J. in ***Bhatt Murphy (a firm) and Ors v The Secretary of State [2008] EWCA Civ 755*** **at** Paragraph 50

> *"A very broad summary of the place of legitimate expectation in public law might be expressed as follows. The power of public authorities to change policy is contained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected then ordinarily it must consult (the paradigm case of procedural expectation). It has distinctly promised to preserve existing policy for a specific person or group who would be substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise in any of these instances would be to act so unfairly as to perpetrate an abuse of power."*

This is regardless of the assertions that the Minister was working in public interest. ***Regina v Secretary of State for Health, Ex parte United States Tobacco International Inc. [1992] Q B 353 at 14***, the Taylor L.J. noted:

"It may be well that, in the end the decision reached by the Secretary of State may prove to be wise and in the public interest, but such a draconian step should not be taken unless procedural propriety has been observed and those concerned have been treated fairly. Although the Regulations were subject to annulment by negative resolution of the House of Commons but were not so annulled, Parliament may be concerned only with the objects of the Regulations and would be unaware of any procedural impropriety. It is therefore to the Court's, by way of Judicial review, that recourse must be had to seek a remedy. In my judgment, the applicants are entitled on this ground to an order of certiorari to quash the Regulations"

The making of regulations further required the Minister to involve the relevant Ministries of Finance and Local Government in the rule-making process. The nature of Board of the Agency requires harmonization with other Ministries and constant consultation in execution of the Agency work.

The act of the Minister to remove the Permanent Secretaries of Finance and Local Government was improper and the Minister had a duty to consult them and agree on how they would operate instead of seeking advice from one Member, who felt that they are too busy and thus unnecessary. The policy considerations for their inclusion in the first place still exist and

therefore their removal would affect the Rural Electrification Strategy and Plan.

I agree with the submission of applicant's counsel that the Minister for Energy breached **sections 63 and 64 (3) (a) of the *Electricity Act*, 1999** when she passed the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 in violation of the Rural Electrification Strategy and Plan for 2013-2022.

When the Rural Electrification Strategy and Plan is made and approved by Cabinet, its implementation takes course and the sector is obliged to implement it because it is a mandate conferred by the Act. Undertaking any policy or legislative change contrary to it **(without first amending it and having the amendment approved by Cabinet)** would be illegal because such a person would be acting beyond the scope provided for in the parent legislation.

In the recent case of ***Uganda Law Society v Kampala Capital City Authority & Another, Miscellaneous Cause No 243/2017 [2020] UGHCCD 82***, this Honourable Court held **that the conferment of rule-making power by an Act does not enable the rule making authority to make a rule that travels beyond the scope of the enabling Act**, or **which is inconsistent therewith**, or **repugnant thereto,** or affects other existing legislations. On the basis of this position of the Court, the Minister for Energy passed a legislation that violates existing laws and Strategy and is therefore illegal.

The exclusion of the Permanent Secretary of the Ministry responsible for Finance compromises the accountability of the Rural Electrification Fund which is a Vote. The exclusion of the Permanent Secretary for the Ministry of Finance also impedes financial access for the Fund. Such results do not better the operation of the Fund and are unreasonable. As such, the act giving rise to or proposing such a result is irrational.

The exclusion of the Permanent Secretary for the Ministry responsible for Local government disables effective delivery of services. The Ministry of Local Government is best placed to provide guidance on areas to which subsidies should be afforded since it is aware of the economic status of various rural communities. Additionally, the decentralised nature of the ministry enables it to assist in coordinating the implementation of rural electrification projects.

As such, excluding the presence of the Permanent Secretary for the Ministry of Local Government only serves to cripple effective service delivery. It is both unjustified and unreasonable, and consequently irrational.

The Minister for Energy also refused and/or failed to comply with the set procedure for the preparation of Statutory Instruments when she passed the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I. No. 62 of 2020 without Cabinet approval. **The *Uganda Public Service Standing Orders*, 2010 at Q–b** details the legislative process. At **paragraph 2** it states that:

"Before instructions are given to the First Parliamentary Counsel for the drafting of Bills or Statutory Instruments, the instructing Ministry or Department must:

(a) seek Cabinet approval authorising the subject legislation; or

(b) request through its Minister, the authority of the Attorney General or Solicitor General for the legislation to be drafted without prior reference to Cabinet. This approval will be given only in special circumstances."

The Respondent has not furnished this Honourable Court with any such proof of Cabinet approval that was sought and obtained prior to the drafting of the impugned instrument. The Respondent has also not presented proof of leave to draft the legislation without Cabinet approval.

At **page 15, paragraph 3.3.3 of the Cabinet Handbook of 2012**, Ministers are to ensure that all other organizations affected by a proposal are consulted at the earliest possible stage, and that their views are accurately reflected. **At page 16 paragraph 3.4, the Cabinet Handbook** lists items that require consideration and approval by Cabinet before they can be implemented. These include the following:

(i) **when it represents new Government policy;**

(ii) when **it represents a change in existing policy approved in a previous Cabinet decision;**

(iii) when it has significant financial implications for the Government;

(iv) when it has significant implications for other Ministries;

(v) when it requires a new legislation;

(vi) when it is a response to a report of a Committee of Parliament;

(vii) when it is deemed to be an especially politically sensitive matter; or

(viii) **matters relating to the appointment to Boards of statutory bodies.**

These items are also listed at **pages 12–13, paragraph 2.10 of the *Guide to Policy Development and Management in Uganda*.**

The *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 is a new legislation changing a previously approved legislation and relating to the appointment to the Board of a Statutory body. It touches on items i, ii, iv and vii above that require Cabinet approval. As such, it should not have been passed without the requisite approval of cabinet or direct involvement in the making process.

***In addition, Paragraph 5 of Q–b of the Uganda Public Service Standing Orders*, 2010** provides for scrutiny of draft legislations. It states that;

> *"Drafts of the legislation, when ready, will be provided to the instructing Ministry or Department which will be expected not only*

to examine them critically but also to circulate them to persons, who in the opinion of the instructing Ministry or Department or Local Government should be given an opportunity to comment on them, for example, the Ministry responsible for Finance and the Auditor General in respect of financial provisions; the Chairman or Managing Director of any particular parastatal body that may be affected by a proposed legislation."

The respondent contended that the Minister wrote to the Cabinet Secretariat who deemed Cabinet approval unnecessary. But it bears emphasis that the Minister was bound to make consultations with the relevant Ministries that are directly affected and this had not been done at this stage. The Minister wrote to the Cabinet Secretariat as a mere formality without any intentions of involving Cabinet in her intended change of policy or Strategy and Plan.

The duty to consult implies reasonable time be given to those whose advice or consultation is sought to express their views. It is not treated as a mere opportunity to make ineffective representations. See page 198 ***Public Law in East Africa by Ssekaana Musa: LawAfrica Publishers***.

The process of exchange of ideas is beneficial to both: to the affected interests itself in so far as they have an opportunity to impress on the authority their point of view; to the rule-making authority in so far as it can gather necessary information regarding the issues involved and thus in a

better position to appreciate a particular situation. The Administration (Minister) is always not always the repository of ultimate wisdom; it learns from suggestions made by outsiders and often benefits from that advice. The consultation process must be timely, thorough and focused in order to be meaningful. See ***Uganda Law Society v Kampala Capital City Authority & Another, Miscellaneous Cause No 243/2017 [2020] UGHCCD 82***

When a Statute provides for a consultative technique or Public and Private participation, then the courts are duty bound to regard it as a mandatory procedural requirement, breach of which may result in the invalidation of delegated legislation. The process of passing the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 was ultra vires, improper and void for failure to consult and follow the set procedures.

What remedies, if any, are available to the parties?

1. This court issues a declaration that the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020 is invalid.
2. The effect of granting an order of certiorari is to establish that the decision is *ultra vires* and set the decision aside. *Certiorari* is a discretionary remedy, and may be refused where the error made is not fundamental or has caused any prejudice. In this case, the

statutory Instrument affects or may affect the operations and purpose of Rural Electrification Strategy and Plan 2013-2022. An Order of ***Certiorari*** issues to quashing the *Electricity (Establishment and Management of the Rural Electrification Fund) Instrument,* S.I. No. 62 of 2020.

3. I make no order as to costs since this matter was brought in public interest.

I so order.

Dated, signed and delivered be email at Kampala this 25th day of September 2020

SSEKAANA MUSA
JUDGE
25th September 2020