THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO.161 OF 2019

IN THE MATTER OF SECTION 36 OF THE JUDICATURE ACT,

CAP 13 AS AMENDED

AND

IN THE MATTER OF THE JUDICATURE (JUDICIAL REVIEW)

RULES SI 11 OF 2009

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

1. SUNDUS EXCHANGE & MONEY TRANSFER LIMITED
2. HALEEL COMMODITIES LIMITED
3. VICTORY GROUP OF COMPANIES LIMITED
4. QEMAT AL NAJAH GEN TRADE LIMITED
5. CITY LOVE GENERAL TRADING LIMITED :::::::::: APPLICANTS
6. HILOWLE GENERAL TRADING COMPANY LIMITED
7. JUMALE BASHIR ALI
8. OMAR SHEIKH ALI
9. ABDULKADIR OMAR ABDULAHI

VERSUS

ATTORNEY GENERAL :: RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING:

Sundus Exchange & Money Transfer Limited & Eight others *(hereinafter referred to as the "Applicants")* brought this application against the

Attorney General *(hereinafter referred to as the "Respondent")* under Rules 3, 4 and 6 of the Judicature (Judicial Review) Rules, SI 11 of 2009; Articles 28, 42, 44 and 120 (5) of the Constitution; Sections 36 and 38 of the Judicature Act Cap 13; and Section 98 of the Civil Procedure Act Cap 71;seeking remedies under judicial review, as follow;

a) A declaration that the decision by the Director of Public Prosecutions (DPP) to charge and/or prosecute the Applicants vide Case Ref. No. 249/2018/Criminal Case No. 51 of 2019 was arrived at illegally, highhandedly, vindictively, irrationally, in bad faith, unreasonably and in breach of the rules of natural justice.

b) An order of Certiorari doth issue quashing the decision of the DPP to charge and/or prosecute the Applicants with alleged money laundering and facilitating money laundering, vide Case Ref. No. 249/2018/Criminal Case No. 51 of 2019.

c) An order of Prohibition doth issue prohibiting the DPP from charging and/or prosecuting the Applicants with alleged money laundering and facilitating money laundering vide Case Ref. No. 249/2018/Criminal Case No. 51 of 2019 or

with any charges arising from the same allegations or investigation.

d) An injunction doth issue restraining the DPP, its servants or agents from charging and/or prosecuting the Applicants with alleged money laundering and facilitating money laundering vide Case Ref. No. 249/2018/Criminal Case No. 51 of 2019, or any charges arising from or related to the same allegations or investigation;

e) An order and/or a consequential order lifting the freezing of the respective Applicants' bank accounts in Bank of Africa, Equity Bank, Stanbic Bank, Diamond Trust Bank, KCB Bank and Barclays Bank.

f) An order that the Applicants shall be free to access and freely operate their respective bank accounts in Bank of Africa, Equity Bank, Stanbic Bank, Diamond Trust Bank, KCB Bank and Barclays Bank; and

g) An order for general damages to be awarded against the Respondent.

The application is supported by the affidavits of the 7th and 9th Applicants sworn on behalf of the other Applicants, and it is opposed

by the Respondent in the affidavits in reply sworn by Ms. Alice Komuhangi Khaukha, a Senior Assistant DPP.

The Applicants' case:

The Applicants' case is that 1st Applicant is a licensed money remittance and forex bureau operator regularly supervised and regulated by the Bank of Uganda (BoU) with a clean record of operations. The 2nd to 6th Applicants are trading and brokerage companies, the 7th Applicant is a Director in the 1st to 6th Applicant Companies, and the 8th and 9th Applicants are both Directors in the 1st Applicant Company. That sometime in April 2017, one Farhan Hussein Haider, a Kenyan national, who was a signatory to the bank accounts of the 1st and 3rd Applicants was questioned by Kenyan authorities on matters relating to alleged criminal activities. That as a precautionary measure, the 1st, 3rd and 6th Applicants, on 7th May, 2018 and 23rd May, 2018, passed board resolutions effectively removing Farhan Haider as signatory to all their bank accounts and as shareholder, director and/or secretary to the companies.

That pursuant to section 17A of the Anti-Terrorism (Amendment) Act, 2015, the Financial Intelligence Authority (FIA) by its letter dated 25th May 2018, issued directives to the Applicants' bankers in Uganda instructing them to freeze all funds on their respective bank accounts. That in spite of the severance of relations between Farhan Haider and the 3rd and 6th Applicants, which are the only companies where he was a director, the FIA froze the accounts of all the other Applicants, including personal accounts of the 7th, 8th, and 9th Applicants. That even the accounts of the 1st, 2nd, 4th, and 5th Applicants where Farhan Haider was neither director nor shareholder were frozen. The FIA then referred the matter to DPP.

That on 2nd July 2018, the courts in Kenya, which had initially questioned Farhan Haider, issued orders lifting the freezing orders on all the bank accounts for companies in Kenya to which he had been a director and a signatory. This was after the Kenyan Police and courts were satisfied that Farhan Haider had severed all relations with companies whose accounts he had been a signatory to. Mr. Farhan Haider was also subsequently cleared of all the allegations money of laundering and financing of terrorism by the office of the

Attorney General of Somalia and the Somali Police Criminal Investigations Directorate, as well as by Kenyan courts and Police.

Meanwhile in Uganda, the Chieftaincy of Military Intelligence (CMI) also investigated and found no wrongdoing on part of any of the Applicants. That on 12th February 2019, the FIA, which was the original complainant, wrote to the DPP that after receiving more intelligence/information and carrying out further inquiries on the frozen funds and on Mr. Farhan Haider, it was discovered that Mr. Farhan Haider had been cleared of any allegations by Police authorities in Kenya and Somalia, and also by the Attorney General's office in Somalia. The FIA asked the DPP to consider those particular facts in the matter the FIA had earlier forwarded to DPP. The Applicants contend that the DPP, however, chose not to pursue the suspect, Farhan Haidar, and instead charged the Applicants with offences which Farhan Haidar had been wholly cleared of, and decided to have the Applicants' funds on the different bank accounts to continue to be frozen.

Further, that the DPP charged the Applicants after the Uganda Police CIID had carried out investigations and issued a report, on 28th November 2018, clearly stating that there is no evidence whatsoever

that the Applicants were involved in any criminal activities of money laundering or financing of terrorism. That even after the said Police report, the DPP sought a court restraining order in respect of the accounts that had been frozen on instructions of FIA, alleging that there was evidence incriminating the Applicants.

That the DPP, applied to the High Court, Criminal Division, which issued a freezing order on 18th January 2019 on the Applicants' accounts, which was to lapse automatically after 90 days. The court considered this period sufficient for the DPP to confirm whether there was any evidence to warrant charges and the continued freezing of the funds. That just seven days to the lapse of the order, the DPP decided to prefer charges against the Applicants with the offences of money laundering and facilitating money laundering. The Applicants contend that the charges were preferred without any evidence or any other investigation report implicating them. Further, that the DPP's decision to charge the Applicants just seven days to the expiry of the order was merely intended to defeat the automatic expiry of the freezing order, as it was on the basis of the existence of the preferred charges that the freezing order was extended for yet another 90 days.

The Applicants aver that this conduct of the DPP manifests bad faith, is irrational, arbitrary and an abuse of the process of court.

The Applicants also contend that there is no complaint or complainant with regard to the charges. That the FIA which had only complained of alleged financing of terrorism, and not money laundering, ceased being a complainant by its letter of 12th February 2019, when it dropped the complaint against the Applicants. That as such, the DPP has now turned itself into the sole complainant, the investigator, the assessor of evidence gathered, the witness and the prosecutor; which is a total breach of the rules of natural justice.

Also, that after the original suspect and the Applicants were cleared by investigation agencies, the decision of the DPP to charge and prosecute the Applicants and have their funds continue to be frozen is high handed, irrational, arbitrary, and unreasonable, done in bad faith and an abuse of the process of court. That no other investigations have been made by any mandated investigation agency implicating them in any criminal activities. That as such, the DPP has constituted itself into the investigator, and continues to actively carry out investigations, while ignoring the findings of the Applicants'

innocence by the mandated investigative agencies of the Police CIID, CMI and FIA; which amounts to the DPP acting ultra vires.

The Applicants also state that none of them ever recorded any charge and caution statement before they were charged. That only three plain statements were recorded from the 7th, 8th and 9th Applicants without telling them for which of the Applicants the statements related to. That this render the decision to charge the Applicants a breach of the law, and of the rules of natural justice, and that it ought to be quashed and set aside.

The Respondent's case:

The Respondent avers that evidence availed to the DPP shows that the 1st Applicant has been using his licence to facilitate money laundering and deliberately operating business in violation of the Foreign Exchange (Forex Bureau & Money Remittance) Regulations, 2006, to facilitate the laundering of funds received from foreign countries, which is an offence under the law. That the evidence shows that Farah Haider was co-signatory to the all bank accounts that were opened in the names of the 1st and 2nd Applicant companies, and was also shareholder in the 1st and 6th Applicant companies,

where the 7th and 9th Applicants are also co-directors and shareholders. That when investigations of providing logistical support to terrorist groups were commenced against Farhan Haidar by the Kenyan authorities, the Applicants transferred his shares to new shareholders and removed him as a signatory to the company's accounts. That evidence from Immigration Office shows that Mr. Farhan Haidar left Uganda on 8th February, 2018 for Nairobi and never returned, but that the 7th Applicant signed board resolutions for transfer of shares indicating that the resolutions are co-signed with Farhan Haidar in May 2018. That the timing of removing Farhan Haidar as shareholder and signatory to the said bank accounts is not an innocent conduct, and that the Applicants' accounts were lawfully frozen by the FIA.

That court made a finding that FIA's actions of freezing the Applicants bank accounts were lawful, and that the Kenya case referred to is not the same case that has been investigated against Applicants by the Police in Uganda and that it is not the basis for charges that have been registered against the Applicants for offences that were committed in Uganda. Further, that the clearances by Kenyan and Somali authorities have no bearing on the charges that were brought

against the Applicants as none of the charges was committed in Kenya or Somalia. That as such, there were justifiable reasons for the issuance of the freezing/restraining orders.

In addition, that the Police has no capacity or mandate to provide legal decisions in criminal cases without the input of DPP. That the Police report referred to, together with the case file, were submitted to the DPP for advice, and that on perusal it was established that the report was made before most inquiries were concluded. That the DPP directed further inquiries to be done and that additional evidence has since been assembled which establishes that it can sustain charges of money laundering. That the decision to charge the Applicants was informed by the evidence and explanations by the Applicants in their plain statements recorded with Police. That in any case, the Police report referred to was not made to the Applicants but is addressed to the Director CIID. That the Applicants tried to rely on the report in the application for the freezing order but that court rejected it after it was found to be a desk report written after interviewing the Applicants only without conducting other inquiries.

That the application for extension of the restraining order was properly filed in court before it expired. That the purpose of the

application was to preserve the exhibits - being the funds on the Applicants' bank accounts, pending the disposal of the criminal case that was registered against them. That the exhibits would have dissipated if the application had not been granted, which would affect the prosecution of the Applicants. The Respondent denies the DPP having ever received any communication from the FIA expressing its loss of interest in prosecuting the Applicants. That after the letter referred to, the FIA has continued to support the investigations.

The Respondent insists that there is a complainant, which is the State, and that the charges against the Applicants were brought in the name of the State. That the State has never lost interest in prosecuting the Applicants, and that FIA has no capacity or mandate to conduct criminal investigations, and that its letter referred to does not refer to the evidence that has been assembled against the Applicants in respect of the allegations made in Uganda.

The Respondent further avers that the Applicants have actively been interfering with investigations and witnesses in the case. That they accessed several official communications between Government institutions which they attached to their affidavits; yet the Applicants were not privy to these correspondences and have not shown how

they accessed them. That it is criminal to interfere with prosecution witnesses, and that investigations in this case were delayed by such interference. That also, the disposal of the hearing of the case has been failed by the Applicants' refusal to attend court in response to summons. That the application to extend restraining order was made in accordance with the provisions of the Anti-Money Laundering Act and that all the required procedures followed by the DPP before applying for extension of the order.

The Respondent also states that the CMI has no mandate or capacity to give legal opinion on the innocence of any person. That the DPP never took over investigations after Police had cleared the Applicants in their report. That initial detectives were incompetent, and the DPP wrote to the Director CIID for another team which continued with the investigations under the prosecution-led investigations to ensure timely assembling of evidence. The Respondent denies that the DPP has turned into an investigator by requesting for bank records of the Applicants. That the DPP has investigative powers and can request for information in execution of its mandate. That apart from writing letters requesting for information, the DPP has never participated in collecting the requested information or interviewing of any of the

suspects and witnesses in the case. The Respondent insisted that the decision to charge the Applicants was based on the evidence assembled against them detailing their individual actions to launder funds that were received through the 1st Applicant and wired to offshore accounts through the numerous bank accounts that they operate in Uganda.

Further, that the DPP is not a witness in this case. That the decision on the appropriate charges is not guided by specific complaints but is based on charges that can be sustained by the assembled evidence and not on Police reports based in incomplete investigations. That as such, the decision to charge and or prosecute the Applicants was not arbitrary or irrational and that it was not just to defeat the automatic expiry of the freezing order. That one of the terms of the said order is that it will automatically expire if prosecution has not committed the Applicants to High Court and disclosed its evidence to them within 90 days, which were due to expire on 26th July 2019. In addition, the court would extend the order, on application, if it is shown that the Applicants had refused to submit themselves to the jurisdiction of the court. That criminal summons were served on the Applicants to appear in court for charges to be read to them and for their

committal, which they have since refused to honour. That this application is, therefore, made in abuse of court process for the Applicants to defeat the terms of the restraining order and to enable them access the funds without giving court opportunity to hear evidence and make an informed decision on disposal of the funds.

That the Anti-Money Laundering Act permits persons who are innocent of any complicity in the commission of an offence or any collusion in relation to crime to apply for order to review or vary restraining orders but that none of the Applicants has ever applied. Further, that there is also no mandatory requirement for charge and caution statement to be obtained from suspects in criminal cases. That the offence of money laundering is distinct from other crimes including crimes of generating proceeds of money laundering and can be charged without convicting a person with the predicate offence. That the nature of evidence that has been availed to the DPP does not require a predicate offence for money laundering charges to be sustained. That as such the DPP's decision was not irrational, or arbitrary or in breach of the rules of natural justice.

Further, that the Applicants' explanations in their plain statements were taken into consideration before the decision to charge them was

made, and hence they were heard before charging them, and that all the principles of natural justices were observed. That the 8th Respondent has been illegally operating in Uganda since his permit expired in 2014. That this application be denied with costs.

At the hearing, the Applicants were represented by Mr. Matsiko Joseph and Mr. Bruce Musinguzi. Mr. Wanyama Khodoli, Principal State Attorney with Mr. Hillary Obira, State Attorney, represented the Respondent. Counsel for the parties in their respective submissions also supplied court with authorities, for which the court is grateful to them. The submissions have been taken into account in arriving at a decision. The following are the issues for determination;

1. ***Whether the DPP's powers under its constitutional and legal mandate are subject to judicial review.***
2. ***If so, whether the DPP's decision to charge and/ or prosecute the Applicants was arrived at illegally, high handedly, vindictively, irrationally, in bad faith, unreasonably, and in breach of the rules of natural justice.***
3. ***What are the remedies available to the parties?***

Resolution of the issues:

Issue No.1: Whether the DPP's powers under its constitutional and legal mandate are subject to judicial review.

The principles and the law governing judicial review are well established. In ***Clear Channel Independent Uganda vs. PPDA HCMA No. 380 of 2008,*** judicial review was stated to be;

> ***"...the process by which the High Court exercises its supervisory powers over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are engaged in the performance of public acts and duties."***

Article 42 of the Constitution, which is the bedrock of judicial review, recognizes the right of any person to apply to a court of law for judicial review against public bodies and/or agencies. It provides as follows;

> ***"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/her."***

Thus, the right of any person to apply for judicial review is now recognized as a Constitutional right, as it was held in ***International Consultants Ltd. vs. Jimmy Muyanja & 2 O'rs HCMC No. 113 of 2018.*** In that case, the court further held that, in accordance with Article 44 of the Constitution, the right cannot be derogated from.

The above authoritative decisions invariably mean that as a public institution charged with the performance of a public duty, the DPP's powers are not beyond the scope of judicial review. This finding is fortified by the persuasive decision of ***Jeewan Mohit vs. DPP of Mauritius, Privy Council Appeal No. 31 of 2005,*** where the court found that the DPP's powers are subjected to judicial review. Further, that if the source of power is a statute or a subsidiary legislation under a statute, then clearly the body in question will be subject to judicial review. Similar stance was taken in ***Hon. Winfred Masiko and O'rs vs. The Director of Public Prosecutions and O'rs HCMA 15 of 2009.*** In that case, court issued prerogative writ of certiorari quashing the DPP's decision to charge and prosecute the applicant therein. The case was subsequently relied on in ***Cairo International Bank vs. Attorney General, HCMA No.52 of 2014,*** where it was held that:

"...the constitutional mandate of the DPP's office and the Director of CID and the Attorney General were reviewed by the High Court in ...Hon Winifred Masiko & 3 O'rs versus DPP and others....In that application, Hon. Justice Kibuuka Musoke considered the case of Jeewan Mohit versus DPP of Mauritius...in which the Privy Council was interpreting Section 73(3) of the Constitution of Mauritius which is in pari materia with Article 120 of our own Constitution of Uganda. The learned Judge noted...that the DPP must exercise his or her powers carefully rationally and if he does not, the decision would be up to judicial review. The DPP must use his or her discretion fairly and reasonably and must consider all relevant factors before preferring charges."

Therefore, within the terms of Article 42 (supra) and in light of the above cited authoritative decision, the exercise of the DPP's mandate and powers are subject to judicial review.

Mr. Wanyama, counsel for the Respondent, advanced the argument that this is not a proper case for judicial review because there are other alternative remedies available to the Applicants. That the

Applicants ought to appear in the criminal court and face the charges against them, and that they could even apply for release on bail or defend themselves against the charges. In reply, Mr. Matsiko, counsel for the Applicants, submitted that the Magistrate's court before which the Applicants would appear lacks the jurisdiction to try them and shall instead remand them on charges which ought not to have been preferred against them in the first place.

It is observed that judicial review is not concerned with the merits of the decision *per se* but with the decision- making process. This position was well articulated in ***Adam Mustafa Mubiru & Irene Walubiri vs. LDC HCMA No. 279 Of 2013.*** Court held that the concern for judicial review is always whether the decision constituting the subject matter of the application was made through an error of law, procedural impropriety or outright lack of jurisdiction generally.

Regarding the point whether or not the Applicants ought to appear in criminal court for the charges preferred against them, it would be prejudicial to require them, or any person for that matter, to submit to a process which they are, as of right, challenging as being inherently flawed and unjust to them. If in the end it is found that

they ought not to have been charged in the first place, appearing in the criminal court and going through the process would occasion a grave injustice against them. A legal process ought to be initiated only when it assures fairness of the process and ensures certainty of justice in the end. This finding finds credence in a similar Kenyan case of ***Hon. Philomena Mbete Milu vs. DDP & O'rs Petition No. 295 of 2018,*** where the court relied on ***Republic vs. Attorney General Ex parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001,*** and observed that;

> ***"... It would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the individual and put him to unnecessary expense and agony. The Court may, in a proper case, scrutinize the material before it and if it is determined that no offence has been disclosed, issue a prohibition halting the prosecution."*** [Emphasis mine].

Judicial review thus acts as a safe guard for ensuring that due process is complied with in the decision making process by public bodies legally entrusted to take such decisions which affect the legal and constitutional rights of persons. Having thus clarified and

contextualized the principles of the law in view of the facts of the instant case, issue No.1 is answered in the affirmative.

Issue No.2: Whether the DPP's decision to charge and prosecute the Applicants was arrived at illegally, highhandedly, vindictively, irrationally, in bad faith, unreasonably and in breach of the rules of natural justice.

For the Applicants to succeed on this issue, they must demonstrate, to the required standard, that the impugned decision to charge and prosecute them, by the DPP, is tainted with illegality, irrationality, high handedness, in bad faith, unreasonableness and a breach of the rules of natural justice. See: ***Pastoli Mukwatanise vs. Kabale District Local Government & O'rs [2008] 2 EA.***

The Applicants strongly fault the DPP's decision to charge and prosecute them, as illegal and irrational, especially being taken without proof of any additional and/or new evidence implicating them, after they had been duly cleared of all the allegations by the various investigative agencies. In particular, Bashir Jumale in his affidavit at paragraph 20, avers that the DPP took over the investigation role, which is illegality, as follows;

"...from the time the Uganda Police issued a Report clearing the Applicants, the DPP's office took over the investigation role."

Mr. Jumale then gives a specific instance, on 14th March 2019, when the DPP wrote to FIA, investigating whether the Applicants' bankers, as accountable persons, had filed reports of any transactions that were above 1000 currency points as required by the Anti-Money Laundering Regulations, 2015. Mr. Jumale attached a copy of the letter of the DPPs as *Annexure "O"*, dated 22nd March 2019, to the FIA. In the relevant part, the letter states as follows;

"The suspects in the above case are being investigated for money laundering and terrorism financing. The suspects operate the bank accounts with the following financial institutions.....

This is to request you to advise us on whether the above listed financial institutions ever filed reports of any such transactions with the Financial Intelligence authority as required under Regulation 39 (3) of the Anti – Money laundering Regulations of 2015 for a period between 2015

and June 2018. We also request to be availed with a list of High Risk Countries together with a copy of the measures to be applied by accountable persons from High Risk countries." [Underlined for emphasis].

The above essentially gives credence to the Applicants' claim that the DPP was actually carrying out investigations into allegations. The DPP was seeking to establish from the FIA whether the Applicants' bankers had filed reports of large transactions. Such evidence would invariably be used to bolster up charges preferred against the Applicants. Most importantly, the DDP wrote this letter making inquiries well after the Police CIID had made their own investigation report, dated 22nd November 2018, wholly clearing the Applicants of any wrongdoing related to money laundering and financing of terrorism.

The Respondent's argument that the Police report that cleared the Applicants is an interim report, does not alter the fact it is nonetheless a Police investigation report. This is particularly so given that no any other report, whether final or otherwise, implicating the Applicants has been adduced as evidence by the Respondent.

Further, in paragraph 23 of Bashir Jumale's affidavit and paragraph 23 of Omar Abdulahi's affidavit, both state that the Applicants know, from their interaction with their bankers as customers, that the DPP has directly been contacting the banks asking for various banking documents, like waste cheques, transfer and withdrawal instructions, among others. Further, that through their interaction with BoU and URA, the Applicants also know that the DPP has been directly in touch with the two institutions asking them to provide information that has the effect of incriminating the Applicants in the alleged offences. The Applicants aver that even with this "fishing for evidence", the DPP has not gotten any, or at all.

The Respondent denies the DPP having turned itself into an investigator by requesting for Applicants' bank records from BoU and URA. That actually, the DPP has investigative powers under various legislations that enable it request for such information in execution of its mandate. That the letters requesting for the Applicants' bank records were lawfully issued in exercise of the DPP's mandate and investigative powers under the law. That save for writing these letters, the DPP has never participated in collecting the requested information or interviewing any suspects and witnesses in this case,

and that the decision to charge the Applicants was based on evidence collected by the Police.

It is noted that throughout the entire evidence of the Respondent, nothing is attached as proof of their prevalent claim of *"evidence that has been availed to by Police"*. Apart from the Police report, *Annexture "L"* referred to, which entirely clears the Applicants of the allegations, there is no any other Police report or other evidence that has shown implicating the Applicants in the alleged crimes. The only available evidence in form of letters the DPP wrote to banks, FIA and URA, tend to reinforce the view that the DPP is conducting investigations to implicate the Applicants after no other incriminating evidence was found by the mandated institutions. Worth emphasizing is that the DPP's inquiries are being conducted well after Police and other investigative agencies had cleared the Applicants. To that extent, the DPP is acting overzealously and in the process has exceeded its constitutional/legal mandate, which amounts to illegality.

In ***Ojangole Patricia & 4 O'rs vs. Attorney General HCMC No. 303 of 2013,*** court defined parameters of "illegality" to mean;

> ***"....when the decision making authority commits an error of law in the process of taking the decision or making the***

act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality."

Similarly, in ***Mrs. Geraldine Sail Busuulwa vs. National Social Security Fund & A'nor, HCMC No. 032 of 2016,*** this court held that acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality. Also in ***Thugitho Festo vs. Nebbi Municipal Council (Arua) HCMA No. 15 of 2017,*** the court held, *inter alia,* that;

"An action or decision may be illegal on the basis that the public body has no power to take that action or decision or has acted beyond its powers."

These principles apply *mutatis mutandis* to the facts of the instant case, and clearly bolster court's finding that the impugned actions of the DPP are illegal and ultra vires in so far as they were exercised outside the DPP's powers and constitutional mandate.

Article 120 of the Constitution, which establishes the office of the DPP and stipulates the functions and parameters of its powers, clearly puts to rest any issue in that regard. Of particular relevance

to this case is Clause (3) (a) thereof, which provides for the functions and powers of DPP to include;

"(a) to direct the police to investigate any information of a criminal nature and to report to him or her expeditiously;.."

Therefore, as it pertains to investigations, the DPP's function under the Constitution, is specifically to direct the Police to investigate and to receive reports of investigation from the Police; and not to conduct investigations. The duty to investigate is the Constitutional preserve of the Police under Article 212 (supra). Contrary to what is erroneously sworn by Ms. Komuhangi, in paragraph 50 of her affidavit, it is not provided anywhere in the Constitution, that the DPP is clothed with the authority and mandate to conduct investigations. The so-called "prosecution led investigation" asserted by the Respondent, is quite alien and has no place in the prevailing Constitutional dispensation pertaining to the powers and functions of the DPP. By taking over the investigation role, the DPP constituted itself into an investigation agency, which is ultra vires its mandate. The framers of the Constitution were acutely alive to the need for the segregation of the mandates of the DPP and the Police, and for that reason provided for them separately. As far as possible, the framers

avoided the DPP directing itself to investigate, being an investigator, making investigation reports and then assessing the outcome of its own investigation or assessing its own reports; as this would be a breach of the rules of natural justice. Investigation and making of reports of investigations was deliberately reserved as the constitutional role of the Police, and not the DPP. This intention was re- affirmed in ***Michael Monari vs. Commissioner of Police & DPP & 2 O'rs HCMA No. 68 of 2011,*** where court held that;

> ***"...the Police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime."***

The rationale for the segregation of duties of the DPP and Police is well stated in ***Rose Mary Nalwada vs. Uganda Aids Commission HCMA 45 of 2010***, to the effect that;

> ***"Surely, a person who previously chaired or participated in an investigation in which the aggrieved party was condemned, would obviously be perceived as biased in a***

hearing or trial of the same victim to justify the result of the investigation."

In ***Bitange Ndemo vs. DPP Miscellaneous Civil Application No. 192 of 2016,*** court found that;

> ***"The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably..."***

The court in the above latter Kenyan case was considering provisions of Article 157 of their Constitution which are in *pari materia* with Article 120 the Uganda Constitution as it relates to functions and powers of the DPP. The Kenyan case is thus of high persuasive value as it relates to the interpretation of the powers and authority of the DPP created by similar constitutional provisions as in Uganda. On strength of these authorities, the DPP's investigative actions leading to the decision to charge and prosecute the Applicants is tainted with illegality and is ultra vires powers and authority of the DPP and breaches the Constitution. This cannot be condoned. In the now *locus classicus* case of ***Makula International Ltd vs. His Eminence***

Cardinal Nsubuga & A'nor, Civil Appeal No. 4 of 1981 it was held that;

> ***"A court of law cannot sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleading including admissions made thereon..."***

In the circumstances, the declarations and orders of certiorari, prohibition and injunction, sought for in the instant case would issue in respect to the decision of the DPP to charge and prosecute the Applicants and to have their funds frozen; with the result that the DPP's decision is quashed.

In addition, Article 120(5) (supra) enjoins the DPP as follows;

> ***"In exercising his or her powers under this article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process."***

The reading of the charges of money laundering preferred against the Applicants in case *Ref. No. 249/2018/ Criminal Case No. 51 of 2019,* easily reveal that indeed there is no complainant or basis of the

complaint. Although the Respondent attempted to deny this, it was a vain attempt against the weight of the obvious facts in evidence. The FIA, which was the original complainant, ceased being the complainant by its letter *Annexure "N"* referred to in the affidavit of Jumale. In the relevant part the latter states as follows;

> ***"After receiving more intelligence and carrying out further inquiries on the frozen funds and on the original suspect Mr. Farhan Hussein Haider, they discovered that he had been cleared of criminal activities by the Police and Interpol and the Office of the Attorney General in Kenya and Somalia respectively."***

The letter was in response to the DPP's self-initiated investigations already stated. The FIA emphasized that since the submission of the matter to DPP in May 2018, the FIA continued to seek more information/intelligence and carried out inquiries, and received information that Farhan Haider, the original suspect, had been cleared of all the allegations. The FIA even forwarded to the DPP documents clearing the only suspect. The intrinsic value of the FIA's response to DPP was that there is no longer any complaint against the Applicants in light of the clearances by Police authorities in

Kenya, where the suspicion on Farhan Haider originated, and in Somalia. It also meant that there is no complainant since the FIA, the initial complainant, no longer had any interest in the matter and had ceased to be, in light of the various cited clearances of the Applicants.

It is thus rather intriguing why in spite of all that, the DPP by itself continued purporting to investigate the matter; on the basis of which it took a decision to charge the Applicants. It is more so, when the original complainant had given up on the complaint, and when no new evidence was forthcoming to support the DPP's decision to charge. By deciding to charge and prosecute the Applicants when there is no live complaint, no complainant, no investigation report implicating them, when the Police actually cleared them of all suspicions, and even when the CMI had cleared the Applicants of any criminal activities; the DPP's decision falls nothing short of abuse of legal process, inimical to public interest. The DPP is acting in breach of public interest, the interest of the administration of justice, and the need to prevent abuse of legal process, which is in contravention of the clear requirements of Article 120(5) (supra). The ***Biting Ndemo vs.DPP & 4 O'rs*** case (supra) is quite instructive in such

circumstances. While considering the Kenyan Constitutional provisions in *pari materia* with Uganda's Constitutional provisions, under Article 120(5) (supra) the court held as follows;

> ***"The prosecution should never be seen to be actuated by the desire to punish the applicant or to oppress him into acceding to their demands by brandishing the sword of punishment under the criminal law, than a genuine desire to punish on behalf of the public a crime committed. And if it is demonstrated that the predominant purpose of the prosecution is to further that ulterior motive, then the High court will intervene."*** [Underlined for emphasis].

Further in ***George Joshua Okungu & Another vs. The Chief Magistrate's Court Anti-Corruption Court at Nairobi & A'nor [2014] EKLR***, it was held that;

> ***"Where therefore the prosecution has been commenced or is being conducted in...a manner which cannot be justified, that conduct would amount to an abuse of the legal process."***

The court went on to hold that;

> ***"Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals <u>other than those legally recognized under the Constitution</u> and the office of the Director of Public Prosecutions Act, <u>that would, in our view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion.</u>"*** [Emphasis mine]

This court agrees with and adopts the reasoning in the above cases and similarly applies it to facts of this case and comes to the same conclusion.

Having found as above, it also important to observe that the principles of fairness and natural justice must be applied even in cases of criminal investigations. The DPP must execute its functions with fairness and impartiality. There is no merit in the argument advanced by counsel for the Respondent that the DPP can just charge and prosecute merely because the victim will be afforded a hearing during the criminal trial. No one has a right to prosecute people anyhow just because people will defend themselves in the trial. There is no doubt, from the evidence adduced in this case, that the DPP's

discretion to charge the Applicants was not exercised within the four corners of the Constitution.

The Applicants also contend that the charges coming just seven days to the automatic expiry of the order freezing their funds, was meant to improperly keep their funds frozen and merely to defeat the automatic expiry of the order. Mr. Matsiko submitted that this was an extraneous goal and an unjustified act. Further, that the charge sheet does not contain any single incidence of proceeds of crime for it to amount to the offence of money laundering. That it does not mention any particular amount or transaction by which proceeds from the unnamed crime was laundered. That there is nothing which shows the sources of the frozen funds or at all. That this is further abuse of legal process.

For their part, the Respondent insists that the DPP's decision on the charges to prefer is not guided by specific complaints, but based on charges that can be sustained by the assembled evidence. That the charge of money laundering was informed by the evidence assembled by Police and not by the Police report based in incomplete investigations. That as such the decision to charge and prosecute the Applicants is not arbitrary or irrational and it was not used to defeat

the automatic expiry of the restraining order. Further, that the application to extend restraining order as justifiable and made in accordance with the law. That all the required procedures were followed before applying for extension of the order. That the decision to charge the Applicants was to preserve the funds pending the disposal of criminal case. That the law permits persons who are innocent of any complicity or collusion in the commission of an offence of money laundering, to apply for an order to review or vary the freezing orders but that the Applicants have not made such an application.

Further, that the offence of money laundering is distinct from other crimes including crimes generating proceeds of money laundering and that it can be charged without convicting a person with the predicate offence. That the nature of evidence that has been availed to the DPP does not require a predicate offence for the money laundering charges to be sustained. That the DPP's decision was not irrational, or arbitrary or in breach of the rules of natural justice.

Evidence shows that the charges were preferred against the Applicants just seven days to the automatic expiry of the order freezing their accounts. Whereas the order gave the DPP the latitude

to prefer charges within the 90 days, the charges coming just seven days to the expiry of the order betrays the intention to keep the Applicants' funds frozen. This intention is clearly manifested in Ms. Komuhangi's affidavit, paragraph 64. She concedes that the decision to charge the Applicants was intended to preserve the funds pending the disposal of criminal case that was registered against them. This is proof that the application for extension was actuated by ulterior motive and the sheer desire of the Respondent to defeat the automatic expiry of the freezing order, just to keep the Applicants' funds frozen. Otherwise, the charges on their own had no basis. This is indeed an improper motive for charging the Applicants. A person cannot be charged just for the sole purpose of keeping his/her funds frozen. The decision to charge the Applicants simply to justify the continued freezing of their funds was therefore taken for an improper motive and an extraneous goal. It is unreasonable, in bad faith and an unjustified act and clear breach of Article 120(5) (supra).

A further reading of the charge sheet, in the criminal case, also shows that it does not state any incidence of the proceeds of crime. It does not indicate any crime that was committed resulting into monetary proceeds which found their way into the Applicants' accounts. There

is no investigative findings showing that the sources of the frozen funds originate from any named crime. The charges also make no mention of any single particular date, place, amount or any transaction by which proceeds from the unnamed crime was laundered. Without these, the decision to charge the Applicants is rendered an abuse of legal process, and it to be quashed.

Needless to emphasize, that the DPP, as a crucial part of the overall legal system, is enjoined within the context of proper execution of its mandate, to facilitate policies of Government. It is the policy of Government to encourage both foreign and local investors for reasons of the economic development of the country. The Applicants who genuinely invested heavily in the country's financial sector ought to not to be frustrated by elements in the DPP's office who, for ulterior motives, seem to be putting roadblocks under the guise of executing their mandate. It is a smoke screen that is too transparent to be a white wash. The duty of this court is to curtail such "run away" abuse of legal process, and to emphatically pronounce that it is "thus far and no further".

The Applicants also contend that the actions of the DPP leading to the decision to charge and prosecute them amounts to procedural

impropriety and abuse of the right to a fair hearing. In that regard they allege that the DPP did not observe the rules of natural justice as they were never interviewed, and no charge and caution statements were taken from them in respect of the charges. That the DPP is simply fishing for evidence after the Police came up with a report clearing them, and after the real suspect had been cleared in Somalia and Kenya, where he had been suspected of wrongdoing. That it also means the DPP will have to assess the information gathered in its investigations, which potentially renders DPP a witness in court to testify regarding its own findings in a case where DPP is also the prosecutor. That natural justice and fair hearing do not permit DPP to play these multifarious roles at the same time.

The Respondent denies that the decision to charge the Applicants is not based evidence or that it is based on investigations made by the DPP. That the charges are based the evidence assembled against the Applicants detailing their individual actions to launder funds that were received through the 1st Applicant and wired to offshore accounts through the numerous bank accounts that they operate in Uganda. That all the evidence in this case has been collected by Police and the DPP has never received any evidence from or interviewed any

suspects or witnesses in this case. Also, that the DPP is not a witness in this case and no evidence was brought to prove that. Further, that the Applicants were accorded a fair hearing and the explanations in their plain statements were all taken into consideration before a decision to charge was made, and that as such the principles of natural justices were duly observed.

To resolve this issue, it is necessary to restate the law as it relates to procedural impropriety. In ***Republic vs. Hill High School & 3 O'rs Misc. Application No. 404 of 2018*** "procedural impropriety" is defined to mean;

> ***"When there is failure to act on the part of the decision making authority in the process of taking the decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision..."***

In ***Diamond Hasham vs. DPP & 4 O'rs Civil Appeal No. 274 of 2014*** it was also held that;

> ***"The society has an interest in both the lawful exercise of prosecutorial powers and in employing a fair procedure***

that does not amount to oppression and persecution. The Constitution envisions a just society. It would not be consistent with the values of the society as reflected in the Constitution if power is abused or unfair administration of justice is resorted to. Both would shock the conscience of the society and would result in the loss of confidence in the institution of the DPP and in the integrity of the judicial process. The exercise of prosecutorial discretion in such a manner would be in contravention of the Constitution and the court has power to intervene regardless of the seriousness of the alleged offence or the merits of the case."

Also in ***Biting Ndemo*** (supra), the court held that;

"A prosecution is not to be made good by what in turns up. It is good or bad when it starts."

A look at *Annexure "O"* to Jumale's affidavit, which is a letter written by Ms. Alice Komuhangi, the Senior Ass. DPP for the DPP to FIA shows that she was inquiring, inter alia, whether the Applicants, through their bankers, filed reports in compliance with Anti-Money-Laundering laws for specified periods. In the prosecution of the

Applicants, Ms. Alice Komuhangi would be required as a necessary witness to testify as to how she conducted investigations on this particular aspect to explain her findings. She would also have to tender her reports of findings in evidence as a witness and at the same time she or someone in the DPP's office would be the prosecutor. Further, in Abdulahi's affidavit, paragraph 23, it is uncontrovertibly shown that DPP has been conducting investigations contacting URA, BoU and the Applicants' banks directly. Clearly, this fusion of the four roles is not contemplated by the Constitution pertaining to the functions of the DPP, and it runs contrary to the rules of natural justice.

Regarding the issue charging the Applicants without a complaint and/or complainant, that too amounts to procedural unfairness which is also contrary to natural justice. It is not correct to argue that the complainant is the State merely because charges are brought in the name of the State. There is a clear distinction between a person who complains of a crime and the State which takes over the role of prosecuting the crime. The name "Uganda" in a charge sheet does not connote the State being the complainant, but simply the State of

Uganda having taken over prosecution of the charges on behalf of the complainant. The DPP ought to know that better than anyone else.

Regarding the issue that the FIA has lost interest, the Respondent maintains that FIA has continued to support the investigations by availing DPP with information. This claim is, however, not supported by any evidence. Other than letter *Annexture "N"* dated 12th February, 2019 clearly expressing loss of interest in the complaint by FIA, the only other letter, *Annexture "P"* by FIA dated 22nd March 2019, in response to inquiries made by the DPP; does not in any way implicate the Applicants with any new evidence of the alleged crimes. If any new evidence had been discovered after the Applicants were cleared, the DPP would have shown it. The DPP did not simply because such evidence is not there.

Closely linked up with the above latter, is the Applicants' complaint that there was breach of the right to a fair hearing in so far as no charge and caution statements were taken from them before being charged. In paragraph 34 of his affidavit, Abdulahi states that the 7th, 8th and himself were made to record plain statements at the Police CIID Kibuli, only relating generally to the nature of their business and the freezing of their accounts, but that they were not informed of

the particular charges in respect of which their statements were being recorded and for which Applicant the statements related to. That the Applicants never recorded any charge and caution statements.

The Respondent's reply is that there is no mandatory requirement for a charge and caution statement to be obtained from a suspect in criminal cases. That the offence of money laundering is distinct from other crimes including crimes generating proceeds of money laundering and can be charged without convicting a person with the predicate offence. That the nature of evidence that has been availed to the DPP does not require a predicate offence for money laundering charges to be sustained.

This court was seized with the same issue in ***Cairo International Bank*** case (supra) in an application for judicial review. In that case the applicant was charged with theft of colossal sums of money, and it was contended for the applicant that no charge and caution statement was taken from the applicant, but only from the applicant's General Manager in his individual capacity. The respondent, like in the instant application, argued that the omission to take charge and caution statements does not render the charges

illegal or improper and that it does not go to the root of the matter.

After considering the arguments, the court held that;

> ***"It was conceded by counsel for the respondent that no statement was obtained from the Managing Director of the Applicant in respect to the allegations made against the Applicant as an institution or corporate entity before the decision to prefer criminal charges was made. I have considered the submissions of counsel for the respondent that there were some officials of the Applicant that made statements to the Police in the investigations of the Pensions Scam case. I have perused through these statements to determine whether at the time they were recorded from the said individual officers, there was an express notification of an intention to prefer criminal charges against the Applicant and that the said statements were made with that position in mind."***

The court went on to state that;

> ***"All these statements were plain ordinary police statements without charge and caution formalities."***

The court then held that;

"...a charge and caution statement is meant to give a suspect an indication of the nature of the accusation and to administer a caution that whatever is stated in respect to the charge could be used against the maker in a criminal prosecution and thereafter procure the statement. A charge and caution statement....gives a party notice of the nature of an accusation, its particulars, an opportunity to answer the charge at the earliest opportunity and by so doing give information to the Police and eventually to the DPP, that could be useful in the investigation and consideration of the case as a whole before the preferment of charges is contemplated and thereby prevent the abuse of legal or due process as by law required....In the circumstances and for the reasons stated ....the DPP has not demonstrated that in making the impugned decision, he acted with regard to legal and due process and in accordance with the requirements of the rules of natural justice, and in the public interest in this matter."

In that case, the decision of the DPP was quashed. Following similar reasoning in the instant case, none of the Applicants ever recorded any charge and caution statement. Only three out of the nine Applicants recorded plain statements. The other 1st to 6th Applicants never recorded any statements at all. Even then, the statements from the three were of a general nature about the nature of business of the Applicants, not addressing any specific incidence of alleged commission of any crime. The three were not informed of the particular charges in respect of which the statements were being recorded nor for which particular Applicant they related to. Therefore, the DPP has not demonstrated that in making the impugned decision, regard was had to legal and due process and in accordance with the requirements of the rules of natural justice.

Needless to state, that an authority cannot base its decision on any material or evidence which the affected party has not been given opportunity to see or rebut. Natural justice is infringed if an authority makes a decision on a matter on the basis of confidential enquiries and information. The right of a party to know the material on which the authority is to rely when taking a decision affecting a party cannot be derogated from. The decision to charge the Applicants

without taking charge and caution statements from them would be fatal to the proceedings in the circumstances as it is in breach of the constitutional right to a fair hearing, and the rules of natural justice and in breach of legal and due process, contrary to Articles 28 (1), (3) (c) and 44 (c) of the Constitution. It ought to be quashed.

Issue No.3: What are the remedies available to the parties?

Having found as above, the application wholly succeeds. The prayer for the award of damages is, however, declined. 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. It is accordingly declared and ordered follows;

1. ***The decision by the DPP to charge and prosecute the Applicants vide case ref. No. 249/2018/Criminal Case No. 51 of 2019 was arrived at illegally, highhandedly,***

vindictively, irrationally, in bad faith, unreasonably and in breach of the rules of natural justice.

2. *An order of Certiorari doth issue quashing the decision of the DPP to charge and/or prosecute the Applicants with alleged money laundering and facilitating money laundering, vide Case Ref. No. 249/2018/Criminal Case No. 51 of 2019.*

3. *An order of Prohibition doth issue prohibiting the DPP from charging and/or prosecuting the Applicants with alleged money laundering and facilitating money laundering vide Case Ref. No. 249/2018/Criminal Case No. 51 of 2019 or with any charges arising from the same allegations or investigation.*

4. *An injunction doth issue restraining the DPP, his servants or agents from charging and/or prosecuting the Applicants with alleged money laundering and facilitating money laundering vide Case Ref. No. 249/2018/Criminal Case No. 51 of 2019, or any charges arising from or related to the same allegations or investigation.*

5. *A consequential order doth issue ordering the lifting of the freezing of the respective Applicants' bank accounts in Bank of Africa, Equity Bank, Stanbic Bank, Diamond Trust Bank, KCB Bank and Barclays Bank.*

6. *An order doth issue that the Applicants shall be free to access and freely operate their respective bank accounts in the banks named in (5) above.*

7. *The Applicants are awarded costs of this application.*

BASHAIJA K. ANDREW
JUDGE
20/08/2019.

Mr. Joseph Matsiko Counsel for the Applicants present.

Mr. Wanyama Kodooli, Principal State Attorney, and Mr. Ebira Hillary Nathan, State Attorney, for the Respondent present.

Mr. Jumale Bashir Director of Applicants and Respondent No. 7 and No. 8, present.

Ms. Jolly Kauma Court Clerk present.

Ruling is read in Court.

BASHAIJA K. ANDREW
JUDGE
20/08/2019.