



company, Neptune petroleum Uganda and/or their successors in title and any other oil companies and the government of Uganda in respect of oil exploration, oil exploitation, oil production and revenue sharing agreements.

- ii. A declaration that the oil agreements mentioned in paragraph (i) above are public documents which the public is entitled to access under Article 41(1) of the Constitution of Uganda.
  - iii. No order be made as to costs.
2. Ms. Samantha Atukunda of M/s. Kakuru & Co. Advocates represents the Applicant and the Oluka Henry (RIP) from the Attorney General's Chambers represented the Respondent. The Attorney General is sued in his representative capacity under section 10 of the Government Proceedings Act for the actions of the government agencies and officials concerned.
  3. The application is supported by the affidavit of Ms. Irene Ssekyaana, the national coordinator of the Applicant. The grounds are briefly that the Applicant has sought to obtain the oil production sharing agreements relating to oil exploration, exploitation and production in the Albertine region from the government and government agencies but access has been denied. Further that because of this denial, the Applicant has not been able to conclude its research and publish its findings, observations and recommendations to the public and government. In addition the denial infringes the right of the Applicant and the citizens of Uganda to access information, which is guaranteed by article 41(1) of the Constitution, the denial is unjustified and as such contravenes the law.
  4. Ms. Maria M. Otaremwa the research assistant of the Applicant deponed another affidavit in support of the application. She averred that in the course of her research, she has conducted interviews with different government bodies, civil society organizations, development partners, among others, seeking information on the oil exploration and exploitation agreements, their significance on information accessibility, livelihoods of people and natural

resources. The interviews conducted with government agencies were completely non-receptive and limited the disclosure of information regarding these agreements. Some formal requests for interviews regarding access to information were denied and/or not replied to at all despite acknowledgement of their receipt and she has been unable to obtain the oil sharing agreements concluded between government and the different oil companies from the government.

5. The application is opposed by the Respondent. Mr. F. A. Kabagambe- Kaliisa - the permanent secretary, ministry of energy and mineral development deposed an affidavit in reply. He averred that on 23<sup>rd</sup> September 2008, the commissioner of petroleum exploration and production department complied and availed the Applicants with a copy of the model production sharing agreement, the same being readily available on the internet for anyone to use. The model is sufficient in respect to the Applicant's concerns and for purposes of the Applicant's research and activities in protecting the environment, the same not being a pre-requisite for one to participate in any environment impact assessment ( herein after the )EIA review exercise. On 21<sup>st</sup> October 2009, the Applicant's national coordinator wrote to him requesting for permission to access the oil exploration areas in Bunyoro. He wrote advising the Applicant to submit a formal research proposal for the ministry's review prior to undertaking the research but the same was not availed. The Applicant was availed the EIA and other relevant documents from NEMA which are sufficient in helping it carry out its activities in the field of environment protection.
6. Further that access to oil and gas exploration areas like drill sites, industrial sites is restricted for one's safety and security. In the agreements that were signed between the oil companies and the government of Uganda, both parties agreed to include a confidentiality clause which could only be breached upon consent of either party, which has not been obtained. It is common for confidentiality clauses to be included in contracts to protect commercially sensitive information which if published would likely cause substantial harm to the competitive positions of the parties concerned. The agreements have provisions concerning technical data and information which would disadvantage the parties contractually and commercially if they were availed to the Applicant in the form and manner requested. As a

matter of practice, the production sharing agreements while in force and the same being confidential in nature are never disclosed to the public. Disclosure of the agreements would result in termination of the agreements for violation of the confidentiality clause which would cause government colossal sums in respect to damages for breach of contract but also jeopardize investments.

7. The issues for resolution are: (1) whether the Applicant should be availed copies of the production sharing agreements; (2) whether the documents are public documents.

### **Analysis**

8. I have read all the pleadings and submission of the parties. For the determination of issue two, we must first establish what a public document is. Section 73 of the Evidence Act provides that “the following documents are public documents — (a) documents forming the acts or records of the acts—(i) of the sovereign authority; (ii) of official bodies and tribunals; and (iii) of public officers, legislative, judicial and executive, whether of Uganda, of any other part of the Commonwealth, of the Republic of Ireland or of a foreign country; (b) public records kept in Uganda of private documents. To the extent the agreements in issue were contracted by the Government of Uganda, by public officials for Uganda, they qualify within the meaning of section 73 of the Evidence Act as public documents. Issue two is accordingly resolved in the affirmative.
9. I do not understand why the Respondent suggested availing the model agreements of what the Applicant seeks access to. That is not what the Applicant wants. The Applicant wants access to the actual contract agreements signed between the government and oil companies.
10. The Applicant relies on article 41 of the Constitution. It provides that “every citizen has a right of access to information in the possession of the state or any other organ or agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person.” Section 5(1) of the Access to Information Act, 2005 (herein after the AIA) reechoes article 41. Subsection (2) of the same Act provides that “ for the avoidance of doubt, information and

records to which a person is entitled to have access under this Act shall be accurate and up to date so far as is practicable.”

11. The right to access information in article 41 and section 5(1) of the AIA is caveated with exceptions where release of such information is likely to prejudice the security or sovereignty of the state or interfere with the privacy of any other person. It follows therefore, that the determination whether denial of access to information is proper, is made on a case by case basis.
12. The confidentiality clause in the said agreement *per se* cannot hold if it does not qualify for this exception clause. The Respondent needed to demonstrate that disclosure of these agreements to the Applicant or to the public, is likely to prejudice the security or sovereignty of Uganda or interfere with the right of privacy of any other person. So the confidentiality presented needed to be tied to this established standard of exception.
13. A confidentiality clause between contracting parties cannot on its own vitiate a constitutional right. All terms between parties have to be in conformity with constitutional and other relevant legal regimes in the land. The Constitution is the supreme law that binds all contracting parties in the country. The rights in the Constitution must therefore be guarded jealously. To use a confidentiality clause in a contract without qualifying it within the exception in article 41 and section 5 (1) above to deny access to information would make such a confidentiality clause arbitrary, unfair, prejudicial and illegal.
14. As presented by Mr. Kaliisa in his affidavit, I am left wondering how allowing the Applicants or the public access to the agreements in issue would prejudice the sovereignty or security of Uganda or interfere with the privacy of any other person. Put differently, mindful that the right of access to information is not absolute under article 41 and section 5(1), the Respondent fails to demonstrate that the agreements if disclosed to the Applicants and the wider public would prejudice the security or sovereignty of Uganda or affect the privacy of any person. Issue one is resolved in the affirmative.

15. Based on the above, it is hereby declared and ordered that :

- i. The Respondent has failed to demonstrate that making the agreements in issue accessible to the Applicant and the wider public violates the exceptions clause in article 41 of the constitution or section 5(1) of the AIA.
- ii. The oil agreements mentioned in issue are public documents which the public (including the Applicant) is entitled to access under Article 41(1) of the Constitution of Uganda and section 5 (1) of AIA.
- iii. The Applicant should be availed copies of the agreements concluded between the government of Uganda and Tullow Oil Company, Heritage oil and Gas Company, Dominion Oil Company, Neptune petroleum Uganda and/or their successors in title and any other oil companies in respect of oil exploration, oil exploitation, oil production and revenue sharing agreements.
- iv. No order is made as to costs.

I so order.

**Lydia Mugambe.**

**Judge.**

**13<sup>th</sup> August 2020.**