

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

NELSON BASALJA ::::::::::::::::::::::::::::::::::::::: APPLICANT

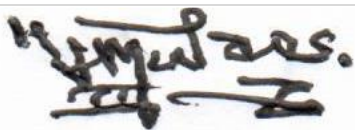
- 1. FORT PORTAL CITY SERVICE COMMISSION**
- 2. FORT PORTAL CITY COUNCIL**
- 3. RWEBEMBERA PATRICK**
- 4. KAGABA R. NDORA**
- 5. KIHUNDE SYLVIA ::::::::::::::::::::::::::::::::::::::: RESPONDENTS**

RULING

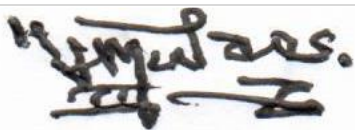
- 1. A declaration that the 2nd Respondent's purported decision of 10th November 2022 to transfer the applicant from the position of Internal Auditor to Commercial Officer is illegal, irrational, ultravires, null and void.**
- 2. An order of certiorari be issued quashing the said decision to transfer the applicant from the position of Internal Auditor to Commercial Officer.**

3. A declaration that the 1st Respondent's Minute No.235/2022 which recommended that the Applicant be transferred from the job position of Internal Auditor to Commercial Officer is illegal, irrational, ultravires, null and void.
4. An order of certiorari be issued quashing the 1st Respondent's Minute No.235/2022 which recommended the Applicant's transfer from the position of Internal Auditor to Commercial Officer.
5. A declaration that the decision by the 1st Respondent to advertise, shortlist, interview and recruit a person to hold the position of Internal Auditor of the 2nd Respondent is illegal, irrational, ultravires, null and void.
6. An order of certiorari quashing the decision of the 1st Respondent to advertise, shortlist and recruit a person to hold the position of internal Auditor of the 2nd Respondent.
7. An order of Mandamus directing the 2nd Respondent to re-instate the applicant to his job position as Internal Auditor.
8. A declaration that the superintendence of the 3rd Respondent over the 1st Respondent in deliberating and taking the impugned decision to wit; that the applicant be transferred from the position of Internal Auditor to Commercial Officer of the 2nd Respondent be advertised was tainted with bad faith.
9. A declaration that the decision of the 4th Respondent to transfer the applicant from the job position of Internal Auditor to Commercial Officer is tainted with bad faith.
10. Costs of taking out the application be met by the Respondents.

The application was supported by the affidavit of Mr. Nelson Basaija, the applicant who deposed as follows:



1. That he was employed by the Fort Portal Municipal Council (now City Council) as an Internal Auditor. Around October 2022, the 1st Respondent under Minute No. 235/2022 erroneously recommended that his services be transferred from the position of Internal Auditor to Commercial Officer on account of lack of the required academic qualifications for the position of Internal Auditor.
2. That on 10th November 2022, the 4th Respondent acting on behalf of the 2nd Respondent and purportedly on the recommendations of the 1st Respondent transferred him from the Position of Internal Auditor to Commercial Officer. The transfer was done before the 4th Respondent receiving a placement report from the 1st Respondent.
3. That on 22nd December 2022, the applicant wrote a complaint to the Town Clerk of the 2nd Respondent who was his immediate supervisor who kept promising to reverse his erroneous decision regarding the transfer. The applicant stated that he had the required academic qualifications and the recommendation of the transfer on account of lack of the same was done maliciously.
4. That on the 28th December 2022, the 1st Respondent advertised in the *New Vision* news paper, Job vacancies in Fort Portal City Council which included the position of Internal Auditor and the required qualifications were: (a) *Honors Bachelor Degree in Finance and Accounting*, (b) Uganda Advanced Certificate of Education (UACE) and Uganda Certificate of Education (UCE).
5. That he had the said qualifications since he possessed a *Bachelor of Business Management (Accounting Option)*, a diploma in Local Government Finance Management, Uganda Advanced Certificate of Education and Uganda Certificate of Education. That the requirement for one to be a Certified Public Accountant or be registered as such which was



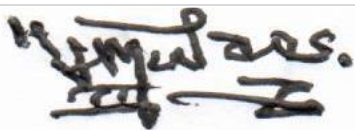
relied upon to cause a transfer of the applicant from the position of Internal Auditor to Commercial Officer was not one of the requirements for the said position.

6. That on the 29th day of December 2022, the Senior Human Resource Officer of the 2nd Respondent wrote to the Ag. Town Clerk citing a number of irregularities including his transfer from the former position and subsequently on 5th January 2023, she was interdicted among others on account of inciting workers.

7. That he complained to the 1st respondent and the Secretary Public Service Commission, Ministry of Public Service regarding his irregular transfer and no meaningful help came through. Further, that on 2nd March 2023, the Permanent Secretary, Ministry of Public Service wrote a letter to the Town Clerk of Arua and copied to all chairpersons of city service commission clarifying on the requirements for the position of Internal Auditor which he possessed.

8. That on 13th March 2023, the 1st Respondent conducted interviews for recruitment of Internal Auditor to fill the position from where he was transferred. That the 1st Respondent acted in bad faith when he recommended his transfer for lack of academic qualifications yet the advert indicated qualifications which he possessed.

9. That the 3rd Respondent acted in bad faith when he presided over the recruitment of an Internal Auditor on 13th March 2023 after receiving guidance from the Ministry of Public Service on the job requirements for the position in issue which the applicant possessed. That whereas the 4th Respondent indicated in the affidavit in reply that he could not act on the complaints of the applicant before receiving guidance from the ministry of Public Service he went ahead and appointed the 5th Respondent as an Internal Auditor.

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10. That the 4th Respondent acted in bad faith when he transferred the applicant from the position of Internal Auditor on 10th November 2022 before he received a placement report and recommendations from the 1st Respondent. That he also acted in bad faith when he assigned him duties of an auditor on 16th January 2023 which was intended to divert him from complaining against the erroneous transfer from his previous position.

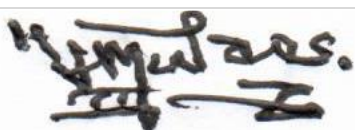
11. That the salary scale of an Internal Auditor is U4 upper at a monthly pay of shs 926,247 while that of a commercial officer is U4 Lower attracting a monthly salary of shs 723,247. That transferring a public officer from a high salary scale to a lower salary scale contravenes the Uganda Public Standing Orders and amounts to a demotion. That whereas he was designated as a Commercial Officer, he was still drawing a salary of an Internal Auditor which is an irregularity and potential area for audit.

12. That at the end of the financial year 2022/2023, the applicant was appraised by the 2nd Respondent as an Internal Auditor and came to the conclusion that he was excellent at his duties as an Internal Auditor which is a contradiction to his designation as Commercial Officer.

In reply, the 3rd and 4th Respondent on behalf of the 1st and 2nd Respondents opposed the application and averred as follows:

1. That the application was irregularly filed against the 3rd and 4th Respondents since the leave to file the application for judicial review was limited to the 1st and 2nd Respondents not in the personal capacities of the 3rd and 4th Respondents and as such the application is an abuse of court process.

2. That the applicant did not have the required qualifications for the position of Internal Auditor. A *Bachelors in Business Management* possessed by the applicant was not among the requirements for the position in issue. The



2nd Respondent directed that the applicant be transferred from the position of Internal Auditor because he lacked the required qualifications.

3. That the purpose of retaining the applicant at the salary scale of an Internal Auditor was in adherence to the guidelines from the Ministry of Public Service. The 4th Respondent did have the jurisdiction to hear grievances arising from decisions of the 2nd Respondent which is a preserve of the Public Service Commission.

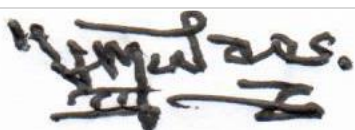
4. That the current application was prematurely brought to court, it was an abuse of court process and a gamble and thus ought to be denied.

The application was further opposed by the 5th Respondent who also averred as follows:

1. That on 28th April 2020, the 10th Parliament of Uganda approved the creation of 15 cities including Fort Portal and the same were to become operational by 1st July 2020. The Permanent Secretary Ministry of Public Service issued implementation guidelines to stay structures for cities on 11th May 2022.

2. That the claim by applicant that he was transferred within service from the position of Internal Auditor to Commercial Officer was on account of lack of CPA is not backed by any Minutes of the 2nd Respondent. Communications from the appointing authority go directed to the Responsible Officer. In this case the responsible officer implemented the minute extract received.

3. That the advert for the position in issue was run in *New Vision* news paper on 28th December 2022 and the applicant did not respond to the advert. The 5th Respondent applied for the said position, did interviews and was successfully recruited and she accepted her position since she had the

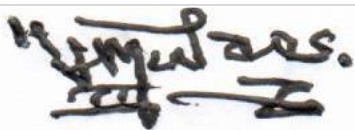


required qualifications. The qualifications possessed by the applicant were not among the requirements for the position in issue.

4. That whereas the applicant claims he had the required equivalent for the position advertised, he did not provide certification from National Council for Higher Education equating his qualifications with what appeared in the advert.
5. That the additional assignment of duties of an Internal Auditor was done in good faith since there was no one substantive in the position in issue since the advert for the said position had been run in newspapers. That it is proper to have a public officer reduced to lower position on condition he retained his salary.
6. That the applicant has since declined to handover office and as such any continued acts as an Internal Auditor is an illegality. That it is in the interests of justice that the application is dismissed with costs to the 5th Respondent.

In rejoinder, the applicant further contended thus:

1. That the extension of time within which to file the current application was not restricted to particular individuals. That the 3rd and 4th Respondent were sued in their personal capacities for acting against the applicant.
2. That the requirements for the position extended to qualifications with a bias in **accounting** per the guidance from the Ministry of Public Service which the applicant has. That the basis for his transfer was because he did not have a professional qualification of CPA which was not required for the position and this is contained in the placement report.
3. That he was previously appointed as an Internal Auditor on the same qualifications and nothing changed. That earning a salary of an Internal Auditor when he is a commercial officer is irregular.



Issues:

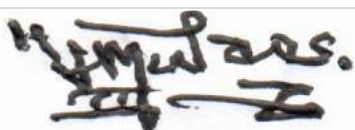
The following issues are pertinent for determination of the case at hand:

1. Whether this application was filed out of time against the 3rd and 4th Respondents.
2. Whether or not, the applicant exhausted the available local remedies before filing the application at hand.
3. Whether the 1st Respondent's Minute No.235/2022 which recommended that the applicant be transferred from the job position of Internal Auditor to Commercial Officer is illegal, irrational, ultra-vires, null and void.
4. Whether the 2nd Respondent's decision of 10th November 2022 to transfer the Applicant from the position of Internal Auditor to Commercial Officer is illegal, irrational, ultra-vires, null and void.
5. Whether the decision of the 1st Respondent to advertise, shortlist, interview and recruit a person to hold the position of Internal Auditor of the 2nd Respondent is illegal, irrational, ultra-vires, null and void.
6. Whether the 3rd and 4th Respondent acted in bad faith when they participated in the process leading to the impugned decisions.
7. What remedies are available to the parties?

Legal Representation:

Mr. Patrick Nyakaana appeared for the Applicant while *Mr. Alex Insingoma* appeared for the 1st, 2nd, 3rd and 4th Respondents. The 5th Respondent was self-represented. Parties filed their respective submissions which I have duly considered.

Resolution:



1. Whether this application was filed out of time against the 3rd and 4th Respondents.

3 Submissions for the 1st, 2nd, 3rd and 4th Respondents:

Rule 7A (1) (9) of the Judicature (Judicial Review) Amendment) Rules 2019, limits the period within which to present an application for judicial review to three months from the date the grounds of the application first arose (*Dawson Kadope v Uganda Revenue Authority, HCMC No. 040 of 2019, IP Mugumya v Attorney General, HCMA No. 116 of 2015 and Uganda Revenue Authority v Uganda Consolidated Properties Ltd, C.A.C.A No. 31 of 2000*).

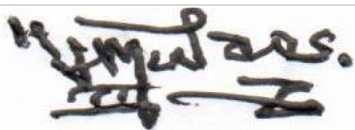
Leave to file the current application for judicial review was in respect of the 1st and 2nd Respondents. The applicant filed the application and included the 3rd and 4th Respondents without leave thus this application is barred by limitation as against the 3rd and 4th Respondent.

Submissions for the Applicant:

The order granting the applicant leave to file the application for Judicial Review out of time was not limited to the 1st and 2nd Respondents. What is key is that the applicant demonstrated sufficient cause why he was unable to file the application within the time provided for under the law. This was ably demonstrated by the applicant at the time leave was granted as such sufficient cause exists warranting presenting the application against the 3rd and 4th Respondents out of time.

21 CONSIDERATION BY COURT:

Rule 5(1) of the Judicature (Judicial Review) Rules 2009 limits the time within which to present an application for judicial review to three months from the date the grounds that call for Judicial Review first arose. Time may be enlarged upon proof of sufficient cause.



The applicant filed Misc. Cause No. 06 of 2023 against the 1st and 2nd Respondents seeking leave to present an application for judicial review out of time. Among the orders sought by the applicants was; ***“Leave is granted to the applicant to file an application for Judicial Review against the Respondents”***. The application was thus limited to only the 1st and 2nd Respondents. If the applicant had the desire to lodge such application against the 3rd and 4th Respondents, he would have included them as parties to the former application seeking leave to demonstrate to court that there is sufficient cause warranting the application to be presented outside the statutory time against them.

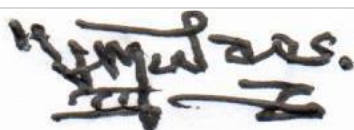
Therefore, presenting this application against the 3rd and 4th Respondent prior to securing leave, renders the same time barred. In addition to the above, the actions complained of by the applicant were executed by the 3rd and 4th Respondent’s in their official capacities as Chairperson City Service Commission and Acting Town Clerk of the 1st Respondent respectively. These actions are thus interpreted to be acts of the 1st and 2nd Respondents. The 3rd Respondent acted as a chairperson of the City Service Commission and other members of the commission.

I thus order that the 3rd and 4th Respondents be and are hereby struck out as parties to this suit. This issue is accordingly resolved in the affirmative.

2. Whether or not, the applicant exhausted the available local remedies before filing the application at hand.

Submissions for the 1st and 2nd Respondents:

The current application is premature before this court on account of failure by the applicant to exhaust available local remedies. Rule 5 of the Judicature (Judicial Review) (Amendment) Rules 2019, provides that an application becomes amenable for judicial review upon the applicant first exhausting the available



remedies within the public body (*Associate Professor Jude Sempebwa & Anor v Makerere University & Anor, HCMA No. 21 of 2021 and Kihunde Sylvia & Anor v Fort Portal Municipal Council & Anor, HCMA No. 61 of 2016*).

Under Section 59(2) of the Local Government Act, a person aggrieved with the decision of the District Service Commission may appeal to the Public Service Commission; however the ruling of the District Service Commission survives until Public Service Commission rules on the matter. The applicant lodged a complaint to the Public Service Commission to which the commission has not pronounced itself. As such the current application is prematurely before court and not amenable for judicial review.

Submissions for the Applicant:

The applicant exhausted all available remedies. After a decision was taken, he lodged a complaint to the Town Clerk, later to the District Service Commission and to the Secretary Public Service Commission. The applicant exhausted all available local remedies before recourse was made to this court.

CONSIDERATION BY COURT:

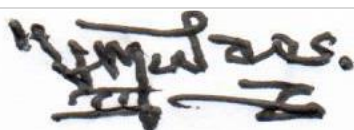
Rule 7A (1) of the Judicature (Judicial Review) Rules 2019 provides thus:

The court shall, in considering an application for judicial review, satisfy itself of the following—

(a) that the application is amenable for judicial review;

(b) that the aggrieved person has exhausted the existing remedies available within the public body or under the law; and

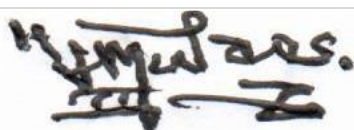
(c) that the matter involves an administrative public body or official.



The term “exhaustion of available remedies” principally connotes to a legal requirement imposed by law to the effect that a party must exploit or resort to all available and effective remedies available under the law before recourse is made to Court. This requirement is hinged on the known administrative principle of creating effective dispute resolution mechanisms within the public bodies which have the knowledge and expertise to handle disputes that arise in different public institution/bodies. (See *KanimiKaganda John v Ntoroko District Local Government, HCMA No. 17 of 2023*).

Further, Musota J (as he then was) in *Charles Nsubuga vs Eng. Badru Kiggundu & 3 Others, HC MC No. 148 of 2015*, while citing with approval the position in High Court of Kenya in the case of *Bernard Mulage vs Fineserve Africa Limited & 3 Others Petition No. 503 of 2014*, made fundamental postulates which I am persuaded to adopt thus: *“There is a chain of authorities from the High Court and the Court of Appeal that where a statute has provided a remedy to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of 12 National Assembly versus Ngenga Karume [2008] 1 KLR 425 where it was held that: In our view there is merit ... that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”*.

The above being the general rule, exceptions have been created through judicial interpretation and activism. In *Salim Alibhai & Others vs Uganda Revenue Authority, HC M.C No. 123 of 2020*, Ssekaana J noted thus: *“The rule of exhaustion of alterative remedies is not cast in stone and it applies with necessary modifications and circumstances of the particular case ... When an alternative remedy is available, the court may refrain from exercising its*

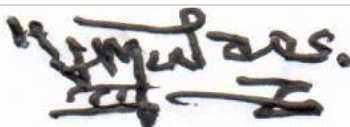


jurisdiction, when such alternative, adequate and efficacious legal remedy is available but to refrain from exercising jurisdiction is different from saying that it has no jurisdiction. Therefore, the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of alternative remedy, the High Court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, (i) where the application seeks enforcement of any of the Fundamental rights; (ii) where there is failure of natural justice; or (iii) the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged...”

The learned judge in *Water and Environment Network (U) Limited and 2 Others v National Environmental Management Authority and Anor (Consolidated Miscellaneous Cause No. 239 of 2020) [2021] UGHCCD 30 (7 May 2021)*, thus: *The Court must have good and sufficient reason to bypass the alternative remedy provided for under the statute. To allow litigants to proceed straight to court would be to undermine the autonomy of the administrative processes.....”*

In *Dr. Badru Ssesimbwa v Nakaseke District Service Commission & Anor, HCCM No. 16 of 2018*, it was observed that: *‘This court has noted that in some cases, it is not a requirement that a party should exhaust the available remedies but it is advisable to explore all such alternative procedure to get the same remedies. The Court has the discretion to give remedies in Judicial Review even if alternative remedies exist.’*

I am guided by the above principles. In the case before me, the applicant immediately after the decision was made, wrote a letter to the Town Clerk and the Chairperson City Service Commission protesting his transfer in service from the position of Internal Auditor to Commercial Officer. He further made an appeal to the Chairperson City Service Commission on 2nd March 2023. No response or



ruling was made by the 1st Respondent on the matter. He later on 6th March 2023 wrote to the Secretary Public Service Commission highlighting the irregularities in his transfer of service. On 23rd March 2023, the Secretary Public Service Commission wrote to the Secretary Fort Portal City Service Commission directing them to give support to the applicant. There seems to be no action that was taken by the 1st Respondent.

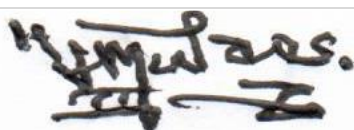
Pending the said complaints, the 2nd Respondent went ahead and advertised the position of Internal Auditor which the applicant contended he was illegally removed from and transferred to another position. The 1st Applicant conducted interviews and the 5th Respondent (now 3rd) was recruited. After filing this application, the Public Service Commission by letter dated 23rd January 2024, responded on the appeal by the applicant where they rescinded the decision of the City Service Commission transferring the applicant from the position of Internal Auditor to Commercial Officer. After a short time, the Public Service Commission wrote another letter staying the implementation of its decision in the letter dated 24th January 2024.

I find in the circumstances of this case that the applicant exhausted all available remedies within Public Service. This issue is thus resolved in the affirmative.

Issues 3, 4 and 5:

3. Whether the 1st Respondent's Minute No.235/2022 which recommended that the applicant be transferred from the job position of Internal Auditor to Commercial Officer is illegal, irrational, ultra-vires, null and void.

4. Whether the 2nd Respondent's decision of 10th November 2022 to transfer the Applicant from the position of Internal Auditor to Commercial Officer is illegal, irrational, ultra-vires, null and void.



5. Whether the decision of the 1st Respondent to advertise, shortlist, interview and recruit a person to hold the position of Internal Auditor of the 2nd Respondent is illegal, irrational, ultra-vires, null and void.

Submissions for the Applicant:

Judicial Review is concerned with process leading to a particular decision and not the decision itself. That if it is established that the process was illegal, improper or subject to procedural flows, then the resultant decision is subject to Judicial Review (*See Section 36 of the Judicature Act and Rule 3 of the Judicature (Judicial Review) Rules 2009*; See also *Chief Constable of North Wales Police v Evans (1982) 3 ALL ER 141* which was cited with approval in *Kuluo Joseph Andrew & 2 others v A.G & 2 others, HCMC No. 106 of 2010* and *Abbey Musinguzi T/a Abtex Productions & Anor v Inspector General of Police & Anor, HCMC 147 of 2019* where it was observed thus: “*The purpose of Judicial review is to ensure that the individual receives fair treatment, not to ensure that the authority, after according fair treatment, reaches on a matter which is authorized or enjoyed by law to decide from itself a conclusion which is correct in the eyes of court.*”

In *Pastoli v Kabale District Local Government & others (2008) 2 E.A 300* court guided that in an application for Judicial Review, the applicant must show that the decision complained of is tainted with *illegality, irrationality and procedural impropriety*. Illegality is when the authority commits errors of law in the process of taking the decision complained of.

The decision by the 2nd Respondent under Minute No.235/2022 recommending the applicant’s transfer from Internal Auditor to Commercial Officer on account of lack of professional qualification (CPA) was illegal, irrational, and null and void. In the advert by the 2nd Respondent for the said position, among the

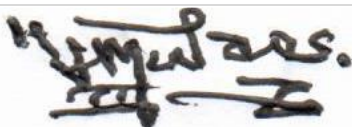
professional qualifications required, it did not include being a Certified Public Accountant. This was the sole basis upon which the 2nd Respondent recommended his transfer in service from the position of Internal Auditor to Commercial Officer.

The applicant possesses the required qualifications for the position in issue. The process adopted by the 1st and 2nd Respondents to cause the applicant to be transferred from the position of Internal Auditor to Commercial Officer was **illegal** and **procedurally improper**.

The decision of the 1st and 2nd Respondents was also **irrational**. In *Associated Picture Houses Ltd v Wednesbury Corporation (1974) 2 ALLER 223* the term irrationality was defined as “*particularly extreme behavior, such as acting in bad faith or a decision that is ‘perverse’ or ‘absurd’ that implies the decision maker has taken leave of his senses. Taking a decision that is so outrageous in its defiance of logic or acceptable and moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*”

The decision taken by the 1st Respondent to transfer the applicant from the position of Internal Auditor on account of not possessing or being a registered CPA and later advertise the said position without the said qualifications is outrageous, defies logic and right of reason. The qualifications for the said position were clarified by the Permanent Secretary; Ministry of Public Service and did include being a Certified Public Accountant. The decision in issue was made in **bad faith** and was thus **irrational**.

The decision to transfer the applicant from a position of Internal Auditor whose monthly salary was Ugx 926,247 under U4 upper to a position of lower pay that is U4 lower attracting a monthly pay of shs 723,868 amounted to a demotion and



contradicts paragraph (f) section f-t of the Public Service Standing Orders. Even after the transfer, the applicant retained his salary accruing to that of Internal Auditor. The process through which the applicant was transferred from the position of Internal Auditor to commercial officer was marred by procedural impropriety and irregularities as observed in *Pastoli v Kabale District Local Government & others (2008) 2 E.A 300*.

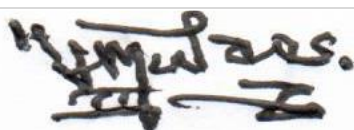
Submissions for the 1st and 2nd Respondents:

In *Nakibinge Latif Abubaker v Attorney General, Misc. Cause No. 106 of 2023*,

Wamala J observed that illegality relates to instances where the authority commits an error in law in the process of decision making. Acting without jurisdiction or ultra vires or contrary to the provisions of the law constitutes illegality. Section 4(a) of the Local Governments Act provides that a City shall be an equivalent of a District. Further Section 55(1) of the Local Governments Act gives the District Service Commission the power to appoint persons to hold or act in any office in the service of the district or urban council, including the power to confirm appointments, exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office.

The applicant lacked the required academic qualifications for the position of Internal Auditor. The applicant has a Bachelor of Business Management which is not among the requirements listed by the 1st applicant and those in the letter by the Secretary Public Service Commission. After the transfer, the applicant continued to receive salary of the previous position since the appointment was at a person to holder basis in line with the guidelines from the Ministry of Public Service.

Submissions for the 5th Respondent:



Article 200(1) of the Constitution 1995 as amended provides that the power to appoint persons to hold or act in any office in the service of the District including the powers to confirm appointments, exercise disciplinary controls over persons holding any such office and removal of such persons is vested in the District Public Service Commission.

Section 58(1) of the Local Government is to the effect that a City Service Commission shall be independent and not subjected to any directions or control from any person or authority. That the 2nd Respondent thus acted within its **powers** to cause the transfer of the applicant in service from the position of Internal Auditor to commercial officer since he lacked the required qualifications.

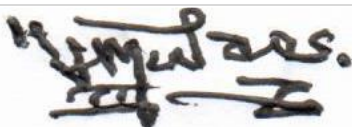
The decision of the City Service Commission was within the City staff structure that came into force upon operationalization of the cities per the guidelines for Implementation of City Staff Structures for May 2022.

Under Section 6(1) of the Public Service Commission Regulations 2009, the decision of the commission is communicated to the responsible officer through Minutes. Under Section 6 (2), the Commission is not required to communicate reasons for its decision to the Responsible Officer. As such there is no **irregularity** or **illegality** that was committed by the 1st and 2nd Respondents.

Rejoinder for the Applicant:

The reason advanced by the 1st Respondent to cause the transfer in service of the applicant from the position of Internal Auditor to Commercial Officer was on account of failure to possess a Certificate of Public Accountant certificate (CPA). Later the 2nd applicant advertised the said position and did not include such as a requirement. As such the process through which the decision was taken to transfer the application from his former position was marred with irregularities.

CONSIDERATION BY COURT:

A handwritten signature in black ink, appearing to be 'M. J. M. J.', is written over a horizontal line.

Judicial review is not concerned with the decision made but the legality, rationality and propriety of the process leading to such decision. (See: *Hillary Delany* in his book “*Judicial review of Administration Action*” 2001 sweet and Maxwell at pages 5 and 6 & *Philadelphia Trade and Industry Ltd v Kampala City Authority*, (Civil Revision No. 15 of 2012) [2013] UGHCLD 19 (25 February 2013)).

Judicial review is about illegality, irrationality and procedural impropriety in the decision making process. In *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1947] 2 ALL ER 680: [1948] 1 KB 223, court noted thus;- (i) illegality: means that the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it, (ii) Irrationality: means particularly extreme behaviour, such as acting in bad faith, or a decision which is “perverse” or “absurd” that implies the decision-maker has taken leave of his senses. Taking a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it and (iii) Procedural impropriety: to encompasses four basic concepts; (1) the need to comply with the adopted (and usually statutory) rules for the decision making process; (2) The common law requirement of fair hearing; (3) the common law requirement that the decision is made without an appearance of bias; (4) the requirement to comply with any procedural legitimate expectations created by the decision maker.

In the celebrated decision of *Pastoli v. Kabale District Local Government Council and Others* [2008] 2 EA 300, court guided as follows: “*In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the*

act,...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a 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. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

The Court’s power under judicial review is discretionary. In Thugitho Festo v Nebbi Municipal Council, HCMA No. 15 of 2017, Mubiru J adopted the position in Nichol v. Gateshead Metropolitan Borough Council (1988) 87 LGR 435 (CA), where court stated that: “The court has an overall discretion as to whether to grant relief or not. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the following:

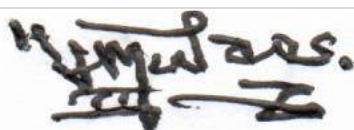
(1) The nature and importance of the flaw in the challenged decision.

(2) The conduct of the applicant.

(3) The effect on administration of granting relief.”

(i) Illegality:

Legality means that the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. Illegality is when the decision-making authority commits an error of law in the **process** of taking or making the act.



Section 4 (a) of the Local Government Act as amended provides that a City shall be an equivalent of the District and the City Council shall exercise all functions and powers conferred upon a District Council within the area of its jurisdiction. This implies that all administrative structures of a city have the same powers like those of District. Section 54(1) of the Local Government Act provides that there shall be established a district service commission in each District. The primary function of the district service commission is under Article 200(1) of the Constitution and section 55(1) being, to appoint persons to hold or act in any office in the service of the district or urban council and includes the power to confirm appointments and exercise disciplinary control of any person appointed in such offices or remove such persons.

Therefore the powers of the City Service Commissions are the same as those of the District Service Commission. These powers must be exercised within the confines of the law.

Fort Portal City Council was created by Parliament in line with Article 179 (1) (A) and section 7(2a) of the Local Government Act as amended. These cities were an upgrade of the existing Municipal Councils. To operationalize these cities which were created, the Ministry of Public Service issued Guidelines titled: **‘Guidelines for the Implementation of the City Structures May 2022’**. The Guidelines among others provided as follows:

“In order to achieve this objective, Government intends to;

Recruit competent human resources to manage the Cities with high degrees of professionalism. These professionals shall also be enablers for the private sector and others key non-state actors to make their invaluable contributions towards cities’ development.

Build capacity of the existing urban Managers to improve their competencies to deliver the enormous task of realizing the vision of running contemporary Cities.”

Item 6.4 provides that:

“Officers occupying posts which have been upgraded and the job content and specifications have changed, such offices will be interviewed and appointed if they have requisite qualifications. If the officer does not have the qualifications for the upgraded position, he/she should be interviewed and considered for re-deployment or retirement on abolition of office.”

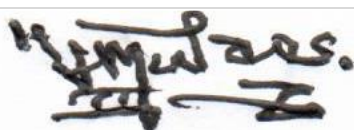
Item 6.5 provided that:

“(i) Where jobs have been revised into lower grades, the present job holders’ salary and benefits shall be retained on personal to holder basis, until their exit; when the rightful job holder will be recruited with the right grade and qualifications.

(ii) The new recruitment shall conform to the new job descriptions, specifications and grading as provided by the Ministry of Public Service.”

Under the policy, the City Service Commission was allowed to place staff that did not meet the job requirement for the positions they held, to other positions within the city structure. For positions which were not filled during the placement exercise, the same had to be advertised and filled using the normal procedure.

The 1st respondent in Implementation of the City Structure did the appointment on promotions and placement of staff and retired several staff of the former urban council. In the said exercise, the applicant who previously occupied the position of Internal Auditor of Fort Portal Municipal Council was transferred on a personal



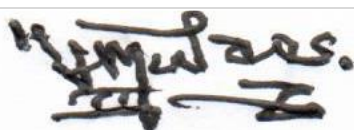
to holder salary basis from the position of Internal Auditor to Commercial Officer.

Under the definition section to the Public Service Standing Orders, Salary Personal to holder is define as; refers to a circumstance where a public officer is receiving a salary that is outside the range set for the post as a result of grading and re-grading or as approved by the Appointing Authority. Under paragraph B-a (Payment of salaries; General rules on payment of Salaries, item 15 of the Public Standing Order, it provides thus;

“When a public officer is appointed on transfer within the Public Service and the salary in his previous appointment is higher than the salary in the new appointment, he or she will retain his or her previous salary on a personal to holder basis until the salary level in the new post reaches his or her level.”

The Public Service Standing Orders permits the transfer of an employee from the position that attracts a higher salary to one with a lower salary. It also permits the down grading and upgrading of posts within the public service. In this case, the applicant was transferred from the position of internal Auditor (U4 upper) which attracted a higher pay to the position of Commercial Officer (U4 lower) with a lower pay.

Therefore one may say that the City Service Commission acted within the law and the Guidelines issued by the Ministry of Public Service when they transferred the applicant from the position of Internal Auditor to Commercial Officer with the higher salary of Internal Auditor on the Salary Personal to holder basis. It should be recalled however that Judicial review is about **illegality**, **irrationality** and **procedural impropriety** in the **decision making process**. It is about the **means** of the **decision making process** as opposed to the **end or the decision**



itself. What I am concerned with is whether there is illegality, irrationality or procedural impropriety in the decision making process.

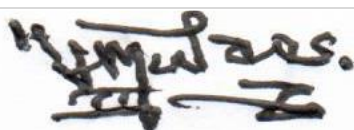
3 **(ii) Irrationality:**

Irrationality means particularly extreme behaviour, such as acting in bad faith, or a decision which is “perverse” or “absurd” that implies the decision-maker has
6 taken leave of his senses (See: *Thugitho Festo v Nebbi Municipal Council, HCMA No. 15 of 2017, Mubiru J.*). In *Dr. Lam –Larogo (supra)*, the court held
9 that in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

12 The basis for the applicant’s transfer from the position of Internal Auditor to Commercial Officer was that the applicant lacked the required academic qualifications for the position of Internal Auditor.

15 It was submitted for the applicant that the ground relied upon by the 1st Respondent to cause the applicant to be transferred from the position of Internal Auditor to Commercial Officer was on account of lack of a professional
18 qualification in accounting (CPA). It was pointed out that the 1st and 2nd Respondent later advertised the same position and did not include CPA as a mandatory requirement. Further, that in the clarification by the Secretary Public
21 Service Commission, it was not indicated that CPA was a mandatory requirement in addition to a bachelors in accounting. That as such the decision taken was outrageous, defies logic and reasons and irrational.

24 In response, it was submitted for the Respondents that the applicant lacked the required qualifications for the position. That he held a Bachelors of Business Management which is not a Bachelors of Commerce or Bachelors of Business



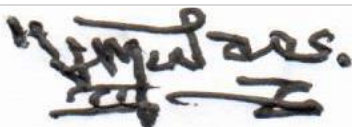
Administration or Studies with an Accounting option. That as such, the commission was right to transfer him within service to another position; that there was no irrationality in the decision.

CONSIDERATION BY COURT:

In paragraph 10 of his affidavit the applicant stated that he holds the following qualifications: (a) Bachelor of Business Management (Accounting Option); (b) Diploma in Local Government Finance Management; (c) Uganda Advanced Certificate of Education (UACE); Uganda Certificate of Education (UCE). On the basis of these qualifications, by letter dated 25th May 2016, the applicant was appointed to the position of Internal Auditor vide DSC Kabarole Minute No. 67/2016.

On the 28th December 2022, the 1st Respondent advertised in the *New Vision* news paper, Job vacancies in Fort Portal City Council which included the position of Internal Auditor and the required qualifications were: (a) **Honours Bachelors Degree in Finance and Accounting**, (b) Uganda Advanced Certificate of Education (UACE) and Uganda Certificate of Education (UCE). That he had the said qualifications since he possessed a **Bachelor of Business Management (Accounting Option)**, a diploma in Local Government Finance Management, Uganda Advanced Certificate of Education and Uganda Certificate of Education.

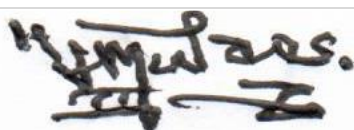
Annexure F1 of the applicant stated the qualifications for the position of Internal Auditor as: An **Honours Bachelor Degree in Finance and Accounting**; or An Honours Bachelor Degree with a bias in Accountancy or Audit option obtained from a recognized awarding institution; or Full professional qualification in Accountancy or audit obtained from a recognized awarding institution accredited by the Institute of Public Accountants of Uganda (ICPAU).



The clarification on the job requirement for the post of Internal Auditor by the Permanent Secretary Ministry of Public Service contained in a letter of 2nd March 2023 stated the job requirements for the position of Internal Auditor were: (i) Either an Honours Bachelor Degree in Finance and Accounting, Business Administration/Studies (Accounting Option) or Commerce (Accounting Option) from a recognized University / Institution or; (ii) Full professional qualification in Accounting such as ACCA, CPA, ACIS or CIMA obtained from a recognized awarding Institution/Body accredited by ICPAU or; A Honours Bachelor's Degree in Science or Humanities plus professional qualifications in accounting such as ACCA, CPA, ACTS or CIMA obtained from a recognized awarding Institution/Body accredited by ICPAU.

On 10th November 2022, the 4th Respondent acting on behalf of the 2nd Respondent on the recommendations of the 1st Respondent transferred the applicant from the Position of Internal Auditor to Commercial Officer. The basis for the applicant's transfer from the position of Internal Auditor to Commercial Officer was that the applicant lacked the required academic qualifications for the position of Internal Auditor.

The applicant by letter of 22nd December 2022 wrote to the Acting Town Clerk complaining about his irregular transfer from the position of Internal Auditor to that of Commercial Officer. By letter of 29th December 2022 the Senior Human Resource officer also wrote to the Acting Town Clerk pointing out what she considered to be anomalies involving the re-designation of the applicant as Commercial Officer. By letter of 2nd March 2023 the Applicant raised his complaint with the Chairperson City Service Commission copied among others to the Acting Town Clerk. By letter of 6th March 2023 the applicant raised the same complaint with the Public Service Commission and among others copied in

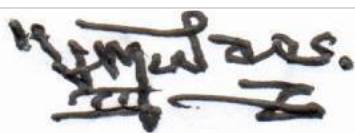
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the City Town Clerk. By letter of 23rd March 2023 the applicant wrote an appeal over the same matter to the City Service Commission.

Amidst the above complaints of the applicant on 13th March 2023, the 1st Respondent conducted interviews for recruitment of Internal Auditor to fill the position from where he was transferred and later appointed the 5th Respondent.

After filing this application, the Public Service Commission by letter dated 23rd January 2024, responded on the appeal by the applicant where they rescinded the decision of the City Service Commission transferring the applicant from the position of Internal Auditor to Commercial Officer; but after a short while, the Public Service Commission wrote another letter staying the implementation of its decision in the letter dated 24th January 2024.

I find that the 1st and 2nd Respondents exhibited extreme behavior and acted in bad faith, and their decisions were perverse, absurd, unreasonable, and untransparent when they pressed on with the recruitment exercise without determining the applicant's complaint and without reaching a justifiable basis as to whether or not the applicant had the required qualifications. Further, the applicant was already in post as Internal Auditor since 2016 on the basis of the same qualifications with no prior concerns raised of his failure to perform the duties of the post. He had acquired working experience in post. Furthermore, the applicant had asserted that he had the required qualifications for the post. Among the rational steps that the 1st and 2nd Respondents could have taken or considered, there is no evidence that the post of Internal Auditor had been upgraded or that the job content and specifications had changed from when the applicant first applied and was originally appointed to the post; or that the applicant had been interviewed for the post and he had failed the interview; or that the 1st and 2nd Respondents had obtained any expert opinion or guidance that the applicant's qualifications rendered him unqualified to continue in post. It was the evidence

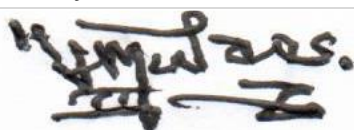
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of the applicant that at the end of the financial year 2022/2023, the applicant was appraised by the 2nd Respondent as an Internal Auditor and came to the conclusion that he was excellent at his duties as an Internal Auditor. These factors make me conclude that the 1st and 2nd Respondents acted with irrationality in re-designating the applicant from the post of Internal Auditor a post that he already held and performed for several years with the same qualifications that he held, to a new designation of Commercial Officer, without addressing and making a determination on his complaints against the re-designation and his assertion that he possessed the required qualifications for the post of Internal Auditor. This ground is proved.

(iii) Procedural impropriety:

Procedural propriety calls for adherence to the rules of natural justice which imports the requirement to hear the other party (*audi alteram partem*) and the prohibition against being a judge in one's cause. The latter essentially provides against bias. Natural justice requires that the person accused should know the nature of the accusation made against them; secondly, that he/she should be given an opportunity to state his/her case; and thirdly, the tribunal should act in good faith. (See: *Byrne v. Kinematograph Renters Society Ltd*, [1958]1 WLR 762).

Therefore, procedural impropriety arises where the decision made is biased or where a party was not accorded a right to be heard before a decision was taken by an administrative body. Procedural impropriety encompasses four basic concepts; (1) the need to comply with the adopted (and usually statutory) rules for the decision making process; (2) The common law requirement of fair hearing; (3) the common law requirement that the decision is made without an appearance of bias; (4) the requirement to comply with any procedural legitimate expectations created by the decision maker (See: *Dr. Lam – Lagoro James Vs. Muni University (HCMC No. 0007 of 2016)*).



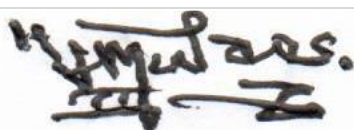
Item 6.4 of the ‘Guidelines for the Implementation of the City Structures May 2022’ provides that: *“Officers occupying posts which have been upgraded and the job content and specifications have changed, such offices will be interviewed and appointed if they have requisite qualifications. If the officer does not have the qualifications for the upgraded position, he/she should be interviewed and considered for re-deployment or retirement on abolition of office.”*

The above provision provided a requirement to interview the applicant who was already occupying the post of Internal Auditor which would have given the applicant an opportunity to defend his qualifications, which factor should have been considered by the 1st and 2nd Respondents in determining whether or not he could retain the job. Before the Applicant was recommended for re-designation or re-designated to the post of Commercial Officer, he should have as well been interviewed for that post, which appears not to have been done. I therefore find in this regard that the 1st and 2nd Responds acted with procedural impropriety. This ground is also proved.

In conclusion, the 1st and 2nd Respondents acted with illegality, irrationality and procedural impropriety in the decision making process that resulted in the re-designation of the applicant from the position of Internal Auditor to that of Commercial Officer.

Issue 7: What remedies are available to the parties?

The applicant has proved his case against the 1st and 2nd Respondents. The case is not established against the 5th Respondent and it fails in this regard. The application succeeds against the 1st and 2nd Respondents with the following orders:



1. A declaration that the 2nd Respondent's decision of 10th November 2022 to transfer the applicant from the position of Internal Auditor to Commercial Officer is illegal, irrational, ultravires, null and void.
2. An order of certiorari doth issue quashing the said decision to transfer the applicant from the position of Internal Auditor to Commercial Officer.
3. A declaration that the 1st Respondent's Minute No.235/2022 which recommended that the Applicant be transferred from the position of Internal Auditor to Commercial Officer is illegal, irrational, ultravires, null and void.
4. An order of certiorari doth issue quashing the 1st Respondent's Minute No.235/2022 which recommended the Applicant's transfer from the position of Internal Auditor to Commercial Officer.
5. A declaration that the decision by the 1st Respondent to advertise, shortlist, interview and recruit a person to hold the position of Internal Auditor of the 2nd Respondent without determining the applicant's complaint against his re-designation from the post of Internal Auditor to Commercial Officer is illegal, irrational, ultravires, null and void.
6. An order of certiorari doth issue quashing the decision of the 1st Respondent to advertise shortlist and recruit a person to hold the position of internal Auditor of the 2nd Respondent.
7. An order of Mandamus doth issue directing the 2nd Respondent to re-instate the applicant to his job position as Internal Auditor.
8. The Applicant's costs of the application shall be met by the 1st and 2nd Respondents.

I so order.

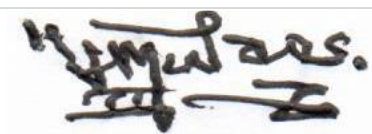
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3 Vincent Wagona

High Court Judge

DATE: 05/04/2024

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