

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL SUIT)
MISCELLANEOUS CAUSE NO. 88 OF 2014
IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS
BY WAY OF JUDICIAL REVIEW
BETWEEN
PAUL KIHKA :::::::::::::::::::::::::::::::::::APPLICANT

AND

- 1. NATHAN IGEME NABETA**
 - 2. ENG. IAN KYEYUNE**
 - 3. SIMON KAHEERU**
 - 4. MARIAM NENYHA**
 - 5. RICHARD BARUNGI**
 - 6. MUHAMMAD KABBA GULAM**
 - 7. SYLVIA NAKABUGU BIRAHWA**
- } :::::::::::RESPONDENTS

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

RULING

On the 20th May 2011, the applicant, Mr. Paul Kihika, was appointed by the Minister of Information, to temporarily take over the management of the Uganda Broadcasting Corporation until a permanent management was put in place. This was pursuant to the orders of HE The President vide his letter to the Head of the Public Service dated the same date.

A new Board of directors was appointed on the 27th March 2014 and inaugurated by the Hon. Minister of Information and National Guidance on 10th July 2014.

On 31st July 2014, the Board of Directors, in alleged exercise of their mandate under the Uganda Broadcasting Corporation Act 2005, appointed Eng. Angello

Nkezza as Acting Managing Director and relieved the applicant of his duties as temporary manager of UBC.

The applicant was removed from office, and the office and powers of Managing Director were handed over to Eng. Nkezza in a public event on the 4th of August 2014 which attracted wide media coverage. He was, however, not satisfied with the actions and decisions of the respondents, who constitute the board of directors of UBC. He filed this application under Articles 42 and 50 of the Constitution, Sections 33 and 36 Judicature Act, Rules 3, 4, 6 and 7 of the Judicature (Judicial Review) No. 11 of 2009 and Section 98 of the Civil Procedure Act, seeking the following orders:

- a) An order of Certiorari to issue against the respondents jointly and/or severally quashing their recommendations and/or decisions by which they purported to terminate the applicant's position as Acting Managing Director of Uganda Broadcasting Corporation and referred him to "his" parent Ministry.
- b) A declaration that the respondents jointly and/or severally acted ultra vires and illegally and thus occasioned miscarriage of justice against the applicant, when they made the aforesaid recommendations.
- c) An order of mandamus compelling and directing the respondents to restore the applicant in his position as the Acting Managing Director of Uganda Broadcasting Corporation.

- d) An order of prohibition, prohibiting the respondents from further recognizing the unlawful appointment of Eng. Angello Nkeeza as the Acting Managing Director.
- e) An injunction restraining the respondents from interfering with the applicant's position as Acting Managing Director.
- f) General, exemplary and punitive damages.
- g) Costs of the suit.
- h) Any other consequential relief as the court may deem necessary.

The grounds on which the application is based are:

- 1) The applicant is the Acting Managing Director of Uganda Broadcasting Corporation having been appointed so by His Excellency The President of the Republic of Uganda.
- 2) The respondents are occupying positions of Board of Directors illegally having been so appointed against an order of the Constitutional Court.
- 3) The decision by the respondents to terminate the applicant's appointment as Acting Managing Director of Uganda Broadcasting Corporation was made without jurisdiction and therefore is ultra vires and illegal.

- 4) There is no Board of Directors for Uganda Broadcasting Corporation as the same was suspended and the matter is sub-judice.
- 5) The respondents, without giving the applicant any hearing, unilaterally made a decision to terminate his appointment and to transfer him without authority.
- 6) The actions of the respondents jointly and severally breached the rules of natural justice, were illegal, irrational and ultra vires the Constitution of the Republic of Uganda; The Uganda Broadcasting Corporation and all enabling laws.
- 7) The applicant is entitled to the orders sought inclusive of general and exemplary damages and costs incurred.

The application is supported by the affidavit of the applicant dated 1st August 2015. It is opposed on the grounds contained in the affidavits in reply sworn by Nathan Igeme Nabeta, Simon Kaheru and Richard Barungi.

On 6th November 2014 court ordered the applicant to file and serve his written submissions by 21st November 2014. However, to date the applicant has not filed the same. The respondents filed their submissions on the due dates, based on the application and affidavit in support which were filed in this matter. Since no reason has been communicated to court for the applicant's non-compliance with court's orders regarding filing submissions, the court decided to go ahead with the ruling.

The issues for determination as contained in the respondents' scheduling notes are as follows:

- 1) Whether the application for Judicial Review was properly brought to court.
- 2) Whether in the circumstances the applicant was unlawfully terminated from the position of Acting Managing Director of Uganda Broadcasting Corporation.
- 3) Whether the applicant is entitled to the orders sought.

Issue 1: Whether the application for Judicial Review is properly brought to court.

It is the respondent's case that a remedy by way of judicial review is not available to a party who has adequate alternative remedies, but a remedy of last resort.

Counsel for the respondents submitted that in this case the applicant had several other remedies, that is to say:

- a) The option of filing an application in the Constitutional court for contempt of a court order against the respondents, since the applicant alleges in paragraphs 6, 7, 8, 9 and 10 of his affidavit that in contempt of orders of the Constitutional Court, the Minister of Information and National Guidance purported to appoint a new Board of Directors comprising of the respondents.

b) Since the claim is based on an employment relationship, the only remedy available to the plaintiff is by way of a complaint to a Labour Officer. (See Section 93 of the Employment Act 6 of 2006). Section 94 of the Employment Act provides for appeal of the decision of the Labour Officer to the Industrial Court.

c) The applicant could have filed a suit in the Industrial court which is fully constituted to handle employment matters such as this. Even before the Industrial court was constituted, Employment matters were handled by the High Court.

Counsel relied on several authorities, that is to say, ***Fuelex Uganda Limited Vs (1) The Attorney General, (2) The Minister of Energy and Mineral Development & (3) The Commissioner Petroleum Supply Department Misc. Cause No. 048 of 2014***, which had placed reliance on ***R Vs Chief Constable of Merseuside Police Ex-parte Calveby & Others [1986] 1 ALL ER 257 at 263***, and ***Preston Vs IRC [1955] 2 ALL ER 327 at 330*** quoted with approval in ***Micro Care Insurance Limited Vs Uganda Insurance Commission Misc. Application No. 0218 of 2009***, to state that a remedy by way of judicial review was not available where an alternative remedy existed and that where parliament had provided appeal procedures, as in a taxing statute, it would only be very rarely that the court will allow a collateral process of judicial review to be used to attack an appealable decision.

Counsel invited court to find that the application was improperly filed, and to have it dismissed.

I have considered the above submission.

On whether the applicant had the option of filing an application is the Constitutional Court for contempt as contended by the respondents' Counsel, this court is not in a position to make any determination on this issue since the applicant did not file submissions, and hence, did not canvas this allegation during submissions.

It appears to me that there is no relationship between this application and Constitutional Petition 1 of 2012, as the parties are clearly not the same with the ones in the present application. The subject matter must have been different too. I am therefore not in a position to interpret the interim order of the Constitutional court in the above said petition so as to determine whether there was such an appropriate alternate remedy in that respect.

On whether the applicant ought to have raised a complaint to the Labour Officer as provided under Section 93 and 94 of the Employment Act, this court has had occasion to pronounce itself on this issue in ***Hilda Musinguzi Vs Stanbic Bank (U) Ltd HCCS No. 124 of 2008***, where court ruled that the unlimited original jurisdiction of the High Court granted under Article 139 (1) of the Constitution of the Republic of Uganda, cannot be ousted by the granting of jurisdiction by a statute to another body. See also ***Habre International Co. Ltd Vs Kassam and Others [1999] EA 125***, and ***David B. Kayondo Vs The Cooperative Bank (U) Ltd CA 10/91***.

As to whether the applicant had the option of filing a matter in the Industrial Court, I find that the applicant filed a Judicial review matter seeking the quashing of certain decisions through orders of Certiorari. Judicial review matters, are by administrative arrangement, handled exclusively by the Civil Division of the High Court. The judicial review application was, therefore, appropriately filed in the civil division of the High Court.

I will, however, proceed to determine whether a suit concerning termination of employment can be brought by way of Judicial Review, as opposed to ordinary plaint, to determine whether the dismissal was wrongful.

The applicant was relieved of his duties and I note that his claim does not only relate to the decision itself, but the process through which the decision was reached. He stated he was not given a right to be heard, and that the decision was made without jurisdiction and therefore ultra vires and illegal, among others. This is the very essence of judicial review. It is trite that judicial review is concerned not with the decision per se, but with the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, but it is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. For this reason each case must be determined on its own merits.

The above said power extends to the acts and orders of a competent statutory public authority, which has power to impose a liability or give a decision, which determines the rights or property of the affected parties. The respondents, as the persons who constitute the body which is bound to explain and defend in any

forum the decisions it takes in the performance of its duties, are amenable to judicial review. See *Kyamanywa Andrew Vs IGG HCMA No. 243 of 2008*.

I have critically studied the law applicable. Rule 3 of the Judicature (Judicial Review) Rules provides for cases that are appropriate for judicial review. It states;

- (1) *An application for_*
 - (a) *An order of mandamus, prohibition or certiorari; or*
 - (b) *An injunction under section 38 (2) of the Judicature Act restraining a person from acting in any office in which the person is not entitled to act, shall be made by way of an application for judicial review in accordance with these rules.*
- (2)

Rules 6 (1) provides for the mode of applying for judicial review. It states;

“In any criminal or civil cause or matter, an application for judicial review shall be made by notice of motion in the form specified in the schedule to these rules.”

In light of the above provisions of the law, any person seeking the prerogative orders of certiorari, prohibition, mandamus and injunction has to do so by way of judicial review. In the instant case, the applicant sought the above mentioned orders by lodging an application for judicial review. He did this by filing a notice of motion supported by an affidavit by himself. It is therefore my considered view that the applicant was entitled to bring this application as he did.

Without prejudice to the foregoing, the applicant has alleged that the decision to terminate him from employment was reached in violation of principles of natural justice in as far as he was not heard. Further that the decision was taken without jurisdiction.

Given the nature of the remedies sought in this application, I find that the application is properly before court. The issue of whether those remedies are available to the applicant would have to be determined at the point of determining the merits of the main application, which in this case is not possible without submissions from the applicant.

Issue 2: Whether in the circumstances the applicant was unlawfully terminated from the position of Acting Managing Director of Uganda Broadcasting Corporation;

In response to the above issue, Counsel for the respondent relied on Section 7 (1) of the Uganda Broadcasting Corporation Act, 2005 which provides that the governing body of the Corporation shall be a Board, which shall consist of the Managing Director and not less than five and not more than seven other directors, one of whom shall be the Chairperson; and Section 11 (2) of the Act which provides that the Managing Director shall be appointed by the Board with the approval of the Minister. He contended, therefore, that the Board and the Minister acted within their mandate under the law.

And as to whether the actions complained of by the applicant were in contempt of the constitutional court's interim orders dated 23rd March 2012 and 30th March 2012, Counsel relied on paragraph 8, 9, 10 and 11 of the affidavits in reply sworn by Nathan Igeme Nabeta, Simon Kaheru and Richard Barungi, to state that this

application is hinged on a wrong interpretation of an interim order of the Constitutional Court in Constitutional Petition No. 1 of 2012 preserving the status quo, to mean that it prevented the appointment of a new Board of Directors and/or removal of the applicant from office whereas not.

Counsel referred court to the clarification by the Honourable Acting Deputy Chief Justice who issued the order that the above interim order of the Constitutional Court only affected the criminal prosecutions of the applicant in that case but did not extend to other matters concerning the existence or operations of the Uganda Broadcasting Corporation. (See Interim Order and letters attached as C1, C2 and C3).

Counsel concluded that:

- 1) The Minister of Information and National Guidance was not in contempt of the said Constitutional Court Order and as such duly, appointed a new board comprising of the respondents.
- 2) The respondents were duly appointed by the Minister properly carrying out her duty under the law.
- 3) The applicant was never terminated from the position of Acting Managing Director but was relieved of his acting capacity and redeployed to where he came from in accordance with the law.
- 4) The Board of Directors of UBC was duly appointed and have carried out their duties in accordance with the law.

Further, that Judicial Review can be granted in cases of illegality, irrationality and procedural impropriety but in the instant case the decision of the Board to transfer

the applicant was done in accordance with the law and was not irrational. Hence the applicant had failed to prove the grounds for grant of this application and so the second issue ought to be found in the negative.

I have considered the submission above. I must say that without any submissions from the applicant to the contrary, I will agree with the respondents that the Board and the Minister acted within the powers vested in them respectively by the law.

On the question of the stated misinterpretation of the import of the interim order of the Constitutional Court, in light of the letter from the Ag. Chief Justice clarifying the matter, I need not say more than to agree that the import of the interim order was misinterpreted by the applicant, either deliberately, negligently or by mistake. I, therefore, find that the applicant has not presented valid reasons for court to find that he was unlawfully terminated from the position of Ag. Managing Director of Uganda Broadcasting Corporation.

The second issue is answered in the negative.

Issue 3: Whether the applicant is entitled to the orders sought:

It was the respondents' case that the applicant was not entitled to the remedies sought because he had prayed for an order of mandamus compelling and directing the respondents to restore the applicant in his position as acting Managing Director of Uganda Broadcasting Corporation; and for an order of prohibition, prohibiting the respondents from further recognizing the unlawful appointment of Eng. Angello Nkeeza as Acting Managing Director. The above two orders sought by the applicant affect two parties who are not party to this application, that is to say,

Uganda Broadcasting Corporation and Eng. Angello Nkeeza. These have not been given an opportunity to be heard.

Counsel concluded that this application is incompetent since the prayers of mandamus and prohibition, if granted, would affect the interests of Uganda Broadcasting Corporation and Engineer Angello Nkeeza third parties who are not parties in this application.

See *Caroline Turyatamba & others Vs Attorney General & Anor Constitutional Petition No. 15 of 2006*.

Counsel further contended that the applicant's prayer for an order of mandamus compelling and directing the respondents to restore the applicant in his position as acting Managing Director of Uganda Broadcasting Corporation was not tenable at law as an employer cannot be forced to retake an employee it no longer wished to continue to engage. (See *Bank of Uganda Vs Betty Tinkamayire Supreme Court Civil Appeal No. 12 of 2007, Kanyeihamba JSC at page 6*).

On the prayer for general, exemplary and punitive damages, Counsel submitted that the applicant had not provided court with material facts for the grant of the damages sought. He relied on *Kampala University Vs National Council for Higher Education Misc. Cause No. 53 of 2014*, to state that an application for Judicial Review cannot support a claim for general, punitive and exemplary damages. That it appears the type of damages envisioned under the rules could be special damages only.

Counsel concluded that the applicant was not entitled to the remedies sought or at all. He prayed that this application be dismissed and that the applicant pays the costs of this application.

I have considered the submissions on this issue.

It is true there is no indication that the interested parties pointed out by the respondents' Counsel were served. Rule 6 (2) of the Judicature (Judicial Review) Rules 2009 provides that the Notice must be served on all persons directly affected. UBC; and Mr. Nkeeza Angello who stands to lose his new appointment if the application were to succeed ought to have been served. This could have been remedied by ordering service if the suit was proceeding normally, which it is not.

Further, would the application fail because the court cannot force an employer to retake an employee it no longer wished to continue to engage? This could be so in the majority of cases. However, the Employment Act, 2006 has introduced several changes and provides for, among others, situations where reinstatement of an employee may be ordered. (See **Section 71 (5) (a) of the Employment Act 2006**). Betty Tinkamanyire was decided basing on the old Employment Act.

Further, there is Article 173 (2) of the Constitution of the Republic of Uganda to contend with, where dismissal of public servants are concerned.

I have not had the opportunity to consider the applicant's submissions as there are none. Therefore, I have to agree with the respondents that under such circumstances, the court cannot order reinstatement.

On the issue of general, exemplary and punitive damages, again there are no submissions to support these.

The above, notwithstanding, I am not persuaded by the proposition that an application for judicial review cannot support a claim for, especially, general damages.

Rule 8 of the Judicature (Judicial Review) Rules (supra) states;

“Claims for damages.

(1) On an application for judicial review the court may, subject to subrule (2), award damages to the applicant, if_

(a) He or she has included in the motion in support of his or her application a claim for damages arising from any matter to which the application relates; and

(b) The court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his or her application, he or she could have been awarded damages.”

I find nothing in the above rule to suggest that it is restricted only to special damages. However, as I have indicated, the applicant has not canvassed his claim for damages in submissions, as there are none. No damages are awardable in this case.

In conclusion, the application is dismissed with costs to the respondents.

It is so ordered.

Elizabeth Musoke

JUDGE

20/02/2015