

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS CAUSE NO. 033 OF 2014

DAVID MARTIN NYENDE :::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

**INSTITUTE OF CERTIFIED PUBLIC
ACCOUNTANTS OF
UGANDA :::::::::::::::::::::::::::::::::::RESPONDENT**

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

RULING

This is an application brought under Article 50; 40(2); 21(1), (2) and (3) of the Constitution of the Republic of Uganda and Order 52, rule 1, 2, and 3 of the Civil Procedure Rules, for orders that:

1. A declaration that the respondent's refusal to renew the applicant's practicing certificate under the name of his choice is illegal.
2. The applicant's right to practice his accountant's profession under the business of his choice has been violated by the respondent.
3. The applicant's right to equality and freedom from discrimination has been violated by the respondent.
4. The applicant's right to a just and fair treatment has been violated by the respondent.

5. The respondent be ordered to renew the applicant's practicing certificate under the name "Continental Partners".
6. Costs of the application be provided for.

The grounds on which the application is premised are:

- a) The plaintiff is a professional accountant and a registered member of the Institute of Certified Accountants of Uganda.
- b) Previously the applicant used to practice his profession with another person under the name and style of PIM & Co. Certified Public Accountants.
- c) By the end of last year the partnership ended and the applicant decided to practice alone under a new name "Continental Partners".
- d) When the applicant applied for a practicing certificate under that name, his application was rejected on the grounds that the name was generic and that the Audit Guidelines prohibit it practicing under generic names.
- e) All efforts to renew his practicing certificate under that name have been ignored.
- f) The refusal to renew the applicant's practicing certificate is a violation of the applicant's fundamental right to property, right to practice his profession under the name of his choice, right to equal treatment and right to non-discrimination

guaranteed under the Constitution of the Republic of Uganda.

- g) It is fair and in the interest of justice that this application be granted.

The application is supported by an affidavit deposed by the applicant, David Martin Nyende, dated 24/3/2014.

It was opposed by the respondent through the affidavit of Derick Nkajja, the Secretary, Chief Executive Officer of the respondent, deponing, inter alia, that;

“Paragraph 2: That the respondent is a creature of Parliament under Section 2 of the Accountants Act 2013.

- 3. That under Section 4 of the said Act, the functions of the Institute are to regulate and maintain the standard of Accountancy in Uganda (Sec 4 (b) and to prescribe and regulate the conduct of accountants and practicing accountants in Uganda.***

- 5. That the Institute is governed by a Council as per Section 7 whose functions include but are not limited to admission of members, maintenance of professional standards, issuance and adoption of internationally accepted accounting and auditing standards and promoting their usage in Uganda, regulation of the conduct of members and promotion of good ethical standards and discipline.***

- 6. That in exercise of its mandate, the respondent Council at its 175th meeting held on 3rd October, 2011 approved practicing guidelines issued in 2012 as "ICPAU Audit Practice Guidelines" for the year 2012. A copy of the minutes is hereto attached and marked Annexure "A". As well as reviewed in December 2012 for further clarification.**
- 7. That under paragraph 1.3.1 of the guidelines, the use of generic names was disallowed.**
- 8. That the guidelines were thereafter circulated to all members for compliance, and are posted on the Institute's website.**
- 11. That it is true the applicant applied to practice alone under a new firm name "Continental Partners" and it is also true that the application was rejected. The rejection was because the use of a generic name was against the letter and spirit of the Audit Practice Guidelines 2012.**
- 13. In response to paragraph 14 and 15, I wish to state that the Audit Practice Guidelines were legally and lawfully passed by the respondent's Council in their mandate to regulate the practice of accountancy and auditing in Uganda and apply to all auditors and accountants.**
- 14. That in response to paragraph 18 I wish to state that the firms quoted received their certificates before the guidelines. A list of the names and the dates of issues is attached as Annexure "C".**

15. That in answer to paragraph 18 and 19, I am advised by our lawyers M/S Turyakira & Co. Advocates which advice I verily believe to be true that it is not true that the applicant was discriminated; his rights violated or has suffered any disadvantage.

- 17. That in response to paragraph 20, I am not aware that accounting firms operating under generic names have an advantage and the applicant has not demonstrated that advantage.**
- 18. That in response to paragraph 21, 22 and 23, I am advised by our said lawyers that it is not true that the applicant's rights have been violated or that he has been discriminated.**
- 19. That I am advised by our said lawyers which advice I verily believe to be true that the refusal to issue the applicant with a certificate under a generic name is lawful and that it is only fair and just that the applicant like all other members and practitioners submit and apply for a licence in accordance with the rules and guidelines as prescribed by the respondent.**

The applicant was represented by Mr. Henry Rwaganika, while the respondent by Mr. Anadet Turyakira.

In their submissions, the respondent raised a preliminary objection to the application and prayed that it be dismissed with costs to the respondent. The respondent's bone of contention was that the applicant applied to ICPAU to practice accounting business under the name and style of Continental Partners on the 27th/08/2013. The CEO/Secretary of ICPAU replied on 17/09/2013 informing the respondent that his proposed name was generic and contravened the Audit Practice Guidelines. On the 18/09/2013, the applicant wrote to the President of the Council of

ICPAU expressing his dissatisfaction to the refusal to use a generic name and requested him to revisit the Secretary's decision and register his proposed name. The respondent's Counsel contended that the applicant went silent on the matter until 6/02/2014 when he issued, through his lawyers, a notice of intention to sue, 5 months after his last communication. Counsel relied on Section 28 (a) of the Accountants Act 2013, to state that a member who was aggrieved by a decision of the Council made under this section may appeal to the High Court within twenty one (21) days after receipt of the decision of council. He further submitted that this application was filed way after the expiry of the twenty one days prescribed by the law which made it incompetent, untenable and time barred. He also relied on ***Western Highland Creameries Ltd & Anor Vs Stanbic Bank & 2 Others HCCS No. 462 of 2011*** for the proposition that matters of limitation of time are substantive and failure to adhere to time would render the suit inadequate.

He invited court to strike out or dismiss this suit with costs to the respondent since the suit was time barred.

I have considered the point of law raised by the respondent. It is not in dispute that the applicant appealed against the decision of the Secretary. (See copy of appeal letter dated 18/9/2013 addressed to the President of the Council). What is not clear is whether Council came up with a decision on appeal. There is no communication on record forwarding to the applicant the

response from Council on the matter. It is, therefore, not possible to know when the 21 days started running.

This objection is therefore overruled.

The background facts of this case which are undisputed are that the applicant is an accountant by profession and a member of the respondent, the regulatory authority of all the Accountants and Auditing firms that operate business in Uganda. The applicant is in private practice and has been operating accountants business in Uganda for the last over 15 years. By the close of 2013 the applicant was practicing under a partnership called PIM & Co. Certified Public Accountants.

It is a requirement that in order to practice in Uganda all accountants must renew their practicing certificates from year to year, and the certificates are renewed against the accountants' respective firm names. The applicant had been renewing his practicing certificate under a partnership until the close of last year when he decided to form a sole business and renew his practicing certificate under the sole business name of "Continental Partners". His application was rejected by the Secretary to the respondent, the reason being that the respondent "Continental Partners" is a generic name and that the respondent's (Institute of Certified Public Accountants of Uganda)

Audit Practice Guidelines of 2012 prohibited issuing practicing certificates to Accountants and Auditors under generic names.

The applicant filed this application contending that the refusal to renew his practicing certificate was a violation of his constitutional rights and therefore illegal and unlawful. He prayed for remedies and costs.

The respondent filed a reply in which it was contended that the refusal to renew the applicant's certificate of practice was lawful.

In a Joint Scheduling Memorandum filed on 15/9/2014, the following issues were agreed:

1. Whether the respondent's refusal to renew the applicant's certificate under the name and style of Continental Partners is lawful.
2. Whether the respondent's refusal to renew the applicant's certificate of practice under the name and style of Continental Partners is an infringement of the applicant's constitutional right;
 - a) To practice his profession,
 - b) To equality and freedom from discrimination,
 - c) Right to a fair hearing.
3. Whether there are any remedies available to the parties.

Issue No. 1

Whether the respondent's refusal not to renew the applicant's practicing certificate under the Names "Continental Partners" was unlawful.

In his supplementary affidavit, the respondent introduced a copy of the Audit Practice Guidelines which the respondent had relied on to reject the applicant's application for renewal of his practicing certificate under the business name of his choice because it bore a generic name.

It was the case for the applicant that the Guidelines, the basis on which the applicant's application was rejected were not law, and should not have been used to debar him from renewing his practicing certificate. Counsel referred court to ***The Oxford Advances Learners Dictionary of Current English at page 383*** which defines guidelines as "advice on Policy", which according to Counsel, meant they were not law. It was therefore unlawful for the respondent to have relied on the guidelines in deciding not to renew the applicant's practicing certificate.

Counsel further submitted that apart from citing the Sections 4, 7 and 12 of the Accountant's Act No. 19 of 2013, which spell out functions of the Institute (respondent), creating the Council as the governing body and spelling out the functions of the Council respectively; the respondent did not cite any of the said provisions that forbade the grant or renewal of accountants

practicing certificate under a generic name. It was therefore erroneous and misleading for the respondent to have stated in paragraph 4 of the letter of rejection that the Act and Guidelines must be read together as a set of laws and rules governing the Practice of Accountants and auditors, because guidelines are not law. Neither is there any provision in the Act which barred the use of a generic name for purposes of grant or indeed renewal of a practicing certificate.

Further, Counsel contended that there was nothing in S.4 of the Act to infer that the respondent had powers to make laws, but only to regulate and maintain the standard of accountancy, and to prescribe and regulate the conduct of accountants and practicing accountants in Uganda.

He relied on Article 79 (2) of the Constitution of Uganda, 1995 under Article 79, to state that no person or body other than parliament had the power to make provisions having the force of law in Uganda, except under authority conferred by an Act of Parliament. There is nothing in the whole Act that confers on the respondent the function of making laws. It is instead the Minister, who under section 53 (1) is empowered, by Statutory Instrument on the recommendation of the Council to make regulations for the better carrying into effect the purpose of this Act. The guidelines don't qualify to be regulations. (See the Interpretation Act Cap. 3).

It was also erroneous for the respondent to rely on Act No. 19 of 2013, at the impugned Guidelines were made in 2012 and the actions of the respondent took place in 2013, before the coming into force of the Accountants Act No. 19 of 2013 which came into force in December 2013.

Further still, the contention in paragraph 6 of the respondent's affidavit in reply that in its mandate, Council approved the Practice Guidelines issued in 2012, is unsustainable because although Section 13 of the Accountants Act Cap. 226 empowered the Council to make byelaws, the impugned guidelines could not be considered as byelaws. The circumstances under which byelaws can be made are stipulated under Section 46 of the Accountants Act Cap 226 and these do not include regulating the use of generic business names of Accounting Firms. Byelaws must also be by Statutory Instrument, and must be approved by the Minister.

None of the above were complied with in the process of making the guidelines in addition to the fact that the Council had no powers to make such a law to regulate use of generic business names of the Accounting firms.

The features, rules and regulations which form part of a Statutory Instrument are stipulated under Sections 14, 15, 16 and 17 of the Interpretation Act and we are lacking in the guidelines. These

include gazetting of the Statutory Instrument, and must be made under a specific provision of the law.

Counsel concluded that the guidelines were not law, and the respondent acted illegally in relying on the same when he refused to renew the applicant's practicing certificate. He invited court to find that the decision to reject the applicant's application was unlawful. He also relied on ***Lex Uganda Advocates & Solicitors Vs Attorney General, Misc. Application No. 322 of 2008***, to state that the respondent had failed to put clearly to the applicant the law which his name was alleged to have offended, apart from merely citing the provisions of the Accountants' Act, which in no way barred the use of generic names.

The respondent was of a different view.

On whether the respondent's refusal to renew the applicant's certificate under the name and style of Continental Partners was lawful, it is the respondent's case that the reason for the rejection of the applicant's application was that the Audit Practice Guidelines discouraged the use of generic names under Paragraph 1.3.1. The applicant was accordingly asked to change his business name to comply with the Audit Practice Guidelines so that his practicing certificate could be renewed. The attention of the applicant had been drawn to the functions of the respondent spelt out in Section 4 of the Accountants Act, No. 19 of 2013 which among others included regulating and maintaining the standards of Accountancy in Uganda. Further, Section 7 of the

Accountants Act, established the Council which is the governing body of the respondent, whose functions under Section 12 of the Act were, inter alia, maintenance of professional standards and regulating the conduct of members. In the execution of its mandate under the Act, the Council formulated the Audit Practice Guidelines, December 2012.

It was Counsel's further contention that although the applicant had tried to define guidelines in his submissions, this was of no relevance to this case. On the contention by the applicant that there was no other law that the respondent had cited other than the provisions of the Accountants Act, Counsel responded that the respondent did not need to cite any other law because it abides by the law that established it which law gave it the mandate to carry out its functions. The argument that there is no provision in the Act that bars use of a generic names cannot be sustained here because this law/Act establishes the Council as the governing body of ICPAU with mandate of maintaining professional standards and regulating the conduct of members in the accounting business.

Counsel submitted that the council formulated the Audit Practice Guidelines to help ICPAU as the supervisory body to maintain the standards of the practice of accountancy in Uganda. The Council in its wisdom considered that the use of generic names in this trade was not healthy for the profession. Rules and regulations of

the profession applied to the members informally thus the Audit Practice Guidelines, 2012 apply to the applicant.

The guidelines were approved by the respondent's Council at its 175th meeting held on the 23rd October 2011 and issued in 2012. At all material times, the applicant was aware of these guidelines. (See Annexure "A" and "B" of Mr. Derick Nkajja's affidavit in reply).

Further, the argument that the law applicable was the Accountants Act Cap. 226 did not change the applicant's position because the same Act has the same provision that established the Council under Section 11 and its functions given under Section 13 include maintaining professional standards of accountancy in Uganda. The Audit Practice Guidelines 2012 are a guide on how the members of the profession are supposed to conduct themselves and the applicant being a member of this profession had to abide by the rules of the "game".

The fact that the guidelines are not a statutory instrument was stated to be no declaration of its intent and purposes for which they were issued.

Counsel submitted that ***Lex Uganda Advocates and Solicitors Vs Attorney General*** relied on by the applicant hinged on the inclusion of the name "Uganda" in the name because the rules on use of generic name barred using a name that had any

connotation to the government of Uganda and this was the major bone of contention in that case. To that extent, the decision in the above case was not applicable to this case.

Counsel invited court to find that the respondent simply executed its mandate, and the applicant should be urged to respect the efforts of the respondent in its endeavours to maintain professional standards of accounting in Uganda.

I have considered the submission of Counsel on either side on this issue.

The applicant's application to register his firm name "Continental Partners" was rejected on the grounds that the name contravened the provisions of the Audit Practice Guidelines of December 2012.

The provision is stated to be Guideline 1.3, which states:

"1.3 Name of the Firm

Members who wish to set up a practice shall first confirm with the Institute of Certified Public Accountants of Uganda (ICPAU) on the use of the firm's name.

- ***The name of the firm shall be consistent with the dignity of the profession.***
- ***The name shall not be misleading.***
- ***The name shall not make any reference, actual or derived, to any symbolic, cultic, political, religious, sectarian, discriminatory or specialty classification.***

- ***The name shall not be offensive.***
- ***The name shall not be directly or indirectly associated with or suggest any connection with any government, parastatal or non-government organisation.***

1.3.1 Use of Generic Names

A generic name is a name other than the name of the practitioner or partner in the firm, or their initials. An audit firm shall not use generic names.”

In the mean time, the respondent stated they derived their powers to make the guidelines from the following Sections of the Accountants Act. I will refer to Cap. 266 which is applicable, since the Guidelines were made before the coming into force of the 2013 Accountants Act. The Guidelines were approved by Council while the Accountants Act 2013, became effective in December 2013.

“S. 4. Functions of the Institute

The functions of the institute shall be-

- (a) to regulate and maintain the standard of accountancy in the country; and***
- (b) to prescribe or regulate the conduct of accountants in Uganda.***

S. 11. The Council

(1) The governing body of the institute shall be a council which shall consist of eleven members, one of whom shall be elected the president of the council.

S. 13 Functions of the council

(a) to admit members to the institute;

(i) to promote the usage of internationally accepted accounting and related standards in Uganda and to make suitable adaptation where necessary;

(n) to regulate the conduct and promote good ethical standards and discipline of members of the institute;

(p) to make byelaws of the institute;

(q) to do anything that is incidental to the functions of the institute.”

Under paragraph 13 of the affidavit in reply (supra) the Secretary to the respondent stated that the Audit Practice Guidelines were legally and lawfully passed by the respondent’s council in their mandate to regulate the practice of accountancy and auditing in Uganda and applied to all auditors and accountants.

Although the respondent refers to Section 7 of the Accountants Act of 2013, the Guidelines were made in December 2012. It should be noted that the provisions in Section 7 as relied on by the respondent in paragraph 5 of the affidavit also appear under Section 13 of Cap 266. The issue however is whether the

Guidelines provided the legal authority to the respondent to reject applicant's application.

The court notes that the Guidelines are just guidelines as the heading states. They do not have the force of law, in that apart from being referred to as Guidelines, it is not stated under what law and section of the law, the maker of the Guidelines (Council) derive their authority to make the guidelines. They should not therefore be applied as if they had the force of law.

Secondly, it is true as pointed out by the applicant in his submissions that the Council is empowered to make byelaws. This is so even in the erstwhile Act that was in force at the time the Guidelines were passed. Even the new Act empowers Council, with the approval of the Minister, to make byelaws. However, the matters for which byelaws could be made were spelt out under Section 46 of Cap. 266. And in any way the respondent probably felt that the provisions in the Guidelines were not fit to be passed as byelaws. The byelaws would have the force of law since S. 46 of Cap. 266, had empowered Council to pass byelaws, by Statutory Instrument and with the approval of the Minister.

The Law Council has been referred to in the respondent's submissions, and it is true it makes regulations. For instance the Law Council passed the Advocates (Use of Generic Names by Law Firms) Regulations, Statutory Instrument No. 16 of 2006. It is specifically stated therein that the said regulations were made under Section 77 (1) (a) of the Advocates Act.

Article 79(2); Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.

It is therefore the court's view that where anybody including the respondent wishes to pass binding provisions, they need to indicate in the body of the Statutory Instrument (because it should be a Statutory Instrument which is the subsidiary legislation) the provision in any law, from which they derive their regulations or byelaws.

I have further examined the provisions of the impugned guidelines.

Paragraph 1.3.1 is the one that prohibits the use of generic names. When one examines paragraph 1.3, it states as follows:

"1.3 Name of the Firm

Members who wish to set up a practice shall first confirm with the Institute of Certified Public Accountants of Uganda (ICPAU) on the use of the firm's name.

- ***The name of the firm shall be consistent with the dignity of the profession.***
- ***The name shall not be misleading.***
- ***The name shall not make any reference, actual or derived, to any symbolic, cultic, political, religious, sectarian, discriminatory or specialty classification.***

- ***The name shall not be offensive.***
- ***The name shall not be directly or indirectly associated with or suggest any connection with any government, parastatal or non-government organisation.***

1.3.1 Use of Generic Names

A generic name is a name other than the name of the practitioner or partner in the firm, or their initials. An audit firm shall not use generic names.”

In my view, paragraph 1.3 envisages the use of generic names by applicants, and the paragraph is therefore in direct conflict with paragraph 1.3.1 (supra) above which prohibits the use of generic names. Otherwise if a firm can only use the names or initials of the partner(s) why is there any need to confirm the use of such names with the respondent? Indeed every provision in paragraph 1.3 above is applicable only to use of generic names. Yet the next paragraph 1.3.1, is prohibiting the use of such names. Therefore the fact that the provisions themselves are contradictory would make their implementation very difficult.

Lastly, the respondent attached a list under “Annexure “C” of the affidavit in reply of firms with generic names who were registered prior to the passing of the Guidelines. It is an agreed fact that there are other audit firms practicing under generic names. I can also gather from the submissions that the prohibition of the use of generic names would not apply to those firms who registered earlier than the passing of the guidelines but

to new applicants for registration. In my view this would mean applying the guidelines with double standards. The applicant has indeed complained that the playing field is not leveled where some firms, especially the foreign based giants who are using generic names would have advantage over his lot.

In conclusion, I find that the application of the Audit Practice Guidelines to reject the applicant's application is unlawful because the guidelines themselves have no legal force.

For the reasons above, the first issue is answered in the negative.

2nd Issue:

Whether the respondent's refusal to renew the applicant's certificate of practice under the name and style of Continental Partners is an infringement of the applicant's constitutional right;

- a) To practice his profession,**
- b) To equality and freedom from discrimination,**
- c) Right to a fair hearing.**

Issue No. 2(a);

Whether the respondent's refusal to renew the applicant's certificate of practice under a generic name is an

infringement on the applicant's constitutional right to practice his profession.

Under paragraph 21 of the applicant's affidavit in support, the applicant states that the respondent's refusal to renew his practicing certificate was a violation of his right to practice his profession freely enshrined under Article 40 (2) of the Constitution of Uganda, which provides that:

"Every person in Uganda has the right to practice his or her profession and to carry on any lawful occupation, trade or business".

Counsel for the applicant contended that the respondent's refusal to renew the applicant's practicing certificate under a generic name without any legal backing was violation of the applicant's right to practice his profession freely as enshrined under Article 40 (2) of the Constitution. The applicant justifies why he opted for a generic name in paragraph 2 of Annexure "APPL" to the applicant's application.

He states:

"From practical perspective, we in practice have come to realize that using personal names has serious drawbacks including among others"

He then goes on to list the reasons in paragraph (a) - (f) which are: the difficulty to sustain personal name in the face of changing composition of audit ownership; continuity of the

practice when the original partners retire or die; that the linking of partners identities in terms of practice is not always practical; that there are many firms, some international operation accounting firms in Uganda, under generic names and that it is difficult to convince anyone that the initial means the partners identities.

Counsel concluded that inspite of the above strong justifications the respondent has not renewed the applicant's practicing certificate thereby denying him the right to practice his profession to date.

In reply, Counsel for the respondent submitted that the practice of accountancy in Uganda is not governed in the abstract but by rules set and prescribed by the respondent, which mandate is derived from an Act of Parliament. The Council of ICPAU deemed it fit to protect the standards of accountancy in Uganda that generic names should not be used and that the applicant was well aware of this, vide the letter dated 2nd may 2012 and that of 12th February 2013 in which these guidelines were brought to his attention before he even applied to trade under the name and style of a generic name. (See Annexure "B" to the affidavit in reply). The applicant was advised that generic names could no longer be used by not only him but accountants who were to register to carry on their accounting business. However, the respondent has never refused or stopped the applicant from practicing his profession in Uganda. Counsel likened the

respondent (a professional body which regulates the conduct of the profession) to the Law Council which regulated the conduct of all advocates in Uganda through various rules and regulations which must be respected and observed by the members. And for the Accountants, the Guidelines were the set of rules for the accountancy regulation. It is our contention that no right of the applicant has been violated.

Counsel submitted further that although in paragraph 19, 29 and 21 of the applicant's affidavit, he swore that he would be disadvantaged if he did not practice under a generic name, that he would be out competed, he had however, not provided sufficient evidence of the allegation that he be out competed if he did not use a generic name. (Refer to paragraphs 19, 29 and 21 of the applicant's affidavit in support).

Issue No. 2(b);

Whether the respondent's refusal to renew the applicant's certificate of practice under the name and style of Continental Partners is an infringement on the applicant's right to equality and freedom from discrimination.

It is the applicant's case that the right to equality and freedom from discrimination is enshrined in article 21 (1) of the Constitution which states that:

“All persons are equal before and under the law in all spheres of political economic, social and cultural life and in every protection of the law”.

Further, the applicant stated under paragraph 16 of his affidavit as follows:

“Being an accountant of long standing that I am, I am aware of many firms that do practice audit and accounting professions in Uganda and have been and continue operation freely under generic names, unhindered.”

The applicant's Counsel submitted that the admission by the respondent, under Annexure “C” to their affidavit in reply, that the respondent has issued practicing certificates and renewed the practicing certificates to both local and international operating business under generic names was an admission of what the applicant had alleged against the respondent in paragraph 18 of his affidavit, to wit that the respondent had denied him the right to equality and freedom from discrimination guaranteed by Article 21 (1) (2) and (3)... by refusing to renew his practicing certificate under the pretext that the law prohibits practicing accounting under generic name yet other firms are practicing under generic names.

Further, Counsel referred court to paragraph 19, where the applicant avers;

“That as a practitioner I will be at a disadvantage if denied to practice under a generic name as I will be out competed by international and local firms which have been allowed to operate similar business under generic names”.

And in paragraphs 20 where the applicant concludes that;

.....“those audit and accountancy firms that operate under generic names have the advantage of creating a branch and their names don’t change with the admission of new partners, while I will be forced to change my firm’s name every time there is a change in partnership as long as I operate under a non-generic name.”

Counsel contended that the respondent had refused to renew the applicant’s Practicing Certificate when it had been renewing practicing certificates of the rest of the firms operating under generic names like his, and he invited this court to find for the applicant on this issue. He relied on ***Lex Uganda Advocates case (supra)***.

He concluded that since the guidelines were not made to apply to all accountants’ firms alike, then the application to the applicant alone is discriminatory.

In reply, Counsel for the respondent submitted that Article 50 of the Constitution was on enforcement of rights and freedoms by courts, but in this case no right of the applicant had been infringed and thus none to enforce. ICPAU's guidance using the Audit Practice Guidelines, 2012 was not a breach of the applicant's right but simply a means of implementing its regulatory duties under the Accountants Act. The applicant was advised to use another name other than a generic one. Article 50 does not therefore apply to the applicant's case.

On Article 21 (1), (2) and (3) of the Constitution which prohibit discrimination and promotes equality of all persons before the law, Counsel for the respondent submitted that the Guidelines prohibit use of generic names and this applied to all accountants who applied to carry out accounting business after the Audit Practice Guidelines came into force. The element of equality is fulfilled and is not discriminatory in any way. It is instead the applicant who wanted to be accorded preferential treatment in light of the Guideline in question. The list of firms' names which use generic names attached to Annexure APPL to the application and Annexure 'E' to the affidavit in reply, were registered before the Audit Practice Guidelines became operational.

He concluded that since the guidelines were made to apply to all accountants' firms who applied to register after the Guidelines came into force, then its application to the applicant was not discriminatory.

Issue 2(c);

Whether the respondent's refusal to renew the applicant's certificate of practice under the name and style of Continental Partners infringed the applicant's constitutional right to a fair hearing.

The applicant stated under paragraph 22 of his affidavit that “... ***the respondent has by its conduct denied me the right to a just and fair treatment guaranteed under Article 42 of the Constitutional by failing or refusing to give me a fair hearing.***”

The applicant relied on Article 42 of the Constitution which states;

“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 or her.”

Counsel for the applicant submitted that the respondent is a public body established by an Act of Parliament whose functions included renewing practicing certificates for accountants. The respondent as such is an administrative body and the decisions the respondent takes are administrative decisions.

The respondent violated the Constitution when it rejected the applicant's application and did not inform him the reasons for rejecting the application and give him the right to defend himself.

The right to a fair hearing under Article 44 of the Constitution demands that parties should be heard by the administrative body before a decision is taken. This right was not accorded to the applicant, hence his appeal to the President of the Council. The applicant was not invited to appear before the respondent Council to present his case when the decision to reject his application was reached. This meant a denial to the applicant of the right to a fair treatment.

Counsel invited court to decide this issue in the affirmative.

On Article 44 (c) of the Constitution regarding ought to be heard, Counsel for the respondent submitted that the right to be heard must be sought. There is no evidence that the applicant requested to be heard and was refused. The applicant wrote to the respondent intending to renew his practicing certificate under the sole practice with the name "Continental Partners". The applicant continued to engage the respondent through a series of correspondences which the applicant has attached. Counsel invited court to find on this issue in the negative basing on the above submissions.

I have considered the above submissions on the issues under Issue No. 2 above.

I have already found that the Audit Guidelines did not have the force of law. I will not therefore belabor this issue. Suffice it to say that in light of my findings in respect of the 1st issue, the

refusal to renew the applicant's practicing certificate because of use of a generic name, infringes on his constitutional right to practice his profession, since he cannot lawfully practice without a practicing certificate.

I have also found under Issue (1) above, that the refusal to renew the applicant's certificate under a generic name was discriminatory, since so many other accountants are practicing under generic names. On the right to a fair hearing, and just treatment by administrative bodies in making administrative decisions, there is nothing on record to show that the council sat and considered the appeal of the applicant.

The court's view is that at the level when the Secretary to the Respondent is considering an application for renewal, he needs not invite the applicant for a hearing before reaching any decision even when it is adverse to the applicant.

When it comes to an appeal, however, it would be just and fair that the appellate body hears from the appellant before taking a final decision on whether or not to confirm the rejection of the appellant's application for a practicing certificate. If the Council sat and considered to appeal without hearing the appellant, I would say that it was unfair on the part of the appellant, and in violation of Articles 44(c) and 42 of the Constitution. This is because the Council would have heard from the Secretary, who rejected the application, who is also Secretary to the Council would have been heard from.

Issue No. 3;

Whether there are any remedies available to the parties.

Following from foregoing submissions in Issue 1 and 2 (a), (b) and (c) it is clear that the applicant's Constitutional rights have been violated by the respondent. The applicant is therefore entitled to remedies against the respondent as provided for under.

On the question of compensation under Article 50, Counsel for the applicant did not guide court on the justification and extent of the compensation sought. However, it is clear the applicant has lost some income during the period he has been denied a Practicing Certificate, which is over a year since the letter of rejection is dated 17/9/2013 (Annexure 'B' to the affidavit in support of the application).

I will allow a nominal payment of Shs. 30million as compensation to the applicant in this respect.

In conclusion, the following remedies are granted:

1. A declaration that the respondent's refusal to renew the applicant's practicing certificate under a generic name of his choice is illegal.

- 2 (a) That the applicant's right to practice his accountants profession under the business name of his choice has been violated by the respondent.
 - b) That the applicant's right to equality and freedom from discrimination has been violated by the respondent.
 - c) That the applicant's right to a just and fair treatment has been violated by the respondent.
3. The respondent is hereby ordered to renew the applicant's practicing certificate under the name "Continental Partners", unless there is any other lawful reason for not doing so.
 4. Compensation of Shs. 30million in accordance with Article 50 (1) of the constitution for the period the applicant has spent without practicing his profession.
 5. Costs of the application be paid to the applicant by the respondent.

Elizabeth Musoke

JUDGE

19/01/2015