

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANEOUS APPLICATION No. 0912 OF 2016
(Arising from Miscellaneous Cause No. 0241 of 2016)

PATRICIA MUTESI ::: APPLICANT

Versus

ATTORNEY GENERAL ::: RESPONDENT

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING:

This is an application for discovery/production on oath of documents in custody of the Public Service Commission for inspection and photocopying. The application is brought by Chamber Summons under Section 98 of the Civil Procedure Act, Rule 9 of the Judicature (Judicial Review) Rules 2009 and Order 10 rules 12, 14 and 24 of the Civil Procedure Rules.

The orders that the applicant seeks are that:

1. The Public Service Commission do make discovery/production on oath the following documents in its custody and do avail them to the applicant for inspection and photocopying:
 - a) The submission to fill a vacancy made by the Ministry of Justice and Constitutional Affairs to the Public Service Commission (PSC) on or about 13th November 2015, in respect of the vacant positions of Principal State Attorney and Commissioner for Civil Litigation Line Ministries.
 - b) The Instrument of appointment appointing Mr. Martin Mwambutsya as Commissioner for Civil Litigation (Line Ministries).

- c) The advice given by the Public Service Commission to the appointing Authority in respect of the appointment of Mr. Martin Mwambutsya as Commissioner for Civil Litigation.
 - d) A letter Referenced PO/23 dated 11th May 2016 from the appointing Authority to the Chairman Public Service Commission to regularize the appointment of Mr. Martin Mwambutsya as Commissioner for Civil Litigation.
 - e) The relevant Minute of the Public Service Commission issued under section A-C paragraph 10(a) of the Standing Orders affecting the appointment of Mr. Martin Mwambutsya as Commissioner for Civil Litigation (including Part 1 of the said Minute which was sent to the Permanent Secretary, Ministry of Public Service for implementation.
2. The Solicitor General do make discovery/production on oath the following documents which are in the possession of the Ministry of Justice and Constitutional Affairs , and do avail them to the applicant for inspection and photocopying:
- a) A letter Referenced PO/23 dated 11th Mary 2016 from the appointing Authority to the Chairman Public Service Commission, copied to the Solicitor General advising the Commission to regularize the appointment of Mr. Martin Mwambutsya as Commissioner for Civil Litigation, and;
 - b) A letter dated 16th June 2016 from the Minister of Justice and Constitutional Affairs to the Solicitor General directing that Mr. Martin Mwambutsya be assigned the duties for Commissioner for Civil Litigation.
3. An order directing the respondent to pay the costs of this application.

The grounds of the application are stated in the amended Chamber Summons and expounded in the affidavit of the applicant in support of the application dated 18th November 2016. They are that:

- (i) The applicant has filed Miscellaneous Cause No. 241 of 2016 seeking orders *inter alia*, to quash the decision of the appointing authority to issue the instrument of appointment appointing Mr. Martin Mwambutsya as a Commissioner for Civil Litigation; and to quash the decision of the Minister of Justice and Constitutional Affairs contained in a letter dated 16th June 2016, directing the Solicitor General, to assign Martin Mwambutsya the duties for Commissioner for Civil Litigation.
- (ii) That the documents are in custody of the Public Service Commission and Ministry of Justice and Constitutional Affairs.
- (iii) The Secretary of Public Service Commission and the Solicitor General of the Ministry of Justice and Constitutional Affairs both declined to avail the applicant copies of the documents.

The respondent opposed the application and filed an affidavit in reply by Mr. Dennis Bireije, Ag. Director of Civil Litigation dated 24th November 2016. The applicant also filed a reply to the supplementary affidavit in support of the application. On 27th January 2017 the respondent filed a reply to the supplementary affidavit which was sworn by Mr. Ojambo Bichachi, a State Attorney in the Directorate of Civil Litigation.

During the hearing of this application, Mr. Kabiito Karamagi appeared for the applicant and Mr. Madete appeared for the respondent.

I have considered the application, the law applicable, the affidavits and submissions of respondent's Counsel.

Discovery is a category of procedural devices employed by a party to a civil or criminal action, prior to trial, to require the adverse party to disclose information that is essential for the preparation of the requesting party's case and which the other party alone knows or possesses. It is a device used to narrow the issues in a law suit or obtain evidence not readily accessible to the applicant for use at trial and/or ascertain the existence of information that may be introduced as evidence at trial provided it is not protected by privilege.

Public policy considers it desirable to give litigants access to all material facts not protected by privilege to facilitate the speedy and fair administration of Justice. Discovery is contingent upon a party's reasonable belief that he or she has a good cause of action or defence. See: **Karuhanga & Anor Vs Attorney General & 2 Ors MISC. CAUSE NO. 0060 OF 2015, [2015] UGHCCD 39 (28 May 2015);**

In view of the above clear objects of discovery, a party seeking for a production of documents from the other party must be before the Court to which the application is made and the suit must have pending issues for determination by that court. The document sought must be documents relevant to the determination of the pending suit before Court. This position is born out in the Law under the provisions of Order 12 rule 12 (1) of the Civil Procedure Rules and Order 10 rule 14 of the Civil Procedure Rules.

Order 10 rule 12 (1) of the Civil Procedure Rules provides that:

“(1) Any party may, without filing any affidavit apply to the Court for an order directing any other party to the Suit to make a discovery on oath of the documents, which are or have been in his or her possession or power relating to any matter in question in the Suit.”

And Order 10 rule 14 of the Civil Procedure Rules provides that;

“The court may, at anytime during the pendency of a suit order the production by any party to the suit, upon oath, of such documents in his or her possession or power relating to any matter in question in the suit, as the court shall think right.....”

It is an obvious fact that there is a Miscellaneous Cause for Judicial Review pending before this court different from this application, with a clear cause of action with issues to be resolved by this Court between the parties. The Miscellaneous Cause is not an interlocutory application.

It is also trite law that court will deny discovery if the party is using it as a fishing expedition to ascertain information for the purpose of starting an action or developing a defence. A court is responsible for protecting against the unreasonable investigation into a party’s affairs and must deny discovery if it is intended to annoy, embarrass, oppress or injure the parties or the witnesses who will be subjected to it. A court will stop this discovery when used in bad faith and if the information to be produced is not protected by privilege.

On what amounts to a fishing expedition I will refer to the case of ***Gale Vs Denman Picture Houses Ltd [1930] KB 588, 590*** per Lord, Scrutton L. J relied upon by the respondent wherein he held *inter alia* thus:

“A plaintiff who issues a writ must be taken to know what his case is. If he merely issues a writ on the chance of making a case he is issuing what used to be called a “Fishing Bill” to try to find out whether he has a case or not. That kind of proceeding is not to be encouraged. For a plaintiff after issuing his writ but before delivering his statement of claim to say, “show me the documents which may be relevant so that I may see whether I have a case or not” is most undesirable proceeding.”

In the instant case, the applicant is seeking for production of documents by the Public Service Commission and the Solicitor General relating to the appointment of Mr. Martin Mwambutsya.

According to Section 19 of the Public Commission Act No. 11 of 2008 it is enacted as follows:-

“19. Privilege of communication.

Subject to the Constitution, but notwithstanding any applicable law, unless the Chairperson, or in his or her absence the Deputy Chairperson, consents in writing, no person shall, in any legal proceedings, be permitted or compelled to produce or disclose any communication, written or oral, between –

- (a) the Commission or any member or officer of the Commission and the President, the Vice-President, a Minister, any Commission established by the Constitution or any member or officer of any such Commission or any other Government Institution or a public officer; or***
- (b) any member or officer of the Commission and the Chairperson; or***
- (c) a member or officer of the Commission and another member or officer of the Commission, in the exercise of or in connection with the exercise of the functions of the Commission.***

My interpretation of this section implies that whatever the applicant seeks to discover from the Public Service Commission is privileged information. Court cannot permit or compel production or disclosure of any communication, written or oral between the Public Service Commission and persons mentioned in that Section who include the President, Vice President, a Minister, any Commission established by the Constitution or Public Officer including the Solicitor General. The only exception and only way that the information may be got is if the Chairperson or in his or her absence the Deputy Chairperson of the Public Service consents in writing. The applicant has not availed this Court with such consent.

Whereas it is true that Judicial Review applications are permitted in respect of proceedings or actions of the Public Service Commission Act but disclosure is restricted by Statute which is still in force. Improper disclosure is in fact an offence under Section 23 of the Public Service Commission Act.

In view of the above clear legal provisions which are still in force, I decline to make the orders sought by the applicant as outlined in the ruling except for the order sought in 2 (b) which is in respect of a letter dated 16th June 2016 from the Minister of Justice and Constitutional Affairs to the Solicitor General directing that Mr. Martin Mwambutsya be assigned the duties for Commissioner for Civil Litigation. The Solicitor General should make discovery/production on oath this document and do avail it to the applicant for inspection and photocopying because it is not privileged.

Apart from the above request in 2 (b), the rest of the orders requested for are dismissed.

In view of the existing employer/employee relationship existing between the parties to this application, I will make no order as to costs.

I so order.

Stephen Musota

J U D G E

29.03.2017