THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. O9 OF 2009

[Appeal against the ruling of Hon. Lady Justice M.S. Arach –Amoko dated 6th February, 2009 in Civil Application No. 160 of 2008 at High Court Kampala].

HIS WORSHIP AGGREY BWIRE :::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

1. **ATTORNEY GENERAL**
2. **JUDICIAL SERVICE COMMISSION :::::::::::::::::: RESPODENTS**

CORAM:

HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON. MR. JUSTICE S.G. ENGWAU, JA

HON. MR. JUSTICE A.TWINOMUJUNI, JA

JUDGMENT OF A.E.N. MPAGI-BAHIGEINE, JA

This appeal is against the Ruling and orders of the High Court dismissing the appellant's application for a judicial review.

The agreed facts are the following. The appellant, His Worship Aggrey Bwire, was at the material time stationed at Nabweru court as a Magistrate Grade I. He was the in-charge of the station. On 25-02-08 the Chief Registrar, acting on the directive of the Judicial Service Commission, hereinafter referred to as the 2nd respondent, interdicted him. The disciplinary committee of the 2nd respondent, hearing the matter, leading to his interdiction was constituted of three members.

The appellant being aggrieved by the act of interdiction and the way the judicial service commission was proceeding, applied for a judicial review in the High Court. The application was dismissed with costs. Hence this appeal.

The memorandum of appeal comprises 13 grounds, namely that:

1. **The learned trial Judge misdirected herself on a point of law when she failed to hold that Regulation 14 (1) of the Judicial Service (Complaints and Disciplinary Proceedings) Regulations (SI 88 of 2005) is ultra vires and in contravention of S. 9 (2) and (6) the Judicial Service Act thereby occasioning miscarriage of justice to the appellant.**

2. **The learned trial Judge erred in law and fact in holding that the second respondent's meeting of 14th February, 2008 which recommended the interdiction of the appellant had the requisite quorum.**

3. **The learned trail Judge erred in law and fact when she failed to rule that that the second respondent's meeting of 14th February 2008 which recommended the interdiction of the Appellant lacked the requisite composition and constitution.**

4. **The learned trial Judge misdirected herself when she failed to consider and rule on whether interdiction or proposal to remove the appellant from performance of his judicial duties was a matter of discipline envisaged under S. 9 (6) of the Judicial Service Act and thus arrived at wrong conclusions.**

5. **The learned trial Judge misdirected herself when she held that since the appellant did not raise any objection on the question of quorum before the Disciplinary Committee of the Second respondent, he could not raise it in an application for judicial review.**

6. **The learned trial Judge misdirected herself when she held that since the appellant had a right of appeal against the decisions of the second respondent, the remedy of**

judicial review was not available to him and thus occasioned miscarriage of justice to the appellant.

7. **The learned Judge erred in law and in fact when she ignored or struck out the appellant's supplementary affidavit without taking into consideration the special circumstances under which it was made.**
8. **The learned trial Judge misdirected herself in law and fact when she completely failed to consider that the minutes of the meeting under which the appellant was interdicted, was on the face of the record, tainted with grave contradictions and inconsistencies, and with fundamentally irreconcilable flaws, thereby occasioning miscarriage of justice.**

9. **The learned trial Judge erred in law and fact when she failed to apply the law on judicial review to the facts before her and thus arrived at a wrong conclusion which occasioned miscarriage of justice to the appellant.**

10. **The learned trial Judge erred in law and fact when she failed to consider and rule on grounds 6, 7, 8, 9, 10 and 11 of the appellant's/applicant's application with were properly before her.**

11. **The learned trial Judge erred in law and fact when she held that a plea of judicial immunity and judicial independence was not available to the appellant without considering the appellant's particular complaints and grievances vis-à-vis the claim for judicial immunity and judicial independence.**

12. **The learned trial Judge misdirected herself and thereby occasioned miscarriage of justice to the appellant when she ignored the appellant's evidence and arguments and only considered the evidence and arguments for the respondent in isolation, thereby arriving at a wrong conclusion.**

13. **The learned trial Judge erred in law and fact when she failed completely to adequately evaluate, scrutinize and weigh the evidence on record and thus arrived at a wrong conclusion.**

At the hearing of this appeal, Mr. David Sempala represented the appellant while Ms. Margaret Nabakooza, Senior State Attorney, appeared for the respondents.

Mr. Sempala prayed court to rely on his filed written submissions, and on the agreed issues only.

Ms. Nabakoza orally addressed us and prayed court to note that at the time of the scheduling conference the appellant was on interdiction but that as at the time of hearing this appeal he had already been dismissed.

She also prayed court to rely on the respondents' conferencing notes as well.

For the appellant Mr. Sempala argued grounds 1, 2, 3 and 4 together.

The contention was that the Disciplinary Committee which sat on 14-2-2008 and decided to interdict the appellant comprised three members only. It was therefore not properly constituted. In this regard **Regulation No. 14 (1)** of the Judicial Service (Complaints and Disciplinary Proceedings) **Regulations 2005 (S. 1.88/2005**) is ultravires and contravenes **sections 9 (1), (2)** and (**6) of the Judicial Service Act**. Learned counsel submitted that the subsidiary legislation purports to supersede, override and or modify the parent Act by substituting the quorum of at least six members of the commission provided for under **S.9 (2) and (6)** of **the Judicial Service Act** with only three members. It is a cardinal rule of statutory interpretation that the provisions of a subsidiary legislation cannot supersede, override or modify the parent legislation. He relied on **William Wade on Administrative Law, 4th Ed. (1977) page 710 Law, 4th Ed. (1977)** page 710, and **Commission for customs and Excise Vs. Cure and Deeley Ltd. (19620 IQB 342,** for this assertion**.**

He further pointed out that the true intent of the Legislature in enacting **S. 9 (1), (2)** and **(6) of the Judicial Service Act** was to ensure or enable judicial officers to enjoy security of tenure and to entrench that position in law, considering the gravity of the situation that would befall a judicial officer removed from office – **Barnwell v. A.G of Guyana (1994) 3 LRC 30 and 31**. Thus the parent Act requires that in order to discipline a judicial officer or remove him from the performance of his judicial functions, at least 2/3 majority of the members of the judicial service

commission besides the Attorney General, the Chief Government Legal Advisor had to be present. He contended that the learned judge erred when she held that **Regulation 14 (1) of the Judicial Service** (Complaints and Disciplinary Proceedings) **Regulations S.1 88 of 2005** is intra vires and not in contravention of **S.9 (2) (6) and (9) of the Judicial Service Act**. The second respondent improperly delegated its powers to a body comprising three members only thus rendering the decision of the committee null and void, he submitted.

Ms. Nabakooza first responding to ground No. I pointed out that **article 146 (1), (2)** and **(3)** establishes the Judicial Service Commission, and **article 147** lays down the functions of the Judicial Service Commission, which include disciplinary control over judicial officers as well as receiving people's complaints concerning judicial officers. The commission is the link between the people and the judiciary.

She agreed with the learned judge that the 2nd respondent is mandated by law under **S. 9 (8) of the Judicial Service Act** to regulate its own procedure. The 2nd respondent is thus empowered under **S. 27 of the Act** to make regulations in relation to the discharge of its functions under the constitution and under the Judicial Service Act. It is therefore in furtherance of this that the Judicial Service (Complaints and Disciplinary Proceedings) **Regulations S.I 88 of 2005** were enacted. Clearly by virtue of this mandate, the Disciplinary Committee of the 2nd respondent was duly constituted to conduct disciplinary proceedings of the appellant. It was the respondents' submission, therefore, that the finding of the learned judge that Regulation **14(1) of S.I 88/2005** is intra vires the parent Act, was proper and correct.

Proceeding to argue grounds 2, 3 and 4, Ms. Nabakooza pointed out that under **Regulation 2** of the **Judicial Service** (**Complaints and Disciplinary Proceedings) Regulations Section I 88 of 2005**, Disciplinary Committee means the Disciplinary Committee of the Judicial Service Commission. The Disciplinary Committee therefore is part of the 2nd respondent. Under **Regulation 13(2) of S.I 88/2005**, the Judicial Service Commission delegates its functions to the committee. **Regulation 14 (1),** provides that the coram of the Disciplinary Committee is 3 members when sitting to hear a complaint against a judicial officer. There was, therefore, a requisite coram when the appellant was being interdicted. Learned counsel further pointed out that an interdiction is a preliminary measure to pave way for proceedings or inquires. This was the case, to pave way so as to inquire into the facts deponed in the affidavit of John Kashaka

Muhanguzi. She submitted that **regulation 25 of S.1 87/2005** authorizes the 2nd respondent, in case of a further misconduct by the judicial officer, to direct the Chief Registrar to interdict the officer as was done in this case. It was within the law. She prayed court to dismiss these grounds of appeal, 1, 2, 3 and 4.

The learned Judge found that:

"According to the certified copy of the minutes attached to Mr. Kashaka's affidavit, the quorum of the Disciplinary committee meeting held on the 14th February, 2008 in the commission's board room comprise of:

1. **Professor Ssempebwa E F. Chairperson**
2. **Hon. Justice CM. Kato Member**
3. **Hon. Peter Jogo Tabu Member.**

On that basis court finds that there was a quorum; and the requisite composition as per Regulation 14 (1) (2) and S.1 88 of 2005, when the Disciplinary committee made the decision to interdict the applicant. Court also finds that the Regulation is intra vires the powers of the commission under section 2 of the Act. The commission has the powers to delegate its functions under the law and did delegate them to the Disciplinary Committee"

I agree with Ms. Nabakoza that the learned judge reached the correct finding.

It is clear that **Section 27 of Judicial Service Act,** amongst other things, empowers the commission to make regulations for discharging its functions as well as regulating the conduct of its disciplinary proceedings. In pursuance of this mandate the commission made the **Judicial Service (Complaints and Disciplinary Proceedings**) **Regulation S.1 88 of 2005**. **Regulation 13 (2)** thereof provides for the diffusion of its functions of hearing, prosecuting and determination of complaints to its Disciplinary Committee. In this regard **Regulation 14 (1**) **of the Judicial Service** (Complaints and Disciplinary Proceedings) **Regulations S. 1 88 of 2005 provides**:

"14 (1) subject to regulation 13 (2), the Disciplinary Committee of the commission, shall comprise at least three members who shall also constitute the quorum"

For a regulation to be intra vires or ultra vires, regard must be had to the nature and object and scheme of the parent Act. – see **Commission For Customs and Excise v. Cure & Deely Ltd (1962) IQB 342** where the matter before court was whether **Regulation 12** of the Purchase Tax Regulations 1945 was ultra vires **section 33 (1) of the Finance (No. 2) Act 1940. SACHS** J. had this to say:

"*To my mind a court is bound before reaching a decision on the question whether a regulation is intra vires to examine the nature, objects, and scheme of the piece of legislation as a whole, and in the light of that examination to consider exactly what is the area over which powers are given by the section under which the competent authority is purporting to act."*

In the instant case, the object and nature of the **Judicial Service Act** is found in **Articles 147 and 148 of the Constitution** under which the Judicial Service Commission is empowered to, inter alia, receive and process people's complaints against judicial officers in the administration of justice generally making sure that judicial immunity and judicial independence is not abused, violated or interfered with. It is in light of this that Parliament enacted the **Judicial Service Act** for facilitating and regulating the appointments of judicial officers by the President and the Judicial Service Commission. That being the case, the Judicial Service Commission, because of its wider mandate, is empowered by **section 27** of this Act to make regulations to facilitate the prompt and speedy discharge of its functions.

Hence, by regulation **13(2) of Statutory Instrument No. 88 of 2005** the commission may delegate its functioning of hearing, prosecution and determination of complaints to the Disciplinary Committee of the commission.

Pursuant to the foregoing, as pointed outabove **regulation 14** sets out the composition of the Disciplinary Committee as follows:

"*14 (1) subject to regulation 13 (2), the Disciplinary Committee of the commission shall comprise at least three members who shall constitute a quorum.*

(2) The Chairperson and the two other members shall be nominated by the commission"

It is important to note, however, that it is the commission itself, under **regulation 12** that conducts investigations into the complaint submitted to it. It is only after all the investigations are complete that the commission may delegate the hearing to the Disciplinary Committee. This committee is not an extraneous body as the appellant seems to imagine, rather it is part and parcel of the commission which continues to oversee the committee's progress as is stated in **Regulation 17** thus:

"17 (1) where during the course of the hearing if it appears to the commission that –

(a) **the complaint is incomplete or defective**

(b) **the evidence discloses or is likely to disclose other complaints not referred to in the complaint, or**

(c) **the complaint requires to be amended in any other way,**

the commission may permit such amendment to be made provided there is no miscarriage of justice.

Regulation 19 goes on to clarify:

19. (1) …….

(2) The commission shall handle complaints in the best interest of the public and of the Judiciary.

The foregoing therefore is the objective of the Judicial Service Act. Consequently the fears expressed by the appellant are unwarranted.

Most importantly the decision taken by the committee was only to interdict the appellant. This is merely an interim disciplinary measure taken against an officer pending a further determination of the complaint against him or her by the commission.

I would consider grounds 1, 2, 3 and 4 to be devoid of any merit and would dismiss them forthwith.

I would thus endorse the Judge's finding regarding the same grounds that regulation 14 is intra vires the Judicial Service Act. The commission properly delegated the hearing to the Disciplinary Committee leading to the appellants interdiction. Its findings were unassailable.

Regarding grounds 5 and 6 it was argued for the appellant that the quorum of the Disciplinary Committee being a matter of law the appellant did not have to plead it before the meeting to be availed the benefit of a fully constituted quorum, and that the learned judge seriously misdirected herself on this point.

This has been sufficiently dealt with above.

It has no merit.

Ground 5 is thus dismissed forthwith.

Concerning ground 6 that the appellant had a legal right to make an application for judicial review once he alleged that his trial before the disciplinary committee of the 2nd respondent was tainted with illegality and nullity and did not have to wait till the end of the proceedings in order to appeal.

For the respondents, Ms. Nabakooza, learned counsel, agreed with the learned Judge that since the proceedings before the committee were not irregular, there was no ground for interfering especially when a right of appeal existed under Regulation 18 of S. I 88 of 2005.

It is trite that judicial review can only be granted on three grounds namely:

Illegality; irrationality and procedural impropriety – **Council of Civil Service Unions v. Minister for the Civil Service (1985) AC. 374.**

The first two grounds are known as substantive grounds of judicial review because they relate to the substance of the disputed decision. Procedural impropriety is a procedural ground because it aims at the decision – making procedure rather than the content of the decision itself. In view of what I have stated above, I do consider that none of the aforementioned grounds were applicable to the proceedings and or decision of the committee. The application was superfluous the learned judge was correct to dismiss it. I would also dismiss ground 6.

Turning to ground 7 Mr. Sempala contended that the learned Judge improperly ignored and/or struck off the appellant's supplementary affidavits without considering the special circumstances under which they were made.

For the respondents, Ms. Nabakooza agreed with the learned Judge's position when the Judge observed:

"There is on record an affidavit filed by the applicant on the 30th June 2008, entitled 'Supplementary Affidavit' I have ignored this affidavit because it was filed after the close of the written submissions, which is well outside all the known rules of our Civil Procedure. Besides, it raised new issues to which the respondent had no opportunity to respond. It would have therefore been unfair for court to rely on such a document of the respondent without giving the respondent also an opportunity to respondent, thus, resulting into an endless litigation. The basic rule is that there must be an end to litigation and the Civil Procedure rules were made for that purpose".

I cannot fault the learned Judge over this finding. This is common practice and procedure. New matters cannot be raised haphazardly after closure of the pleadings except on application with leave of court; otherwise the rules of procedure will be rendered useless rendering the proceedings chaotic. Most importantly litigation has to come to an end as the judge quite rightly pointed out.

I would also dismiss ground 7.

Ground No. 8 is to the effect that the learned judge misdirected herself in law when she completely failed to consider the minutes of the meeting under which the appellant was interdicted, which on the face of the record, were tainted with fraud, contradictions, inconsistencies and with fundamentally irreconcilable flaws, thereby occasioning a miscarriage of justice to the appellant.

This complaint, as rightly pointed out by Ms. Nabakooza, is the gist of the supplementary affidavit belatedly and surreptitiously put on record by the appellant, outside the correct procedure. This issue has been covered under ground 7 above which is disallowed.

Grounds 9 and 10 were to the effect that the learned Judge failed to apply the correct legal principles on an application for judicial review otherwise she would have found that the appellant was not supposed to have been charged by the 2nd respondent with the alleged offences arising from a decision reached by the magistrate while exercising judicial power.

I have already covered the grounds upon which the learned Judge would have granted the application for judicial review but which were non existent on the record. The Judge thoroughly examined the said grounds and found the appellant's case did not warrant a review.

Under ground 11, the appellant's complaint was that the learned Judge failed to consider the applicability of the plea of judicial immunity and judicial independence to the appellant vis a vis the complaints against him.

It was asserted for the appellant that the proceedings under which the appellant was interdicted were conducted in breach of the rules of natural justice in that the prosecutor and other nonmembers of the commission were allowed to participate in the absence of the appellant.

For the respondents it was submitted that the learned Judge sufficiently considered the issue of judicial immunity and judicial independence. It was recognized that the appellant is protected in the due performance of his duties. However, if he misconducts himself as was alleged then, he would lose the protection. Such protection is not absolute.

The learned Judge exhaustively dealt with this aspect of the matter thus:

"In the applicant's case, Mr. Kashaka has deponed, and the applicant has not denied that he did appear before the Disciplinary Committee on diverse days between June and October 2007. He deponed in paragraph 5 (d) of his affidavit in support:

"(d) That I have been compelled to appear before three members of the commission instead of 6 as required by the law in PRI/67/95/8403 by Nanteza Nakate and in PRI/67/95/106 by Ntale Andrew on the following dates: 30/07/07, 30/08/07, 1/10/07 and12/03/08.

It is also not disputed that the applicant ever attended the hearing and cross examined witnesses and adduced evidence on his own behalf, but at no time did he object to the legality of the regulations under which he was charged, or the competence of the committee conducting the hearing.

As for judicial immunity, the applicant is indeed protected while lawfully exercising his judicial functions. If he misconducts himself as alleged, however, he, like any other judicial

officer would be subject to disciplinary proceedings in accordance with the law. Judicial immunity is not absolute…."

I think I need to briefly comment on the principles of judicial immunity and judicial independence so as to throw more light on the appellant's situation.

Judicial independence or immunity is not a privilege of the individual judicial officer. It is the responsibility imposed on each officer to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. The core of the principle of judicial independence is the complete liberty of the judicial officer to hear and decide the cases that come before the courts and no outsider be it government, individual or even another judicial officer should interfere, with the way in which an officer conducts and makes a decision – **RV Beauregard, Supreme Court of Canada, (1987) LRC (Const) 180 at 188 per Chief Justice Dickson.**

Independence and impartiality are separate and distinct values. They are nevertheless linked as mutually reinforcing attributes of the judicial office. Impartiality must exist both as matter of fact and as a matter of reasonable perception. There is absolute immunity once the foregoing is adhered to.

However, the perception that a judicial officer is not impartial may arise in a number of ways, for instance through a perceived conflict of interest, the officer's behaviour on the bench or his or her associations outside the court.

With the above in mind, the appellant was charged with being untrustworthy and lacking integrity in private and public transactions contrary to **regulation 23 (g) of the Judicial Service Commission Regulations S.I 88 of 2005**.

On count II he was charged with abuse of judicial authority contrary to **Regulation 23 (m) of the JSC. Regulations S.I 88/2005**. On count III he was charged with conducting himself in a manner prejudicial to the good image, honour, dignity and reputation of the service contrary to **Regulation 23 (a) JSC. S.I 88/2005**.

He was interdicted by the Disciplinary Committee pending full inquiries and investigations and final decision by the Judicial Service Commission which eventually dismissed him from service.

In view of what I stated above, it cannot be said that under the circumstances of his case the principles of judicial independence and immunity could have applied to him. Certainly not.

By his own conduct he had disqualified himself from their protection.

I would consider that this adequately disposes of this entire appeal.

Since my Lords S.G. Engwau and A. Twinomujuni J.J.A both agree the appeal stands dismissed with no order as to costs.

Dated at Kampala this …14th ….day of…December… 2009.

Hon. Justice A.E.N.Mpagi-Bahigeine
JUSTICE OF APPEAL

JUDGMENT OF ENGWAU, JA

I have had the benefit of reading, in draft, the lead judgment prepared by Hon. Mpagi-Bahigeine, JA. I concur with her reasons and conclusions that the appeal be dismissed with no order as to costs for lack of merit.

Dated at Kampala this …**14th** ..day of …**December**...**2009**

S.G.Engwau
JUSTICE OF APPEAL

JUDGMENT OF TWINOMUJUNI, JA

I have had the benefit of reading the judgment, in draft, of her Lordship Justice A.E.N.Mpagi-Bahigeine, JA. I concur and I have nothing useful to add.

Dated at Kampala this …**14th**…day of …..**December**……**2009**

5

Hon Justice Amos Twinomujuni

JUSTICE OF APPEAL