THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGAND AT KAMPALA
(CIVIL DIVISION)

MISC. APPLICATION NO. 320 OF 2021
(ARISING FROM MISCELLANOUS CAUSE NO. 131 OF 2021)

IN THE MATTER OF S. 36 OF THE JUDICATURE ACT CAP 13 LAWS OF UGANDA 2000

AND

IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS OF JUDICIAL REVIEW OF CERTIORARI, MANDAMUS, PROHIBITION AND INJUNCTION

CLAIRE S. KAWEESA :: APPLICANT
VERSUS
1.UGANDA FREE ZONES AUTHORITY
2. FREDERICK KIWANUKA :: RESPONDENTS

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

On the 26th of April 2021, the Applicant filed an application seeking for prerogative orders of judicial review of Certiorari, Mandamus, Prohibition and Injunction vide Miscellaneous Cause No. 131 of 2021 against the Respondents. Pending the hearing of the said Cause, the Applicant lodged this application by way of Chamber Summons under *Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, and Order 41 Rules 1 and 9 of the Civil Procedure Rules SI 71-1* seeking orders that:

a) A temporary injunction doth issue restraining the Respondents, their agents, legal representatives, assignees or any one claiming under the Respondents from implementing the Respondent's Board decision warning the Applicant on unfounded allegations of dishonesty contrary

to Section 5.8 of the Respondent's Human Resource Policy and Procedures Manual 2019; and imposing a Performance Improvement Plan in the employment Contract of the Applicant until the final determination of the Main Cause No. 131 of 2021.

b) Stopping the Respondent, from dismissing the Applicant or taking any other adverse action based on the impugned allegations of forgery, dishonesty and falsification of records, as well the impugned Performance Improvement Plan until determination of the main Miscellaneous Cause.
c) Costs of this application be provided for.

The grounds of the application are set out in the Notice of Motion and in an affidavit in support of the application deponed to by the Applicant plus an additional affidavit by the same deponent. The application was opposed by the Respondent through an affidavit in reply deponed to by Hez Kimoomi Alinda, the Executive Director of the 1st Respondent plus a supplementary affidavit in reply by the same deponent. The Applicant also filed an affidavit in rejoinder.

Brief Background

On 1st January 2016, the Applicant was appointed as the Manager Legal and Compliance of the Respondent Authority on a 4-year contract. The above contract expired on the 31st December 2019 and was renewed by the Respondent's Board on 1st January 2020 for a period of one year. The Applicant states that during that year to the time of bringing these proceedings, she also served as the head of the Directorate of Legal and Corporate Affairs upon termination of the contract of the substantive Director Legal and Corporate Affairs. Upon expiry of the above said one-year contract, the 1st Respondent's Board of Directors renewed the Applicant's employment contract for a period of two years effective 1st January 2021 subject to a six months Performance Improvement Period. During the period, the Applicant would be assessed on key tasks every three months.

The Applicant raised with the Respondents the issue of failure to follow procedure and the unfairness in the imposition of the Performance Improvement Plan but the Respondents refused to acknowledge receipt of her correspondence and she was, instead, issued an ultimatum to sign the contract. The Applicant signed the contract on 11th January 2021. It is stated by the Applicant that on 29th March 2021, she was summoned to the 1st Respondent's Board Meeting to clarify on the interpretation of a consent interim order signed by Mr. Julius Mukholi on behalf of the Authority on the 29th January 2020; which clarification she made. The Applicant was only shocked and surprised when she was issued a warning letter accusing her of "falsification of records/documents (forgery)" and "deliberate giving of false information" contrary to the 1st Respondent's Human Resources Policy and Procedures Manual.

The Applicant perceived that she was being victimized and thus filed the main Cause No. 131 of 2021 for judicial review.

Representation and Hearing

At the hearing of the application, the Applicant was represented by Ms. Lydia Tamale while the Respondents were represented by Ms. Byarugaba Kusiima. It was indicated by Counsel for the Respondents that the Respondents intended to raise some preliminary objections which had the effect of disposing of the main Cause and thus this application as well. It was agreed that the preliminary objections be heard and determined at the same time as the application for a temporary injunction. It was further agreed that the hearing proceeds by way of written submissions which were duly filed. I have considered the submissions of both Counsel in as far as they touch the issues that are before the court for determination.

Issues for determination by the Court

1. Whether the application for judicial review is time barred.
2. Whether the application is amenable to judicial review?
3. Whether the application for judicial review is barred as against the 2nd Respondent?
4. Whether the affidavit in reply to the application for a temporary injunction was deponed to without the requisite authority on the part of the deponent.
5. Whether the Applicant is entitled to grant of an order of a temporary injunction?
6. What remedies are available to the parties?

Resolution of the Issues

Issue 1: Whether the application for judicial review is time barred.

Submissions by Counsel for the Respondents

It was submitted by Counsel for the Respondents that the genesis of the performance improvement plan dated as far back as December 2020 and later, in January 2021. Counsel submitted that in as far as the performance improvement plan and the contract were concerned, the application was time barred having been filed in excess of the 3 months from the time of the occurrence of the incident and in absence of an application for extension of time. The application was therefore improperly before the court. Counsel relied on the provisions of *Rule 5 (1) of the Judicature (Judicial Review) Rules No. 11 of 2009* and the decision in ***Dawson Kadope vs Uganda Revenue Authority, HC MA. No. 40 of 2019***.

Applicant's Submissions

In reply, the Applicant did not contest the fact that the application was brought outside the three months' period stipulated by the law but sought to justify an exercise of the court's discretion to extend or ignore a strict application of the requirement as to time. Counsel relied on the decision in ***Philadelphia Trade & Industry Ltd vs Kampala Capital City Authority, HC Civil Revision No. 15 of 2012*** which in turn relied on the case of ***Kulou Joseph Andrew & 2 Others vs The Attorney General & 6 Others, HC Misc. Cause No. 106 of 2001*** for the submission that whereas Rule 5 (1) of the Judicature (Judicial Review) Rules provides for an application for judicial review to be made within three months from the date when the grounds of the application first arose, such a provision has been interpreted by this court to be directory and not mandatory; and that the said time limit was more intended to ensure expeditious determination of the application than to oust the jurisdiction of courts to hear the parties after the prescribed period.

Counsel for the Applicant further submitted that even if the time was to be construed strictly, the Applicant's challenge of the legality and rationality of the Warning Letter which was issued on 19th April 2021 cannot be construed to be out of time.

Court determination

Rule 5 (1) of the Judicature (Judicial Review) Rules, 2009 provides:

> *"Time for applying for judicial review*
>
> *(1) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the court considers that there is good reason for extending the period within which the application shall be made."*

The law is that time limitations are substantive provisions of the law and limitation of actions is not concerned with merits of the case. In ***Dawson Kadope vs Uganda Revenue Authority, HC MA. No. 40 of 2019*** while citing the decision in ***I.P Mugumya vs Attorney General, HC M.A No. 116 of 2015***, the court held that from the clear wording of the rule [5 (1)], failure to bring the application within the prescribed time and the failure to seek and obtain the court's order extending the time renders the application for judicial review time barred and therefore not amenable for judicial review. The court added that the general effect of the expiration of the limitation period is that the remedy is also barred.

I am in agreement with the above position of the law. This is because it is a long settled position of the law that provisions as to time limitation are usually strict and inflexible; such that litigation is automatically stifled after the fixed time has elapsed, regardless of the merits of a particular case. See: ***Hilton vs. Steam Laundry [1946] 1 KB 61 at p.81.***

It was argued by Counsel for the Applicant herein that the said provision has been interpreted by the Court to be directory and not mandatory; and that the said time limit was more intended to ensure expeditious determination of the application than to oust the jurisdiction of courts to hear the parties after the prescribed period. Counsel referred the Court to the decision in ***Philadelphia Trade & Industry Ltd vs Kampala Capital City Authority, HC Civil Revision No. 15 of 2012*** which in turn relied on the case of ***Kulou Joseph Andrew & 2 Others vs The Attorney General & 6 Others, HC Misc. Cause No. 106 of 2001***.

I have found the two cited decisions distinguishable on the one hand and not of great persuasive value on the other. In ***Philadelphia Trade & Industry Ltd vs Kampala Capital City Authority (supra)***, at page 5 of the Ruling, the court expressed its view as follows:

"I agree with the arguments by Counsel for the applicant that, the inherent power of the courts to ensure that the ends of justice are met should be exercised judiciously meaning that all circumstances surrounding a matter should be taken into account vis a vis the law. And where there are express provisions in a statute demanding that an act must be done within a particular period of time failing which court may enlarge the time for the doing of such a thing, when an aggrieved party does not do the thing contemplated and further does not move court to extend and/or enlarge the time for doing such a thing, he cannot hide behind the inherent powers of the court to remedy his dilatory conduct. The question whether the applicant is guilty of dilatory conduct in bringing this application in court shall be dealt with in this ruling hereinafter."

Then at page 6 of the same Ruling, the court went on to agree with the decision in ***Kulou Joseph Andrew & 2 Others vs The Attorney General & 6 Others (supra)*** that the time limitation in issue has been interpreted as being directory and not mandatory. In ***Kulou Joseph Andrew & 2 Others vs The Attorney General & 6 Others (supra)***, the Learned Judge held as follows:

"From my reading of the Judicial Review Rules in question, I get the impression that time limits therein are more intended to ensure expeditious determination of the applications for judicial review than to oust the jurisdiction of courts to hear the parties after the prescribed period. I am saying so because the rules do not state the legal consequences of failure of a party to comply with it. Like I said in *Wakiso Transporters Tours & Travel Ltd & Others Vs IGG & Others HCMC No. 0053 of 2010* ***(unreported), if the law maker intended it to be so strictly construed, it would have stated so in***

express terms. The issue in that case was the 56 days rule in Rule 7 thereof regarding filing of reply to the notice of motion."

The court went on:

"Even if court were to accept the suggested strict interpretation of Rule 5(1) in connection with this matter, I would still find, as I did in *Nampogo Robert & Anor Vs Attorney General HCMC No. 0120 of 2008,* ***that there is allowance under the said rule for court to exercise a discretion in favour of an applicant, where court considers that there is a good reason for extending the period within which the application shall be made. In the event of upholding the objection, the application would be struck out and the applicants would still be entitled to file yet another application for extension of time under Rule 5(1) in the sense that the alleged illegality would still subsist and the state of affairs would still have to be remedied. In a case such as this involving alleged violation of human rights, such a course would further serve to violate the human rights of the applicants. Given that our Constitution mandates courts to administer justice expeditiously and without undue regard to technicalities; and mindful of the fact that the administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights (****per Supreme Court in RE Christine Namatovu Tebajjukira [1992 – 93] HCB 85),* ***I am inclined to overlook the legal obstacle, in the greater interests of justice in accordance with Article 126 (2)(e) of the Constitution and Section 98 of the Civil Procedure Act, and allow the applicants to proceed with this application, on the understanding that the claims for wrongful termination are unaffected by the three months limitation period provided for under the said Rules and that a***

legality (sic) once brought to the attention of court cannot be swept under the proverbial carpet albeit the application having been filed outside the prescribed time limit."

I have decided to quote the above statement of the Learned Judge extensively in order to bring out the reasoning that led him to the conclusion he did. It is clear to me that the court reached that decision based on the facts and circumstances of that particular case. I do not agree that the above statement was meant to be a general statement of the law. This is because where the law has set a time limit within which to bring an action, such time cannot be ignored or adjusted except in accordance with the law. Most especially, where the provision of the law gives a remedy as to what happens when a party is late, then such a party cannot ignore that remedy and cling onto invocation of the court's inherent power.

In the provision under consideration, it clearly gives a remedy to a party who is caught by time; which is, to move the court to consider extending the period within which to make the application. If an applicant indeed has reasonable cause to bring the application outside the set time, the law has already catered for him/her, and he/she ought to make use of the official route that has been lawfully provided instead of attempting to go through the window of asking the court to exercise substantive justice by bending clear and substantive provisions of the law unnecessarily.

On the facts before the Court, the major complaint by the Applicant in the judicial review application is the procedural impropriety on the part of the Respondents in the process of extending her contract for two years from January 2021 to December 2022. It is alleged by the Applicant that in the said contract, the Respondents, unfairly and without following procedure, imposed on the Applicant a performance improvement plan which was based on unrealistic targets and timelines. The Applicant avers that the above unfair

terms and processes were intended to victimize her and eventually push her out of the institution. The Applicant further states that the said intention was further exposed when the Respondents shockingly served her with a warning letter on allegations of dishonesty, well knowing that the said disciplinary offence is one of those offences for which the Applicant could be dismissed summarily. That is why the Applicant took the recourse to the Court.

According to the Applicant, she came to learn of the decision to impose the performance improvement plan upon her through the Contract. The contract was drawn effective 1st January 2021 and the Applicant signed it on 11th January 2021. On 8th January 2021, the Applicant wrote to the Respondents expressing her dissatisfaction with the unfairness and failure to follow clearly laid down procedure over the matter. The Applicant alleges that the Respondents ignored her correspondence and gave a deadline by which she should have signed the Offer Letter or else, it would be rescinded. The Respondent later on went ahead and served her with a warning letter which she construed as a sign of well calculated steps to malice her. She decided to bring the application for judicial review.

The question therefore is when, in the instant case, the grounds for judicial review first arose. It is contended by the Respondents that it was on 8th December 2020 when the 1st Respondent's Board sat and made the decision regarding the performance improvement plan. There is, however, no proof that this decision was communicated by the Respondents to the Applicant before January 2021 when the same was communicated to her through the Contact Offer Letter. There is evidence, however, that by 8th January 2021, the Applicant had received knowledge of the Contract Offer Letter and she made a response to it addressed to the Respondents. For all intents and purposes therefore, my finding is that the grounds for judicial review, in the instant case, first arose by 8th January 2021. The three months' period therefore expired by 7th April 2021. The application was filed on 26th April 2021, way outside time.

It was argued by the Applicant that the time started running after she was served with the warning letter on 19th April 2021. This is not true in as far as the major alleged procedural impropriety is in regard to the performance improvement plan. As such, even if I was to accept the argument that the warning letter establishes a different limb of the cause of action, it would not cure the time limitation; and still, the claim is not capable of establishing a distinct and independent cause of action. In any case, the date of service of the warning letter cannot be referred to as the "time when the grounds of the application first arose". That can only be a ground that subsequently arose and cannot be the basis for calculation of the relevant time limitation.

In my finding therefore, the present application for judicial review was brought outside time and without seeking and obtaining extension of time from the Court. For the above reasons, I have not been persuaded by the reasoning of my learned brothers in the two above cited decisions in ***Philadelphia Trade & Industry Ltd vs Kampala Capital City Authority (supra)*** and ***Kulou Joseph Andrew & 2 Others vs The Attorney General & 6 Others (supra)***. Rather, I am greatly persuaded by the decisions in ***Dawson Kadope vs Uganda Revenue Authority (supra)*** and ***I.P Mugumya vs Attorney General (supra)***, and do agree that from the clear wording of the *rule 5 (1) of the Judicature (Judicial Review) Rules, 2009*, failure to bring the application within the prescribed time and the failure to seek and obtain the court's order extending the time, renders the application for judicial review time barred and therefore not amenable for judicial review.

The above finding makes the application incompetent before the Court. Once an application is found incompetent, nothing can be done under it. It would therefore be inconsequential to deal with the other aspects raised herein. Further, once the judicial review application is incompetent before the Court, the application for a temporary injunction equally collapses with it. No option

therefore exists but to strike out the main Cause vide Misc. Cause No. 131 of 2021 and this application vide M.A No. 320 of 2021. The two said applications are therefore struck out accordingly. The Applicant is at liberty to follow the law and seek appropriate remedies. The Respondents will have the costs of these proceedings.

It is so ordered.

Dated, signed and delivered by email this 7th day of June, 2021

Boniface Wamala
JUDGE