

THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT
MBARARA

HCT-05-CV-M A-055-2009

IN THE MATTER OF ARTICLES 42 AND 50 OF THE CONSTITUTION,
SECTIONS 33 AND 36 OF THE JUDICATURE ACT CAP 13 (AS
AMENDED) AND S. 93 OF CIVIL PROCEDURE ACT CAP 71

AND

IN THE MATTER OF THE JUDICATURE JUDICIAL REVIEW RULES
2009

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL RELIEFS OF
CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF A DECISION BY THE PUBLIC SERVICE
COMMISSION DIRECTING IBANDA DISTRICT COMMISSION TO
RESCIND AND RE-ADVERTISE THE APPOINTMENT OF MR.
LAWRENCE G NUWAGIRA AS THE DISTRICT CHIEF FINANCE
OFFICER

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF
PROHIBITION RESTRAINING IBANDA DISTRICT SERVICE
COMMISSION FROM IMPLEMENTING AN ULTRA VIRES
DECISION/DIRECTIVE
LAWRENCE G NUWAGIRA.....APPLICANT

VS

1. PUBLIC SERVICE COMMISSION)
2. ATTORNEY GENERAL) RESPONDENTS
3. IBANDA DISTRICT SERVICE COMMISSION)

BEFORE : THE HON. MR. JUSTICE LAWRENCE GIDUDU

RULING

This is a Ruling on an application for Judicial Review by Lawrence G
Nuwagira against a decision of the Public Service Commission directing

Ibanda District Service Commission to rescind the appointment of the Applicant to the office of Chief Finance Officer.

The application is supported by the affidavit of the Applicant and relies on several Annexures thereto but most important of all is annexure "BIAS" which is a letter dated 7/4/09 from the Secretary Public Service Commission addressed to the Secretary Ibanda District Service Commission.

The application seeks the orders of Certiorari and Prohibition. The grounds for the application are numerous but can be summarized as follows:

1. That the Public Service Commission assessed the qualifications of the Applicant and advised the District Service Commission to rescind his appointment and re-advertise the job of Chief Finance Officer for the reason that the Applicant was not qualified to be appointed as such.
2. That the Applicant was not given a hearing before the decision was reached to advise Ibanda District Service Commission to rescind his appointment.
3. That the Public Service Commission fraudulently, illegally, unlawfully, in bad faith and exceeded its Constitutional Mandate.
4. That if the decision of the Public Service Commission is implemented, the Applicant would have been condemned unheard.

The Respondent Attorney General opposed the application and filed two affidavits in reply. The affidavit of Mrs. Kefeero who is the Deputy Secretary of the Public Service Commission contended that the Public Service Commission has the mandate to determine appeals from persons aggrieved by the decision of District Service Commissions and had enough information to make a decision on the matter without requiring the attendance of the Applicant.

The second affidavit is that of Dr. Munyiga Felician which defended the

decision of Ibanda District Service Commission to appoint the Applicant deponing that the advert for the job was made by the Ministry of Local Government and The District Service Commission was not at any fault. I understand Dr. Munyiga's affidavit to mean that no action is being contemplated to implement the guidance of the Public Service Commission. Mr. Kanduho who appeared with Ms Matovu Suwaya for the Applicant and Mr. Wanyama who appeared with Ms Betty Kalungi, Ms Kampire and Ms Anne Tusiime for the Respondents argued correctly, in my view, on the law governing the grounds upon which the courts may exercise their discretionary powers to review decisions of Public bodies.

Mr. Kanduho for the Applicant contended that the decision of the 1st Respondent was unlawful, illegal, harsh, in bad faith and ultra vires its mandate under Article 166 of the Constitution particularly Clause 1 paragraph (d). That the 1st Respondent guides and co-ordinates, District Service Commissions but has no power to direct District Service Commissions to dismiss employees.

Secondly, that the Applicant was not heard before a decision was taken to have his appointment rescinded.

Thirdly, that the 1st Respondent owed the Applicant a duty to grant him a fair hearing before a decision was made to have his appointment rescinded.

Finally, that the 3rd Respondent should as a result of the 1st Respondent's actions be prohibited from implementing the same.

Mr. Wanyama, Ag. PSA, who represented all the Respondents opposed the application submitting that it was premature and misconceived. He rested his arguments on two grounds.

The first is that the decision in the letter of 7/4/09 from the 1st Respondent was addressed to the 3rd Respondent and not the Applicant.

The second is that the 3rd Respondent has not yet implemented the decision and so the application is premature and misconceived.

He summed up the opposition to the application that there is no decision for this court to review since the Applicant is still the Chief Finance Officer of Ibanda Local Government.

I have carefully perused the motion, the affidavits in support and opposition and the accompanying annexures.

The genesis of this matter as can be deduced from the pleadings is that the Applicant applied for a job of Chief Finance officer advertized by the 3rd Respondent following an advert prepared by the Ministry of Local Government.

The Applicant emerged successful after interviews and was appointed Chief Finance Officer.

In January, 2009, one Munanura Milton Chris writing a concerned citizen wrote to the 1st Respondent complaining that the Applicant who had been appointed Chief Finance officer - Ibanda District fell short of the qualifications required for the job. In February 2009, the 1st Respondent wrote to the 3rd Respondent seeking its comments on the complaint and copies of the Advert plus the Applicant's academic and professional papers that supported his application for the job. In March 2009 the 3rd Respondent complained and forwarded the required information.

In April 2009 the 1st Respondent wrote to the 3rd Respondent communicating a decision it had taken that the Applicant was not qualified to hold the post of Chief Finance Officer because at the time of appointment, he had not served for a minimum of 3 years as Principal Finance Officer and that the advert to which he had responded was defective and contravened Government Standing Orders Chapter 1 Section A-h 2(1) (b-c).

The 1st Respondent then **ADVISED** the 3rd Respondent to **CONSIDER** rescinding the applicant's appointment and re-advertizing the job.

The issues that arise from the above facts are in my view:-

1. Whether the 1st Respondent acted ultra vires its powers or functions under the Constitution.
2. Whether the Applicant was entitled to be heard by the 1st Respondent before any decision was made.
3. Whether the Applicant is entitled to any remedies against the 1st and 3rd Respondents.

It was the submission of Mr. Kanduho, counsel for the Applicant that Article

166 (1) (d) of the Constitution gives the 1st Respondent the power to guide and co-ordinate District Service Commissions but not to direct them to dismiss employees meaning that the letter of 7/4/2009 from the 1st Respondent to the 3rd Respondent was ultra vires its powers.

Mr. Wanyama for the Respondents argued that the 1st Respondent has powers under Article 166 (1) (d) of the Constitution to do what it did and that in dealing with the 3rd Respondent, the Applicant was not entitled to be heard.

For a decision to be referred to as ultra vires, the decision maker or body making the decision must have exercised powers he/she/it does not have. The action must be outside the jurisdiction of the maker or the decision maker must have purported to exercise a power which he/she/it does not possess or else uses a power for a purpose other than the purpose for which the power was granted. For a public body to take a decision or to embark upon a decision making process without authority or power means that it acts ultra vires or without jurisdiction.

See Council of Civil Service Unions vs Minister for the Civil Service (1985) AC. 374 at p.410and

R. Vs Secretary of State for the Home Department (1994) Q.B. 198.

What did the 1st Respondent's communication amount to? The letter of 7/4/2009 provides part:-

“In view of the above, members decided that the District Service Commission be Advised to consider

- (i) Rescinding the appointment of Mr. Nuwagira George Lawrence as Chief Finance Officer Scale U1E
- (ii) Re-advertizing the post using the current person specifications.”

Mr. Kanduho referred to this as a directive to the 3rd Respondent and that Article 166 (1) (d) of the Constitution does not give the 1st Respondent those powers.

With respect when the Public Service Commission writes to Ibanda District Service Commission concerning "Advice to consider", it is not giving a directive but awaiting information and knowledge which the 3rd Respondent may have lacked, ultimately the decision to be taken is that of the 3rd Respondent if it takes the advice seriously.

The Macmillan English dictionary for advanced learners defines guide as "something that helps you to make a judgment about something" it also defines co-ordinate as

"to organize the different parts of a job or plan so that the people involved work together effectively or to control the movements of different parts of your body so that they work well together"

It also defines advice as "an opinion that someone gives you about the best thing to do in a particular situation". Finally the same New Edition defines consider as to think about something carefully before making a decision or developing an opinion."

Guide and coordinate are plain English words and as defined above are relevant to the functions of the 1st Respondent as contained in the entire Clause 1 of Article 166 of the Constitution. It is the function of the 1st Respondent to offer technical and professional wise counsel to all District Service Commissions in the country to ensure that they apply the same standards across the national civil service. It is a mandate the 1st Respondent had the jurisdiction and obligation to discharge and when it did, it sent a piece of advice to the 3rd Respondent to consider. In other words the 1st Respondent was duty bound to tender a technical opinion to enable the 3rd Respondent to think carefully before taking a decision on that advice.

Clearly, it is within the 1st Respondent's powers to do so under the Constitution and to hold otherwise would be an affront to the clear provisions of the Constitution and legislation of anarchy in the civil service of Uganda Perhaps, I should add that District Service Commissions would be starved of technical and professional advice if courts held otherwise. The 1st Respondent has vast knowledge and experience which District Service Commissions should tap into through technical and professional advice.. I, therefore, hold that the communication of 7th April 2009 was not ultra vires the powers and functions of the 1st Respondent.

I, further, hold that the advice tendered was not a directive as counsel for the Applicant proposed in his submissions. The words used in the letter of 7th April 2009 to the 3rd Respondent are civil and within the normal civil service etiquette regarding communications between government bodies or departments. The words appear to have been chosen carefully and the plain meaning I have quoted above does not support the submissions of counsel for the Applicant that the letter was a directive conveying an ultra vires decision. I resolve the 1st issue in favour of the Respondent.

Regarding the second issue, was the Applicant entitled to be heard by the 1st Respondent before a decision could be taken? It was the Applicant's contention that he ought to have been heard while the

Respondent No.1 contended that the Applicant was not entitled to be heard. Perhaps, I should revert to Article 166 of the Constitution for guidance.

Paragraph (d) thereof mandates the Public Service Commission to guide and co-ordinate District Service Commissions and paragraph (e) thereof, mandate the Public Service Commission to hear and determine grievances from persons appointed by District Service Commissions.

The case before me, is that the Public Service Commission received a complaint not from an employee but from a concerned citizen and it engaged the 3rd Respondent in some correspondences and according to the affidavit of Mrs. Kafeero, all the information was available to make the decision which was tendered in form of an advice to the 3rd Respondent. The 1st Respondent did not employ the Applicant and could not directly deal with him in matters regarding his employment unless the 1st Respondent was hearing an appeal from the Applicant - which was not the case.

Moreover section 5 of the Public Service Act (Cap 285) prohibits the use of communication from the Public Service Commission without the consent of the Minister writing. The Applicant does not have that consent and can be taken to have pilfered the documents he relied on and if the 3rd Respondent supplied them, then it acted irresponsibly or in ignorance of the law.

When the Public Service Commission is guiding and coordinating District Service Commissions, real cases may come into view such as that of the Applicant but since the issue was standardization of qualifications and enforcement of standing orders, the Public Service Commission was not obliged to deal with the Applicant but with his employer. If the District Service Commission had made a decision against the Applicant, then he could appeal to the 1st Respondent vide para (e) of Clause 1 of Article 166 of the Constitution. Only then would the 1st Respondent be obliged to hear

the Applicant. This was not the case# Matters of standards are between the 1st and 3rd Respondents irrespective of whether they affect the Applicant or any other person. They are not personal matters for which the Applicant would expect to contest by appearing before the Public Service Commission.

Consequently for reasons above, I find that the Applicant was not entitled to be heard and had no locus in matters between the Public Service Commission and Ibanda District Service Commission in this particular matter. I resolve this issue in favour of the Respondents.

Finally is the Applicant entitled to any remedies against the 1st and 3rd Respondents? My holding on issue one and two above means that the Applicant has no remedy against the 1st Respondent.

Has he got a remedy against the 3rd Respondent? It was Mr. Kanduh's submission that a judicial relief may be pre-emptive while learned counsel for the Respondents argued that the Ibanda District Service Commission is comfortable with the Applicant holding the post of Chief Finance officer and this is evident from the affidavit of Dr. Munyiga in reply.

The effect of a prohibition order is similar to an injunction in that it prevents a public body from acting or continuing to act in a way which is unlawful. Are there any acts by the 3rd Respondent from which this court can deduce that unlawful acts are being committed or about to be committed that this court should use its discretion to prohibit? There is none. On the contrary, there is evidence on oath by the Chairman of

Ibanda District Service Commission that the Commission is comfortable with the qualifications and process that led to his appointment as Chief Finance Officer Ibanda District.

The meaning or import of Dr. Munyiga's affidavit is that the advice of the

1st Respondent has been ignored which at the moment is relief to the Applicant. Why then would this court speculate and literally give the Applicant a blank cheque to fill in when the 3rd Respondent summons him to show cause? Courts' orders should not be issued in vain. They are issued to address specific grievances that have occurred or are in the process of being inflicted upon a bonafide person. If the 3rd Respondent had written to the Applicant either terminating him or had called a meeting to discuss terminating him without his being heard then this court would promptly issue writ of certiorari or prohibition as the case may be. Mere feeling uneasy that in future I may be disturbed in my appointment is no basis for seeking Judicial Review. That is stress every public officer must put up with and only complain to court when specific action has been taken or the processing of taking action has commenced without the in-put of the person concerned. The court can not issue a blank remedy to the Applicant to fill in the acts in future.

In the premises I am unable to grant the reliefs sought by this application. The same is hereby dismissed with costs.

Lawrence Gidudu **J u d g e**
21/10/2009

22/10/2009 Parties absent

Mr. Kanduho and Ms Matovu for Applicant are absent Ms Adong Imelda holding brief for Mr. Wanyama Tushemereirwe clerk Court:

This Ruling was scheduled for 19/10/2009. However, I had boded that day to deliver judgments in appeals in Kabale. I went and did so but left written instruction to have this Ruling adjourned to 22/10/2009. The Applicant and his counsel have not turned up. I shall proceed to pronounce the Ruling since it is ready and I have no information why the Applicant is not in court yet my clerk Tushemereirwe affirms they were made aware of this date.

Lawrence Gidudu **J u d g e**
22/10/2009

Court:

Ruling read in open court.

Judge
22/10/2009