THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-CA-0026-2009

ENG. JOHN R. SENFUMA ::APPELLANT

VERSUS

THE ENGINEERS REGISTRATION BOARD ::::::::::::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The appeal is against the decision of the Engineers Registration Board, hereinafter referred to as 'the Board,' which ordered the suspension of the appellant from active engineering practice for a period of one year effective 01/07/2009.

The grounds on which the appeal is based are:

1. ***The members of the Engineers Registration Board erred in law and fact by ordering the suspension of the appellant's engineering practice basing on the report of the Construction Technical Investigation Team, which report is under judicial review.***

2. ***The members of the Engineers Registration Board erred in law and fact by failing to evaluate the evidence before them and thus arriving at a wrong conclusion occasioning a miscarriage of justice to the appellant.***

3. ***The members of the Engineers Registration Board erred in law and fact by hearing the disciplinary action when the coram of the members was improperly constituted as it included members who were already biased against the appellant***.

4. ***The members of the Engineers Registration Board erred in law and fact by failing to appreciate the circumstances that caused the accident.***

The appellant prays that:

a). This appeal be allowed.

b). The decision and order of the Engineers Registration Board be set aside;

c). Costs of this Appeal be provided for.

Ms. Diana Musoke for the appellant

Ms. Christine Kahwa for the respondent.

Appeal Background

The appellant is one of the partners in Seka Associates, a consulting firm located on Sure House. He was contracted as a consultant on the NSSF project, Pension Towers, on Lumumba Avenue, Nakasero in Kampala. In the course of the consultancy, a land slide occurred at the site and a number of construction workers were killed. The Minister of Works and Transport then appointed a Construction Technical Investigation Team (the CTIT) to investigate the cause of the accident and make appropriate recommendations.

The Team came up with a Report attributing blame, inter alia, onto W. Henry Ssentoogo t/a Sentoogo & Partners, a firm of Architects. The Report also found that M/s Seka Associates had the responsibility of approving temporary works. In his submission, the Structural Engineering Consultant gave such approval for the excavation support system, which CTIT found to be inadequate. The Team therefore recommended that they (Seka Associates) be held liable for their omission.

It would appear that M/s Seka Associates did not participate in that investigation. Be that as it may, Mr. Henry Sentoogo applied for Judicial Review to have the said Report quashed.

The order of court allowing Mr. Ssentoogo to file an application for judicial review operated as a stay of all proceedings by persons to whom the Report had been addressed or copied. They were stopped from implementing its recommendations or act on it in any other manner pending determination of the application for judicial review. The said leave was granted on 31/03/2009 and an order to that effect extracted for service on all concerned agencies. Mr. Ssentoogo's application, ***Misc. Application No. 215 of 2009*** (Arising out of ***Misc. Cause No. 32 of 2009***) is still pending determination before another Judge.

From the records, on the basis of the said Report the Engineers Registration Board invited the appellant for a meeting on 12/05/09. The aim of the meeting was to hear his side of the story regarding the finding of the CTIT in connection with M/s Seka Associates. The appellant obliged. After the hearing, the respondent made a resolution to suspend the appellant from active engineering practice for a period of one year. Hence this appeal.

The Law

Section 27 of the Engineers Registration Act, Cap. 271, governs appeals against decisions of the board. Under this law, any person aggrieved by a decision of the board to refuse to register his/her name, or delete the name of a registered engineer from the register, or to suspend the effect of registration of his/her name, may appeal to the High Court against the decision of the board. In any such appeal High Court may give such directions in the matter as it thinks proper. Any order of High Court under this section shall be final.

I now turn to the grounds of appeal.

Ground 1

The members of the Engineers Registration Board erred in law and fact by ordering the suspension of the appellant's engineering practice basing on the report of the Construction Technical Investigation Team, which report is under judicial review.

I have already indicated that the appellant was invited to attend the hearing of the Board. This was by a letter to him dated May 5, 2009.

True, this court's order of March 31, 2009 prohibited any action by all those persons to whom the Minister of Works and Transport's letter dated 15 October 2008 appointing the Construction Technical Investigation Team was addressed or copied. The order was issued in the matter of an application by W. Henry Ssentoogo t/a Ssentoogo & Partners (***Misc. Cause No. 32 of 2009***). The appellant herein was not party to that case. Mr. Ssentoogo being an Architect, the body to act on the recommendations contained in the Report was the Architects Registration Board. There is evidence to show that the court order was served on the Architects Registration Board.

As regards the appellant herein, he is an Engineer, belonging to the Uganda Institution of Professional Engineers. The appropriate body to discipline him on the basis of the CTIT Report was the Engineers Registration Board. Whereas there is evidence that the said court order was serviced on the Architects Registration Board in connection with Mr. Ssentoogo's application for judicial review, there is no evidence that the same order was served on the Engineers Registration Board as well. The impugned proceedings themselves do not show that the issue of the stoppage of any person or organization from implementing the Report was raised at the hearing by the appellant or any other person, to raise inference of a deliberate and conscious violation of the court order. In my view existence of the order was one thing and service thereof on all persons to whom the Minister of Works and Transport's letter of 15 October 2008 was addressed or copied another.

Given that the appellant was a stranger to the court order and in the absence of evidence that the appellant brought to the attention of the respondent the factum of the existence of the court order, I am unable to fault learned counsel for the respondent's submission that the appellant cannot rely on the purported violation of the court order to question the validity of the decision of the Board.

For the reasons stated above Ground 1 would fail and it fails.

Ground 2

The members of the Engineers Registration Board erred in law and fact by failing to evaluate the evidence before them and thus arriving at a wrong conclusion occasioning a miscarriage of justice to the appellant.

This Ground attacks the validity of the respondent's decision on merits and yet Ground 3 attacks it on the basis of alleged bias. It is trite that a decision reached in breach of natural rules of justice is void even if the decision would have been the same had the rules of natural justice been complied with.

See: ***Medical Council vs Spackman [1943] A. C. 627.***

This being so, I will dispose of Ground 3 next and, circumstances allowing, revert to Ground 2 later.

Ground 3

The members of the Engineers Registration Board erred in law and fact by hearing the disciplinary action when the quorum of the members was improperly constituted as it included members who were already biased against the appellant.

From learned counsel's submissions on this point, the appellant's complaint relates to the right to a fair hearing as opposed to lack of quorum per se. The substance of the submission is that some members of the board were already biased and therefore there was no chance of the appellant being accorded a fair hearing.

From the pleadings, the CTIT, a joint investigation Committee constituted by the Minister and comprising Uganda Society of Architects and Uganda Institution of Professional Engineers, among others, went into action soon after the accident. It was chaired by one Prof. Jackson A. Mwakali, the Chairman, Engineers Registration Board.

As early as October 2008, Daily Monitor carried a story indicating that according to the Team which Prof. Mwakali chaired, initial findings indicted Roko, the project lead Consultants, Sentoogo & Partners, the structural engineers Sseka Associates and the designers, Arch Design Ltd, for collapse of the retaining wall of the Shs.120 billion building project. The extract is on record in ***HCMA No. 215 of 2009***.

The Team Report forwarded to the Hon. Minister on November 28, 2008 confirmed the Newspaper report on the matter. I have already indicated that Prof. Mwakali, the Chairperson of the CTIT was at the same time a member of the Engineers Registration Board, and in fact its Chairman as well.

From the Minutes of the Board meeting held on 20/05/2009, Prof. Mwakali was present. However, the session was chaired by the Vice-Chairman, Eng. L. S. Kangere after the Chairman, Prof. Mwakali, stepping aside on account of having chaired the CTIT. From the Minutes also, all that Prof. Mwakali did was to step aside from the Chairmanship of the Board Meeting that day. He otherwise remained in the meeting itself, participated in its deliberations and even asked a number of pertinent questions to the appellant.

It is the appellant's case that Prof. Mwakali having been Chairman of the CTIT and at the same time a member of the ERB was already biased against him because of what he knew from the CTIT inquiry; that he could not deal with the ERB inquiries with a clear mind.

Learned counsel for the respondent does not agree. According to her, the record of appeal indicates that Prof. Mwakali stepped down from the chair and even then the record does not reflect bias. She submits further that the Record shows that the appellant was given an opportunity to defend himself; that the record further shows that the decision reached by the board was not a pre-conceived judgment formed without a factual basis. She has therefore invited me to dismiss this Ground of Appeal.

I have addressed my mind to the able arguments of both counsel.

Article 28 (1) of the Constitution provides that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before ***an independent and impartial court or tribunal*** established by law (emphasis mine).

The Engineers Registration Act clearly states in Section 25 (6) thereof that an inquiry held by the board shall be deemed to be a judicial proceeding.
Bias is difficult to prove. It is a state of mind that usually cannot be proved by direct evidence. Even then the burden of proof is on the party alleging bias. On a practical note, in a case of any possibility of bias, the board member as judge should disclose the potential and perceived bias and should not participate in the discussion and decision or the vote and should leave the room while the discussion is being held. But what happens, as in the instant case, where a Chairman of a board reasonably thinks that sitting in judgment of another person may not be perceived as fair, vacates the chair for another person but participates in the proceedings?

In ***Cooper vs Wilson & Others [1937] 2K.B.309*** the court observed that the presence of the Chief Constable, whose mind was made up in advance and who was in effect the respondent to the appeal, was fatal to the validity of the Watch Committee's decision. Scott L. J. could not have expressed it better when he said (at p. 344):

> ***"the risk that a respondent may influence the court is so abhorrent to English notions of justice that the possibility of it or even the appearance of such possibility is sufficient to deprive the decision of all judicial force, and to render it a nullity."***

Similarly in ***Metropolitan Properties Co. (F.G.C) Ltd vs Lannon & Others [1969] IQ. B 577*** Lord Denning M. R. observed (at 599):

> ***"……..in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand."***

In another case, ***R vs Sussex Justices ex parte McCarthy [1924] 1 K.B.256***, arising out of a collision between a motor vehicle belonging to the applicant and one belonging to W., a summons was taken out by the police against the applicant for having driven his motor vehicle in a manner dangerous to the public. At the hearing of the summons the acting clerk to the justices was a member of the firm of solicitors who were acting for W. in a claim for damages against the applicant for injuries received in that collision. At the conclusion of the evidence the justices retired to consider their decision, the acting clerk retiring with them in case they should desire to be advised on any point of law. The justices convicted the appellant. It was stated on affidavit that they came to that conclusion without consulting the acting clerk, who in fact abstained from referring to the case.

Held, that the conviction must be quashed, as it was improper for the acting clerk, having regard to his firm's relation to the case, to be present with the justices when they were considering their decision.

From the above authorities, the impression given to other people would be that a person who previously chaired an investigation in which the appellant was condemned, would obviously be perceived as biased in a hearing or trial of the same victim to justify the result of the investigation. Given that Prof. Mwakali took part in the CTIT proceedings,

he was, in my humble view, in a position where he would not give impartial advice to the Board. It would not matter that he did not chair the meeting.

I would find merit in this Ground of Appeal and I do so.

Ground 4

The members of the Engineers Registration Board erred in law and fact by failing to appreciate the circumstances that caused the accident.

Like Ground 2 this Ground also attacks the validity of the respondent's decision on merits. From what I have said above, the respondent's decision must be quashed, as it was improper for Prof. Mwakali who was the chair of the CTIT to also actively participate in the proceedings of the respondent. It was a decision reached in breach of rules of natural justice. It is ***void ab initio*** even if the Board would have come to the same decision had the rules of natural justice been complied with. For this reason, I am inclined not to make any finding on Grounds 2 and 4 as to do so would pre-empt the outcome of ***HCMA No. 215 of 2009*** for judicial review and/or any further action the Board may wish to take against the appellant after the judicial review.

In the result I would allow this appeal in part on Ground 3 only. I would set aside the decision and order of the respondent suspending the appellant from active engineering practice for a period of one year effective July, 2009.

Given the partial success of the appeal, I would award half of the taxed costs in this appeal to the appellant.
Orders accordingly.

Yorokamu Bamwine
JUDGE
30/04/2010

Order:

The Deputy Registrar shall in my absence deliver this Judgment on my behalf.

Yorokamu Bamwine
JUDGE
30/04/2010

30/04/2010
Parties absent
Dr. Diana Musoke for Appellant in court
No Counsel for Respondent

Court:
Judgment read.

Isaac Muwata
REGISTRAR – CIVIL DIVISION