THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCT-00-CV-MC-0056-2009

WILLIAM TUMWINE ::PLAINTIFF

VERSUS

1. **KAMPALA CITY COUNCIL**
2. **MINISTER OF LOCAL GOVERNMENT ::::::::::DEFENDANTS**

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This application for judicial review was brought under Sections 36 (1) (b) (c) and 38 of the Judicature Act (as amended) and Rules 3, 5, 8 of the Judicature (Judicial Review) Rules S.1 No. II of 2009. It seeks orders for:

a) Quashing, by way of certiorari, the findings of the Report of the Commission of Inquiry into the running and management of public affairs in Makindye Division by the 2nd respondent against the applicant that was made without taking into consideration all the evidence available to the Commission.

b) Injunction, to restrain the respondents from implementing the recommendations of the Report of the Commission of Inquiry into the running and management of Makindye Division against the applicant.

c) A declaration that the Commission of Inquiry acted illegally and unlawfully and occasioned a miscarriage of justice to the applicant when they failed to take into account all the relevant evidence available to them thereby reaching an erroneous and unjust decision against the applicant.

d) An order of prohibition, prohibiting the implementation of the findings of the Report of the Commission of Inquiry by the respondents against the applicant.

e) Damages to be awarded to the applicant.

f) Costs of the application.

Counsel:

Mr. Geoffrey Nangumya for the applicant

Mr. Sendege for the 1st respondent

Ms. Margaret Nabakooza for the 2nd respondent.

As the court record shows, the application has taken unusually longer than expected to be determined. This was because of its unique nature.

The initial application was against the Ministry of Local Government. It was amended to reflect Minister of Local Government. Later, the delay was occasioned by the fact that the same matter was being handled by the Inspector General of Government (the IGG). When hearing finally went under way, the parties agreed on the following facts:

1. The applicant was an employee of the 1st respondent in the capacity of Senior Principal Assistant Town Clerk attached to Makindye Division.

2. A Commission of Inquiry was instituted by the 2nd respondent to investigate mismanagement of public affairs of Makindye Division, Kawempe Division and Mbarara Municipal Council.

3. The Commission made a Report submitting the applicant to the District Service Commission (the DSC) for disciplinary action.

4. Prior to the institution of the Commission of Inquiry on 16/09/2008, the applicant was interdicted on 23/07/08.

5. The interdiction is still on.

6. The DSC directed that the interdiction be lifted with effect from 16/09/2009.

By 15/03/2010 the position was that fresh charges had been preferred against the applicant by the 1st respondent. As the matter was pending determination, an extract of Minutes of the 21st Meeting of the District Service Commission held from 25th to 27th of a non-disclosed month was filed indicating that the said District Service Commission had decided that:

i) Interdiction be lifted with effect from 23rd July, 2008.

ii) All his monies withheld be paid.

iii) Be severely reprimanded.

iv) He pays back 25% of Shs.71,409,679/=

If this is so, then the application has been overtaken by events much as the applicant does not want to believe so. I would have thought that instead of bundling up the documents and forwarding them to court after pleadings had closed, the better option would have been to withdraw the application and abide by the decision of the District Service Commission or else show cause why the decision of District Service Commission should not be complied with.

At the conferencing, the parties agreed that the application be disposed of on the basis of the evidence on record and written submissions. Hence this Ruling.

From the tone of Mr. Nangumya's written submissions, the applicant is aggrieved by the Report and recommendations that he be removed from office by the Commission of Inquiry into the running and management of public affairs in Makindye Division of Kampala City Council which has already been forwarded by the 2nd respondent to the 1st respondent with instructions to take disciplinary action against him. The reason for the grievance is that the Commission of Inquiry ignored key documents in its investigation which, had they been considered, the Commission would have reached a different conclusion in regards to the applicant. According to the applicant, such documents include correspondences between the applicant and other Division employees as well as

his immediate boss, the then Ag. Town Clerk Kampala City Council, which show that the applicant did all that was within his powers to ensure that the Division was not defrauded. The long and short of the applicant's case is that the Commission failed to properly evaluate and scrutinize the evidence before it and/or acted with premeditated perception and bias thereby reaching wrong conclusions.

I am constrained to comment on the competence of this application at this stage notwithstanding that it has not been raised as a point of law. My understanding of the law is that whether the defence does or does not raise the issue of competence in its pleadings, this is a matter of law. As I observed in ***Gibert Kadilo vs Makerere University Council Misc. Cause No.26/2010*** (unreported), incompetence of a suit cannot be condoned and/or waived. Relating this principle of law to the instant case, I would note that the applicant's major complaint relates to the Commission of Inquiry's failure to properly evaluate and scrutinize the evidence before it and/or acting with a premeditated perception and bias thereby reaching wrong conclusions.

I have made this point in a number of cases but it keeps coming up again and again. The point is that any person, natural or artificial, bound to explain and defend in any forum the decision he/she makes in the performance of his/her duties is answerable to judicial review proceedings. The decision maker must understand correctly the law that regulates his/her decision making power and give effect to it. If he exercises the power for an improper purpose, makes any mistake of law or fact and/or applies the law inconsistently, he/she will bring his/her act or omission within the scope of judicial review. In short mandatory considerations of Statutes must be given effect by decision makers or else be ordered to comply.

From the records, the Commission of Inquiry was instituted by the 2nd respondent. The Commission was tasked to investigate mismanagement of public affairs of Makindye Division, among other areas, and make a report. It made a report submitting the applicant to District Service Commission for disciplinary action. It is not the applicant's case herein that the 2nd respondent lacked the power to institute the Commission of Inquiry or that he exercised the power for an improper purpose or made any mistake of fact or law. Why then has the applicant preferred a case against the 2nd respondent when the challenge

is not on the decision to institute it but the alleged failure of the Commission to conduct the inquiry in accordance with the law?

The decision to submit the applicant to the District Service Commission for disciplinary action was a decision of the Commission of Inquiry in its competence and not a decision of the respondents or any of them. To this extent the applicant's application as against the two respondents is misconceived. It is against wrong parties. For this reason, for as long as the Commission is not party to these proceedings, court lacks the power to pronounce itself on the applicant's submission that it excluded from the list of documents a number of them (documents) which it reviewed, and denied the applicant a chance to put forward his case. The reason is that one of the chief rules of natural justice is not to hear one side behind the back of the other.

There is another reason why this application is unsustainable. The applicant admits that there was fraud involving loss of colossal sums of money to Psalms 24:1 Investment Ltd, implying that the investigation directed by the 2nd respondent was necessary. The Commission did its work and in its competence issued a Report. The applicant now seeks court's determination as to whether or not he acted appropriately in failing to avert the fraud.

One of the fundamental principles regarding judicial review is its restricted scope, when compared to ordinary appeals. I have also emphasized this point in numerous applications of this nature, notably ***Kyamanywa Andrew K. Tumusiime vs IGG HCT-00-CV-MA-0243-2008*** (unreported) but it keeps coming up again and again.

While it is the duty of the appellate court to review the record of evidence for itself in order to determine whether the decision of the trial court ought to stand, the scope of judicial review is restricted to a supervisory jurisdiction, not an appellate one. Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. The primary object of the prerogative orders, the likes of the ones sought herein, is to make the machinery of government operate properly and in public interest. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate the rights of the parties as such, but to ensure that public powers are exercised in

accordance with the basic standards of legality, fairness and rationality. The court is not, therefore, entitled on an application for judicial review to consider whether the decision was fair and reasonable. Lord Hailsham of St. Marylebone L.C stated the purpose of judicial review in the following terms:

> ***"Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by law.***
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> ***The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or joined by law to decide from itself a conclusion which is correct in the eyes of the court."***

See: Chief Constable of North Wales Police vs Evans [1982] 3 ALL ER 141 AT P.143 h-144 a.

From the records availed to court, the question as to whether or not the applicant acted properly in the circumstances is a matter which the Commission of Inquiry dealt with in its Report. I do not see how it comes in here when the Commission is not a party to these proceedings to have the opportunity to defend itself against the accusation. I cannot decide a matter behind its back, much as Issa Gumomye has sworn an affidavit in reply, without flouting the rules of natural justice which this court has high regard for.

As regards interdiction, the applicant contends that it was not justified in the circumstances and that it was not properly executed. He argues, for instance, that his office falls under the office of the Public Service Commission and the responsible officer who should have handled his case and decided on whether or not to interdict him should have been the Secretary to Public Service Commission; and that at the District level it should have been the District Service Commission and not the office of the Town Clerk.

He may have a point but of what relevance is all this here?

The decision-maker, in the context of an application for judicial review, was Ruth Kijjambu (Mrs), Ag. Town Clerk. She was not sued in her individual capacity. If the applicant wanted to challenge it as being the decision of the 1st respondent , made by its servant in the scope of her employment as such under the doctrine of vicarious liability, he ought to have so pleaded.

He didn't.

Even then it is important to note that the applicant was interdicted on 23/07/08 and the Commission of Inquiry was instituted after over one month later, on 23/09/08. He was therefore not interdicted on the strength of the Report of the Commission of Inquiry.

As court observed in ***His Worship Aggrey Bwire vs Attorney General & Anor Misc. Application No.160 of 2008,*** an interdiction is a mere preliminary step in the process of disciplinary action. Its main intention is to pave way for investigations so that the affected officer does not interfere with investigations. It is not a final decision.

In the instant case, while the applicant was on interdiction, a Commission of Inquiry was instituted to investigate him and other people. The Town Clerk had in the mean time informed the District Service Commission about the interdiction according to the letter of interdiction, annexture 'A' to Ruth Kijjambu's affidavit. Whether the District Service Commission acted on the report of the Commission of Inquiry or the interdiction by the Ag. Town Clerk, the fact now is that the District Service Commission has since directed that the interdiction be lifted with effect from 23/07/2008 and that all his monies withheld be paid. He has also been recommended for severe reprimand and paying back 25% of

Shs.71,409,679/=. That is where the focus should be now, not the fact of interdiction which did not decide anything final about him. Given that the applicant was in charge of Makindye Division and that colossal sums of money were lost to fraudsters, I have seen no reason to fault the decision to interdict him pending investigation and/or disciplinary action. Court is not in position to say whether or not the action taken against him by the District Service Commission is proper because there is no evidence on record on which such a decision can be based and in any case the District Service Commission is not party to these proceedings.

For the reasons stated above, I have come to the conclusion that the applicant has not proved on the balance of probabilities or at all that any of the respondents' acts merits any judicial review. I would therefore dismiss the application and I do so.

As regards costs, the usual result is that the loser pays the winner's costs. This is of course subject to court's discretion so that a winning party may not be awarded his costs. In the instant case, the applicant is a Senior Civil Servant. He was suspected of wrong doing, interdicted, investigated and has now been cleared for re-deployment on terms. His reaction thereto is a matter outside the scope of the inquiry herein. Notwithstanding the fact that he has not made out a case to entitle him to an order for relief on any of the prayers sought, the justice of the case demands that each party be ordered to meet its own costs. I so order.

Dated at Kampala this 18th day of August, 2010.

Yorokamu Bamwine

JUDGE

18/08/2010:

Ms. Nabakooza Margaret for the 2nd respondent

Ms. Phiona Kunihira for applicants

Applicants absent

Court:

Ruling delivered.

Yorokamu Bamwine

JUDGE

18/08/2010