THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-MA-0095-2012

OUMA ADEA……..……APPLICANT
VERSUS
1. ATTORNEY GENERAL
2. BUSIA DISTRICT LOCAL GOVERNMENT…….RESPONDENTS

BEFORE: THE HON. JUSTICE STEPHEN MUSOTA

RULING

This is an application for Judicial Review. The applicant, **Ouma Adea** represented by M/s Luzige-Kamya, Kavuma & Co. Advocates and M/s Kamba & Co. Advocates brought this application by way of Notice of Motion under Articles 28 (1), 28 (7), 26 (2), 42 and 44 of the Constitution of the Republic of Uganda and S.36 of the Judicature Act as well as rules 3(1) and (2) of the Judicature (Judicial Review) Rules No.11 of 2009.

The reliefs sought in the application are that:

(a) An order of Certiorari doth issue hence forth quashing the directive and/or the decision of the Minister for Local Government constituting a tribunal to investigate the intention of Busia District Councilors to remove the chairperson of Busia District, **Mr. Ouma Adea** out of time.

(b) The same order of Certiorari does issue henceforth quashing the decision of the tribunal investigating the intention of Busia District Local Councilors to remove the Chairperson of Busia **Mr. Ouma Adea** directing the Chairperson to defend himself over a non-existing offence.

(c) A declaration that the said tribunal investigating the intention of Busia Local Council V Councilors was irregularly constituted.

(d) A further declaration that the proceedings of the said tribunal violated the principles of natural justice thereby occasioning injustice to the Applicant.

(e) An injunction doth issue restraining the respondents and their agents, the tribunal investigating the intentions of Busia District Local Government Councilors, their servants or any other person acting under their authority from irregularly investigating the Chairperson and abusing his rights or removing him from office.

(f) Order for costs be made.

The grounds of this application are that:

(i) The applicant is an elected Chairperson Busia District Local Government.

(ii) The Councilors from the District submitted a petition through their speaker for the removal from office of the chairperson under S.14(2) (a) and (b) of the Local Government Act to the Minister of Local Government **Hon. Adolf Mwesige** on 3rd day of October 2011.

(iii) The Ministry of Local Government duly received the said petition on the 3rd of October 2011.

(iv) The Minister for Local Government appointed and constituted a tribunal to investigate local councilors of Busia District allegations on various dates as follows:-

- Chairman on 21 February 2012.
- Member on 5th January 2012.
- Secretary on 5th January 2012 respectively.

(v) The said appointments and Constitution of the tribunal was done way out of the mandated period or time as prescribed by law and was therefore irregular

and void. That the tribunal proceeded and heard the allegations without a lead counsel thus making it the prosecutor and at the same time judge thereby violating the principles of fair trial and natural justice.

(vi) The tribunal proceeded and put the applicant herein on his defence on an allegation based on an offence which does not exist in law or which is not provided for by law.

(vii) The tribunal failed to avail to counsel for the applicant proceedings which reflect the trial/investigation hearing in as far as:

- They never recorded appearances of the four applicant's counsel. What was asked in cross-examination and answers to the said questions.
- They omitted all vital evidence of proceedings and therefore the applicant cannot adequately prepare his defence basing on an inaccurate Record of proceedings which fact was put to the attention of the Chairperson.

(viii) The Tribunal investigating the intentions of Busia District Local Councilors has no authority to proceed with the said investigations.

(ix) The tribunal is in breach of Rules of Natural Justice as it was the prosecutor and at the same time the Judge.

(x) It is fair, equitable and in the interest of justice that the respondents' agents' decision of proceeding with the said trial or investigation be quashed.

The application is supported by the affidavit of the applicant reiterating the contents and grounds of this application as contained in the Notice of Motion. It is also supported by the affidavit of **Mr. James Okuku** an advocate who received instructions to represent the applicant in the ongoing investigations. He deponed and confirmed that when he appeared before the tribunal at Busia District headquarters he raised three preliminary issues namely:

(a) That the tribunal did not have legal counsel and this rendered it to appear as prosecutor and judge in their own cause thus compromising their impartiality or legitimacy.
(b) That his client had not been served with a copy of the petition filed against him thus rendering the proceedings a trial by ambush.
(c) That the summons served onto his client referred to him as a former chairman thus depicting the impending trial or inquiry appear to be a foregone conclusion against him.

Mr. Okuku further deponed that issue (a) above got a mute response. The tribunal ordered service of the petition and all documents intended to be relied upon onto counsel.

Regarding the 3rd issue the Chairperson apologized for what he called an 'error'. When **Mr. Okuku** read the certified copy of the record of the proceedings of the tribunal dated 15th May 2012 he did not find all the above record of 9th March 2012 recorded. That this implies that the certified record of 15 May 2012 is not a complete record of proceedings in the above tribunal.

The application has attached to it annextures "A" to "G" and a summons to the applicant referring to him as "former District Chairperson Busia."

The 1st respondent represented by the learned Attorney General filed an affidavit in reply deponed to by one **Cheptoris Sylivia** a State Attorney in the Attorney General's chambers Mbale Regional office in which she relays information from the Minister of Local Government acknowledging receipt of a notice to censure the

applicant. That the Minister needed to consult the Attorney General and Chief Justice and therefore could not easily appoint a tribunal in 21 days.

The tribunal was thus appointed after 21 days and the tribunal conducted inquiries/investigations and forwarded a report to him. That in his letter of 12th June 2012 the Minister communicated the findings of the tribunal to the District Speaker Busia District Council for appropriate action. **Cheptoris Sylivia** further deponed that the appointment of the tribunal after 21 days was a reasonable move in the circumstances. That it is just and fair that this application be dismissed because it is brought in bad faith and without merit.

The 2nd respondent, Busia District Local Government Council represented by **Mr. Lumbe** of the Attorney General's Chambers Mbale deponed an affidavit in reply through **Mr. Adeya Vincent** the Ag. Deputy Chief Administrative Officer Busia District Local Government opposing the application. He reiterates the background to the appointment of the challenged tribunal. He depones that he got information from Masaba Peter a State Attorney of Attorney General's Chambers that it is not mandatory that the Minister has to appoint a tribunal within 21 days after receipt of the notice from the Speaker in view of the wording of S.14 (4) of the Local Government Act because the Minister has to be satisfied that there is sufficient ground to appoint a tribunal. Further that the appointed tribunal does not conduct a tribunal but does an investigation and therefore there is no need for lead counsel. That no breach of natural justice occurred and the applicant was driving government vehicles without authority and this is what the tribunal asked the applicant to defend himself against.

The deponent further averred that the applicant was present all the time during the hearing and was duly represented by four lawyers who cross-examined witnesses implying he was accorded a fair hearing.

That it is just and fair that this application be dismissed.

At the hearing of this application learned counsel on both sides addressed court in support of their respective cases.

I have considered the application as a whole and the submissions by respective counsel in support of their respective cases. I have studied the law applicable and the wealth of authorities cited and referred to by learned counsel for this court's guidance and consideration.

In the instant application, the applicant is seeking from court an order of certiorari to quash the decision or directive of the Minister of Local Government constituting a tribunal to investigate the intention of the Councilors of the 2nd respondent to remove the applicant as Chairperson of Busia District.

The applicant is also seeking for a similar order quashing the decision of the tribunal to require the applicant to defend himself on a non-existent offence.

Further that a declaration that the proceedings of the tribunal violated the principles of natural justice and that an injunction be issued restraining the respondents and their agents to irregularly investigate the applicant as Chairperson and removing him from office.

The Law Applicable:

This court has made several decisions regarding Judicial Review. I will however quote the decision cited by learned counsel for the applicant in ***Twinomuhangi v. Kabale District & Ors, 2006 HCB Vol.1 130*** with which I agree and which concisely outlined the law and basis for grant of an application like the one under consideration.

In an application for judicial review, the affidavits filed in court by and for the respective parties to the application constitute the record with regard to the decision or act complained of and the subject of the review.

The High Court may upon application for Judicial Review, grant among other orders an order of certiorari removing any proceeding or matter into the High Court for purposes of being quashed, an order of prohibition prohibiting any proceedings or matter, a declaration or an injunction to restrain a person from acting in any office in which he or she is not entitled to.

In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality is when a decision making authority commits an error in law in the process of taking the decision or making the act, the subject of the complaint. Instances of illegality implies acting without jurisdiction or *ultra vires* or contrary to the provisions of the law or its principles.

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercised jurisdiction to make a decision.

It should be noted that Judicial Review is not a means of appeal to look into mistakes of the decision maker. What needs to be proved is some ground for vitiating the decision making process.

The first issue I will consider is whether the Hon. Minister of Local Government erred when he appointed the tribunal after the expiration of 21 days.

In their respective submissions **Mr. Kamba** and **Mr. Luzige** learned counsel for the applicant were emphatic that the minister erred and committed an illegality when he appointed the tribunal after 21 days. That the decision was contrary to parliamentary statute which couched the provision in mandatory terms. That S.14 of the Local Governments Act touches individual rights of the Chairperson LC V, therefore the Minister ought to have complied with any jurisdictional conditions and followed the prescribed procedures. That the matter of removal of a

Chairperson is of public importance where the victim should know his/her fate as soon as possible.

On the other hand, **Mr. Lumbe** for the respondents contended that S.14 is not couched in mandatory terms although the word shall is used. That the said word "shall" is directory. That failure to constitute the tribunal in 21 days did not prejudice the applicant or deny him a right to fair hearing. Finally that appointment of the tribunal after 21 days was a trivial matter.

It is enacted under S.14 (4) of the Local Governments Act that:

> ***"The Minister shall evaluate the notice in Consultation with the Attorney General and if satisfied that there are sufficient grounds for doing so shall, within twenty one days after receipt of the notice, constitute a tribunal consisting of a judge of the High Court or a person qualified to be appointed a judge of the High Court, as chairperson and two other persons all of whom shall be appointed by the Minister in consultation with the Chief Justice to investigate the allegations."***

This duty is bestowed on the line Minister to consider if the grounds for removal of a Chairperson are sufficient in his view after consulting the Attorney General and the Hon. The Chief Justice. The notice for the purpose must have been presented to the Speaker.

The notice under S.14 (2) has to be in writing and signed by not less than one-third of all members of counsel and the Speaker is required to transmit the notice to the Minister and Chairperson within 24 hours of receipt.

It has been conceded by the respondents that indeed the Minister did not appoint the tribunal within 21 days of receipt of the notice as required by statute. The contention is whether that non compliance renders the Minister's action illegal and whether the requirement is directory rather than mandatory. Interpreting the use of the word shall has been done over time in our courts of law but not without difficulty. One of the most authoritative precedent is the Supreme Court case of ***SITENDA SEBALU V. SAM K. NJUBA AND THE ELECTORAL COMMISSION ELECTION PETITION APPEAL NO.26 OF 2007***.

When interpreting whether a statutory provision is mandatory or directory court has to try in the circumstances of a given provision to ascertain the intention of the legislature in the legislation under consideration in order to formulate its criteria for determining the issue.

According to ***SMITH'S JUDICIAL REVIEW OF ADMINISTRATION ACTION 4TH EDN. 1980 P.142*** the learned author opines that court must formulate its criteria for determining whether the procedural rules are to be regarded as mandatory or as directory notwithstanding that judges often stress the impracticability of specifying exact rules for categorizing the provisions. The learned author then states.

> ***"The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the***

relation of that provision to the general object intended to be secured by the Act.

In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequence of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if serious public inconvenience would be caused by holding them to be mandatory or if the court is for any reason declining to interfere with the act or decision that is impugned."

In my view, the emphasis ought to be on the consequences of non-compliance, and posing the question whether parliament can be fairly taken to have intended total invalidity so that the act done in breach of a given provision should be invalid. Therefore each case has to be judged on its facts and the discretion is solely on the trial court which must ensure that one purpose is not achieved at the expense or to the prejudice of the other.

My reading of S.14 of the Local Governments Act gives me the impression that removal of a Chairperson from office was regarded as a serious matter by the legislature. The legislature prescribes unequivocal time frames for doing acts

geared towards that purpose and it was deliberately mean with time. For example the Speaker was under S.14 (3) given 24 hours after receipt of the notice referred to in subsection (2) to cause a copy to be transmitted to the Chairperson and the Minister. Under S.14 (4) the Minister is required to evaluate the notice in consultation with the Attorney General and find if there are grounds to constitute a tribunal and to do so within 21 days in consultation with the Hon. The Chief Justice. The person to chair the tribunal should be one qualified to be appointed a judge of the High Court. This is no mean requirement. Members have to be people of high moral character and proven integrity and possess considerable experience and competence with high caliber in the conduct of public affairs.

Others grounds for removal of a chairperson such as physical or mental incapacity must involve the Chief Justice. All processes have time limits assigned to them by statute.

I therefore agree with learned counsel for the applicants that time frames for processing removal of a chairperson were deliberately put by the legislature. The offices involved in the process are very important offices in this country implying that removal of an elected chairperson is of great public importance and touches the rights of the individual chairperson holding the unchallenged mandate of the electorate. He and the people must know his fate as soon as possible. In the circumstances I take these time frames to be mandatory. The use of the word shall was therefore deliberate and intended to carry its natural meaning. Not following the strict provisions in the act is a jurisdictional error and would be subject to judicial review. I will follow the opinion expressed in ***A PRACTICAL APPROACH TO CIVIL PROCEDURE 14th Edn. by Prof. Stuart Sime P.610 Para.45:14*** that:

> ***"Judicial Review will lie where an inferior court or tribunal or public body has acted without or in excess of its jurisdiction. Such bodies must not act outside their powers, or ultravires. They must abide by any jurisdictional conditions, must follow prescribed procedures, and cannot delegate except as expressly laid down…… Any order made must be one which the relevant body has jurisdiction to make."***

In the instant case therefore I am inclined to hold that by constituting the tribunal outside 21 days, the Hon. Minister acted without jurisdiction. He breached a mandatory provision. He received the notice on 3rd October 2011 (Annexture B). He appointed the chairperson vide letter dated 21st February 2012, a whooping four months later. He appointed members on 5th January 2012. Given the importance parliament attached to this process, this inordinate delay is inexcusable.

I uphold the submission by learned counsel for the applicant that the tribunal in question was illegally constituted for violating the mandatory statutory provisions of the Local Governments Act. The actions by the tribunal were void *ab initio*.

Although no express provision was put in the law to give the consequences of breach, the process under consideration by this court is one of them. A person considering him or herself prejudiced by the breach can resort to the jurisdiction of this court through Judicial Review.

Another issue for consideration in the application is whether the tribunals order directing the chairperson to defend himself was for a non existent offence. i.e. driving himself in a government vehicle. The resolution of the first issue would settle the current issue. The tribunal had no authority to carry out the inquiry since its constitution was irregular. Nevertheless, on this issue I will uphold the submission by **Mr. Lumbe** that prosecution for a non existent offence is not a matter for review. I will not also delve into re-evaluating the evidence adduced before the impugned tribunal because this is not an appeal.

Regarding whether the tribunal proceedings violated the principles of natural justice, learned counsel for the applicant contended that this was because the tribunal did not have lead counsel. That the tribunal acted as prosecutor and judge in their own cause which was irregular.

On the other hand **Mr. Lumbe** submitted that the law does not provide for lead counsel in constituting such a tribunal. That the absence of lead counsel did not prejudice the applicant.

It is true that S.14 (4) of the Local Governments Act gives the Minister authority to appoint a chairperson of the tribunal and two other persons as members of the tribunal without expressly providing for appointment of lead counsel. It is my considered view that any tribunal worth the name should have lead counsel to guard against the chairperson and members constituting themselves into judges and prosecutors in their own cause. This issue was decided upon in the Supreme Court case of ***JOHN KEN LUKYAMUZI VS. ATTORNEY GENERAL AND ELECTORAL COMMISSION CONSTITUTIONAL APPEAL 02 OF 2007***. In the said appeal, the meaning of the word "Tribunal" was explained. Black's Law

Dictionary defines a tribunal as “a court or other adjudicatory body”. A tribunal can also be defined as;

> “ *1. **The seat of a judge or one acting as a judge.***
>
> ***2. A court or forum for justice, a person or body of persons having power to hear and decide disputes so as to bind the parties.”***

It can also be defined as;

> “ ***a type of court with the authority to deal with a particular problem or disagreement.”***

Another definition of a tribunal can be found in “words and phrases legally defined.”

This defines tribunal as:

> “***any government department, authority or person entrusted with the judicial determination as arbitrator or otherwise of questions arising under an Act of Parliament.”***

From the above definitions there is no doubt what role the tribunal constituted by the Minister performs. It performs a judicial or quasi judicial role and therefore must be enjoined to respect the principles of natural justice. Whenever the law gives an authority power to exercise judicial functions, it is usually a requirement that such an authority should have written rules prescribing the rights and obligations of persons to appear before it to avoid prejudicial treatment. Therefore by the law allowing the tribunal in this case to proceed without lead counsel it fails to promote the interest of proper administration of justice in this country by allowing a situation where power for investigation, prosecution and adjudication are combined in the tribunal. The tribunal set up under S.14 of the Local

Administration Act is in breach of the principle of *memo judex in causa sua* (no person shall be a judge in his or her own cause). It makes the tribunal the investigator and judge all rolled into one. The rules of natural justice include a right to be heard, a right to be informed of any adverse, allegations made and the tribunal must not be a judge in its own cause.

For a body or a person to be called a tribunal there must be an accuser and an accused person or parties with a dispute to resolve. The tribunal will then conduct a hearing and come to a decision which will then be binding on the parties. The right to a fair hearing is guaranteed by Articles 28 (1) and 44(c) of the Constitution.

It is provided for under Article 28 (1) that:

> **"(1)** ***In 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***."

Article 44(c) provides that there shall be no derogation from the enjoyment of the following rights and freedoms.

> "(c) *the right to fair hearing*."

These provisions must be respected and observed by all courts of law or tribunals for justice not only to be done but also to be seen to be done.

I will therefore agree with learned counsel for the applicant and declare that by acting without lead counsel the proceedings of the impugned tribunal violated the principles of natural justice thereby occasioning injustice to the applicant.

It is my considered view that in the interest of enforcing values of intergrity and proper conduct of leadership in this country and promotion of the rule of law it is important that the law be urgently amended by including the provision for appointment of lead counsel whenever a tribunal is set up to inquire into intentions of councils to remove a chairperson from office.

I will finally comment in general terms on the errors on the face of the record as enumerated by learned counsel for the applicant and responded to by learned counsel for the respondents.

The law is to the effect that where there is an error on the face of the record, Judicial Review will lie even if the body being reviewed has kept within its jurisdiction. And the main remedy where there is an error on the face of the record is quashing order.

Had the tribunal under consideration been properly constituted, it would suffer the wrath of this law. As deponed by **Mr. James Okuku** in his affidavit in support of the application, when he read a certified copy of the record of proceedings of the tribunal dated 15th May 2012, he did not find on record all that transpired on that day. This included his concern that the tribunal had no lead counsel, that the applicant was not served with a copy of the petition against him and that the summons referred to the applicant as a former chairperson of the 2nd respondent. Since the record includes the document which initiates proceedings, the statements

of the case and the adjudication or reasoned decision, omission of the above information renders the record defective and a subject for judicial review which could lead to quashing the orders of the tribunal.

One of the documents on record referred to the applicant as a former chairperson. Although the chairperson of the impugned tribunal apologized and called it an error, that reference tainted the veracity of the tribunal's impartiality. It suggests that the tribunal had prejudged the applicant rendering it biased. Under normal circumstances, that leads to a retrial before another tribunal or judicial forum. No amount of apology can suffice to cure that irregularity.

I will also comment on the affidavit in reply to the application.

According to learned counsel for the applicant, the affidavit by one **Sylivia Cherotich** contained hearsay evidence. That the Hon. Minister did not depone any affidavit himself. That the said affidavit be struck out. Further the affidavit of **Adea Ouma** has no annexture annexed thereto.

When I perused the affidavits in reply especially that of **Sylivia**, I agreed with the submissions by learned counsel for the applicant that the said affidavits are full of hearsay evidence which is inadmissible. They are in breach of O.19 r.3 (1) of the Civil Procedure Rules. In the case of ***MAYERS AND ANOR. VR. AKIRA RANCH [1974] EA 169*** the criteria to be applied in determining what is to be excluded from affidavits under the hearsay rule was outlined. While quoting **Vol.15 P.26 of the Halsbury's Laws of England 3rd Edn**, the High Court of Kenya and I agree held inter alia that:

> ***"A witness cannot be called in proof of a fact, to state that someone else stated it to be one. Care must be taken to distinguish between evidence which is tendered to prove that someone else has spoken certain words when the fact of which proof is required is merely speaking, and evidence which is tendered to prove that someone else has spoken certain words as leading to a conclusion that the words were true. The former is admissible…… the latter is not."***

In the instant case both **Ms. Cheptoris Sylivia** and **Mr. Adeya Vincent**'s affidavits are coined in the latter part of the above quotation which renders their respective affidavits hearsay and inadmissible. **Sylivia** was deponing about what the Minister informed her and not whether what the Minister told her was the truth. **Mr. Adeya** also swore about what he was told but not to verify that what he was told was true.

Had the tribunal been properly constituted, these flaws would have rendered the affidavits in reply inadmissible thus leaving the application unrebutted.

In view of the reasons given herein I will allow this application for Judicial Review.

I will grant the following reliefs.

1. That an order of Certiorari doth issue henceforth quashing the decision of the Minister of Local Government constituting a tribunal to investigate the

intention of Busia District Local Councilors to remove the Chairperson Busia District **Mr. Ouma Adea** out of time.

2. A declaration that the said tribunal investigating the intention of Busia Local Council V Councilors to remove the Chairperson was irregularly constituted.
3. A declaration that the proceedings of the said tribunal violated the principles of natural justice by proceeding without lead counsel thereby occasioning injustice to the Applicant.
4. An order of Certiorari doth issue quashing the proceedings of the impugned tribunal.
5. An injunction doth issue restraining the respondents and their agents the tribunal investigating the intentions of Busia District Local Government Councilors, their servants or any other person acting under their authority from irregularly investigating the Chairperson or removal from office.
6. The Applicant shall get the taxed costs of this application.

Stephen Musota

JUDGE

24.07.2012