THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HC CV MA NO. 0007 0F 2011

KYOMUHENDO REX
NDOLERIIRE ROBERT ::APPLICANTS

VERSUS

KYENJOJO DISTRICT SERVICE COMMISSION
KYEGEGWA DISTRICT LOCAL GOVERNMENT :::::::::::::::::::::: RESPONDENTS

BEFORE HON. MR. JUSTICE MIKE J. CHIBITA

RULING

This was an application by Notice of Motion brought by the applicants under section 38 of the judicature act, The Judicature (Judicial Review) Rules and the Civil Procedure Rules, for the prerogative orders of certiorari, prohibition, injunction and mandamus against the respondents and for costs of the application.

The application was accompanied by the affidavit of one of the two applicants, Stephen Rex Kyomuhendo. The second applicant, Robert Twesige Ndoleriire did not file an affidavit.

At the hearing the applicants were represented by learned Counsel Richard Rugambwa while the respondents were represented by the learned Principal State Attorney Grace Ndibarema Mwebaze.

The parties agreed to file written submissions. Before delving into the main application, the learned State Attorney decided to raise preliminary points of law that he believed would dispose of the entire application.

The first objection was that though the application was filed by two applicants only one applicant filed a supporting affidavit. Neither did the applicant with a supporting affidavit, Stephen Rex Kyomuhendo, show whether or how he came to support the second applicant's application.

Counsel Ndibarema then cited **Makerere University vs. St. Mark Education Institute and another (1994) 5KALR 26** to show that a deponent who does not show that he had authority to swear an affidavit renders the application in question untenable in law.

He also argued that a representative order is mandatory and lack of leave of court to file in a representative capacity is fatal under Order 1 rule 8 of the Civil Procedure Rules.

Counsel referred court to the cases of **James Rwanyarare and another vs Attorney General, Const Petition No. 11 of 1997, Maximor Oleg Pettrovich vs Premchandra and another HCCS 802 of 1998 and Hajji Edirisa Mutasa and others vs IGG** and **Lyantonde District MC No. 66 of 2010 (Masaka)**

He contended that this ground of objection alone was enough to dispose of the application.

The second objection raised by Counsel was that the applicants chose a non existing entity in proceeding against the 1st respondent Kyenjojo District Service Commission. He argued that section 54 of the Local Governments Act, which established District Service Commissions did not establish them as legal entities with capacity to sue or to be sued.

Neither are District Service Commissions Scheduled Corporations under schedule 3 to the Civil Procedure and Limitation (Misc. Provisions) Act. A suit against a non existing party being no action at law, counsel argued therefore that the application ought to fail on this ground.

The third ground of objection, according to Counsel Ndibarema was that the affidavit in support of the application did not disclose sources of information for the allegations of bribery or corruption.

Counsel cites Order 19 rule 3 of the Civil Procedure Rules to argue that it is mandatory that affidavits confine themselves only to matters within the deponent's knowledge or else the source of information must be disclosed.

In support of his assertion he cited the case of **Attorney General vs Lutaya SCCA 1 of 2007** where it was held that an application supported by an invalid affidavit is bound to fail.

Counsel raised as his fourth ground an objection that referred to the application as a gamble for not having valid grounds under the specific law under which it is brought.

He referred to the case of **Re an Application by Mustapha Ramadhan CA Civil Appeal No. 25 of 1995** to assert that judicial review remedies will not be available where alternative remedies do exist.

Finally Counsel argued that the application was time barred since it should have been filed within three months of the alleged cause of action. Since it was not filed within the specified time then it should be struck off and/or dismissed with costs.

Counsel Rugambwa responded to the grounds of objection one by one but in effect dismissed them as having been misconstrued and misconceived.

While admitting that the second applicant did not file an affidavit he denied that this was fatal to the application. He distinguished the cases referred to by Counsel for the respondents while denying that he ever purported to swear his affidavit on behalf of the second applicant or anybody else for that matter.

He responded to the second objection with the argument that the applicants could not have sought the orders without including the body that made the impugned decisions. He added that several actions had been maintained in court against similar respondents though he did not name any such case.

Counsel referred to the third objection as not being an objection and referred court to his main submissions, since, as he asserts, it boils down to evidence. He must have intended to point out that rather than being a preliminary objection, this ground addresses the merits of the application.

On the fourth objection regarding failure to specifically plead grounds of bribery and corruption and their source, Counsel argues that the application is not grounded on only those grounds. He therefore admits that whereas there may be alternative remedies to corruption and bribery the prerogative orders are the only ones that address the decisions arrived at by the respondents.

On the issue of the application being time barred Counsel disagreed. He pointed out that the impugned decisions were made in November, 2010 and the application filed in January 2010 before the expiry of three months.

He rightly pointed out that Counsel for the respondents did not show the dates when he thinks the decision was made and therefore when the time expired. He therefore prayed that this particular objection and all the others before it should fail.

I agree that the second applicant did not show his relevance to the suit and is therefore dispensed with. He did not swear an affidavit neither did the first applicant show how he would be included in the application.

The application therefore at this point can proceed with one applicant since dispensing with the second applicant does not render it fatal.

On the second objection regarding the capacity to sue or be sued by Kyenjojo District Service Commission, I agree with Counsel that being party to a suit is not a matter of course. There must be capacity to sue or be sued before a party can be added to a suit.

Counsel for the applicants has not shown the legal qualifications of Kyenjojo District Service Commission to be party to this application.

The application is however not fatal just because the 1st respondent is not a legal personality. The application can still proceed between Kyomuhendo Rex Stephen and Kyegegwa District Local Government.

On the objection regarding the suit being time barred, Counsel for the respondents did not show the time frames that render the application to be time barred. Counsel for the applicant stated that the impugned decision was made in November and the application filed within time in January.

Without evidence to the contrary, court is left with no option but to decide this objection in favour of the party who has clearly spelt out the relevant dates. For such an objection to be sustained the party raising the objection should have shown when the impugned decision was made, when the application was filed and when it should have been filed in order to be within time.

Since this was not done that preliminary objection fails.

The third and fourth objections are matters that touch on the substance of the application and will therefore be considered as substantive issues.

I will follow the issues as outlined by Counsel for the applicants. Issue one is whether the application is tenable. The preliminary objections discussed in the foregoing paragraphs were dealing with this issue. They have been exhaustively discussed and it has been concluded that the application is tenable.

Issue number two, as framed by the applicant is whether the 1st respondent was mandated to recruit staff on behalf of the 2nd respondent. It has already been argued and decided from issue one that the 1st respondent is not a body corporate and has no capacity to sue or to be sued.

Court cannot therefore inquire into the matters of a non-party to the suit. In matters of this nature there must be a party with capacity to be sued vicariously for the acts of the party without legal personality. In most cases such party is the Attorney General.

On whether the 1st respondent was properly constituted, again it has already been ruled that the 1st respondent was wrongly added to this suit because it lacks legal personality and therefore has no capacity to sue or be sued.

Issue number 4 is whether the 1st respondent acted illegally, irregularly and improperly in recruiting staff of the 2nd respondent. Again, court will not delve into the workings of a non-party to the suit.

The same fate awaits issue number 5 regarding whether there were corrupt practices and bribery by members of the 1st respondent during the recruitment of staff for the 2nd respondent.

On remedies, under issue number six, the applicants seek a number of remedies under judicial review. I agree that the case of **Re an Application by Mustapha Ramadhan Civil Appeal No. 25 of 1995** is relevant in the present application.

There are alternative remedies in this case. Indeed Counsel for the applicants states in his submissions that they filed complaints about the same with the Inspectorate of Government and the Public Service Commission.

To issue the prerogative orders prayed for would affect the lives and status of many people who are not party to this suit. Court cannot grant such orders which will have the effect of prejudicing parties who were not party to the application, were not given a hearing and were not party to the wrongs complained of.

The net effect of granting the orders prayed for would be to paralyze the operations of the District Local Government with the resultant failure of service delivery to hundreds of thousands of unsuspecting taxpayers. Courts have to be wary of granting such orders.

The applicants' complaints can best be served by following up their complaint with the Inspectorate of Government so that specific officers who committed specific malpractices are singled out and penalized.

For the foregoing reasons the application fails. The applicants are advised to follow up their complaints with the relevant organs. Since the application was brought in the interest of what the applicants perceived to be a malpractice and therefore in the public interest, each party will bear its own costs.

Dated this 8th day of January, 2012.

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JUSTICE MIKE J. CHIBITA DATE

The ruling will be delivered by the Assistant Registrar on 18th January, 2012.

Mike Chibita

Judge.