

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISC CAUSE NO. 103 OF 2011

DR. FRANK MWESIGYE ===== APPLICANT

VERSUS

1. ATTORNEY GENERAL

2. NATIONAL DRUG AUTHORITY ===== RESPONDENT

BEFORE: HON JUSTICE ELDAD MWANGUSYA

RULING

This is an application brought under Section 38 of the Judicature Act and Rules 6, 7 and 8(2) of the Judicature (Judicial Review) Rules S. I No. 11 of 2009 seeking the following reliefs:-

1. An order declaring the decision of the Hon. Minister of Health Dr. Ondoa D. J Christine dissolving the National Drug Authority contained in her letter Ref: MH/NDA/159 dated 15th July, 2011 null and void and of no effect having been made ultra vires.

2. An order declaring the decision of the Hon. Ondoa D. J Christine appointing a new National Drugs Authority null and void the same having been made ultra vires.

In alternative but without prejudice to the above.

3. An order of certiorari issue quashing the decision of the Hon. Minister of Health the Hon. Dr. Ondoa D. J stated in paragraphs 1 and 2 above.
4. A declaration that the Minister has no power to dissolve the Authority under the National Drug Authority Act.
5. An order of mandamus directing the Minister of Health the Hon. Dr. Ondoa D. J Christine to reinstate the National Drug Authority dissolved by her letter MH/NDA/of 15th July 2011.
6. An order directing the Respondent to pay to the Applicant general damages for loss of reputation embarrassment and distress caused by the said decision of the Minister.
7. An order directing the Respondent to pay costs of this suit.
8. An order of declaration that the dissolution of the Board amounted to unlawful dismissal of the applicant.

In alternative but without prejudice to the above.

9. An order directing the Respondent to pay the applicant his retainer fee for the expired part of his contract.

The application was by a Notice of Motion supported by the affidavit of Dr. Frank Mwesigye, the applicant herein. The grounds are enumerated as follows:-

- (a) The applicant was on 5th March 2010 appointed to the National Drug Authority as Chairperson for a period of three years.
- (b) That his appointment has duly carried out his functions to the best of his ability and the Authority and his tenure of office was performing very well.
- (c) That sometime in February 2011 the Authority started a process of recruiting an Executive Secretary as the term of the then office bearer was due to expire.
- (d) That in July 2011 the Authority after due diligence and in strict compliance with the law established procedure did appoint a new Executive Secretary duly qualified and the Minister was notified.
- (e) That on 12th July 2011 the Minister of Health wrote to the Applicant suspending the Authority because she was never consulted on the process of appointing the Executive Secretary.
- (f) On 13th July 2011 the Minister wrote to Inspectorate of Government seeking a report over the integrity of the newly appointed Executive Secretary.

- (g) On 15th July 2011 the Minister dissolved the Authority over the same issue without giving them a hearing.
- (h) On 2nd August 2011 the Minister of Health appointed “an interim board” for the National Drug Authority.
- (i) On 11th August 2011 the “Interim Board” was sworn in and took office.
- (j) The applicant concluded that the above actions of the Minister are null and void and are of no effect having been made Ultra vires, in contravention of the National Drug Authority Act and in violation of the principles of Natural Justice.
- (k) The actions of the Minister contravenes Articles 42 of the Constitution.
- (l) That the Applicant had as a result of the Minister’s action suffered damages

In alteration and without prejudice to the above

- (m) The Applicant is entitled to damages for loss of earnings for the unexpired term of his contract.

(n) That it is just and equitable that this application be granted.

The affidavit of the applicant only expounds on these grounds. The issues raised in the Motion can be adequately resolved without going into the details of the affidavit. The averments that may be relevant in the resolution of the issues will be specifically cited and relied upon if there is need.

The first Respondent opposes the application through an affidavit in reply sworn by Mr. Asuman Lukwago, the Permanent Secretary Ministry of Health sworn on 10.12.2011. The Permanent Secretary defended the Ministers act to dissolve the National Drug Authority Board and appoint an interim Board which according to him was in accordance with the law. He justifies the dissolution of the board chaired by the applicant whom he accuses of insubordination during his tenure as Chairperson of the authority.

On behalf of the 2nd Respondent Dr. Aceng Jane Ruth who describes herself as an interim Chairperson filed an affidavit in reply in which she opposes the application and avers that this application falls outside the scope of Judicial Review. She also defended the action of the Minister of Health to dissolve the board headed by the applicant whose activities are subject of an investigation and that what the Minister did was within her authority to do so.

Dr. Ondoa D.J Christine, the Minister of Health swore an affidavit in reply in which she defended her action to remove the applicant from the authority because the Minister of Health is the Appointing authority. She justified her action to dissolve the authority which according to her was saddled with crippling problems and the dissolution was to pave way for investigations with the activities of the second respondent and in order to ensure continuity, appointed an interim board.

The parties filed a joint Scheduling Memorandum in which the following facts were admitted.

1. That acting under the provisions of the National Drug Policy and Authority Act (Cap 206) the Hon. Minister of Health appointed the Applicant Chairperson of the 2nd Respondent for a term of three years with effect from 5th March 2010.
2. That under the terms of his appointment the applicant was entitled to a Retainer Fee of Shs 17.150.000= per annum.
3. That on 15th July 2011 the Hon. Minister of Health dissolved the 2nd Respondents Board appointed on 5th March 2010 and subsequently an interim Board was sworn in and todate is in place.

The parties agreed on the following issues:-

1. Whether the Minister of Health had power to dissolve the 2nd Respondent's Board.
2. Whether the Hon. Minister's act of dissolving the 2nd Respondents Board amounted to dismissing the Applicant, and if so, whether the Applicant's grievance is justifiable in the present proceedings.
3. What remedies are available to the parties.

The applicant raised an additional issue as to whether the decision of the Minister violated the Applicant's right to natural justice.

On the issue as to whether or not the Hon. Minister had power to dissolve the board, Mr. Kenneth Kakuru counsel for the applicant submitted that the National Drug Policy Authority Act (Cap 206) Laws of Uganda establishes an Authority and not a board and therefore the question of dissolving a board that doesn't exist would not arise. He added that the Authority is constituted by nineteen persons of which sixteen are on the Authority by virtue of their offices and only three including the chairperson are appointed by the Minister who cannot dissolve the Authority which is constituted by law. He further submitted that the Minister does not have the power to dismiss the Chairperson of the Authority and that even if the Minister had such powers such dismissal would have to comply with the law. The

dismissal of the chairperson and the other two members would in itself not dissolve the Board and the fact that the Authority does not have a substantive Chairperson would not render it dissolved and neither would it prevent it from concluding its statutory duties. He concluded that the directive of the Minister contained in her letter dated July 15th 2011 addressed to the applicant was made Ultra vires and is null and void.

For the Attorney General it was submitted that the Minister who has authority to appoint the chairperson and two other members from the public has the power to dismiss them. It was submitted that the applicant was dismissed pending investigations into matters of financial and resource management. According to the Attorney General there was no dissolution of the board but a removal of the chairperson which necessitated his replacement with an interim chairperson which was lawful.

Mr. Tibaijuka Ateenyi counsel for the 2nd Respondent submitted that although the word 'board' is not used in the Act the body created by S. 3(2) read together with S. 3(3) is a board. This is because it fits in with the definition of the word "board" which is defined in Jowitt's Dictionary of English Law 2nd Edition P. 231 as "a body of persons, statutory or otherwise, having delegated to them certain powers or elected for certain purposes". According to Mr. Tibaijuka it is the applicant who uses the words "the Authority" interchangeably with the words "the board" and the phrase "dissolving the board" and "dissolving the Authority" and all the Minister did was removing the

Chairperson and the other members that she is mandated to appoint. He relies on Section 24 of the Interpretation Act (Cap 30 which provides that ***“where, by any Act, a power to make any appointment is conferred, the authority having power to make the appointment shall also have power to remove, suspend, re-appoint or reinstate any person appointed in exercise of the power.”***

In order to appreciate what the minister is empowered to do under the National Drug Authority Policy and Authority Act Cap 206, I will set out the contents of her letter dated 15th July 2011 that this application seeks to quash and then the law under which she purported to act.

“The Board Chairman

National Drug Authority

KAMPALA

RE: DISSOLVING OF THE NATIONAL DRUG AUTHORITY BOARD.

Reference is made to Cap 206, Section 3(3) and 5, 4(3) of the National Drug Policy Authority Statute 1993.

I have also noted the persistent failure of the board of National Drug Authority (NDA) to consult me on matter concerning the appointment of the Executive Secretary of NDA.

Also reference is made to the letter from the Inspector General of Government (IGG) Ref: TD 62/2003 of 2003, paragraph 12, concerning the newly appointed Executive Secretary.

This is therefore to inform you that:-

- 1. The National Drug Authority (NDA) Board which was appointed on 5th March 2010 under even reference has been dissolved with immediate effect.**
- 2. The director General of Health Services Delivery Monitoring Unit should immediately start intensive investigations of the NDA.**

Hon. Dr. Ondoa D. J Christine

MINISTER OF HEALTH.

cc: Hon. Minister of State to Health (General Duties)

cc: Ag Permanent Secretary, Ministry of Health

cc; Director of Health Services

cc: All Board Members of the National Drug Authority

cc: Director of Medicines & Health Services Delivery Monitoring Unit”

The law under which the Minister acted to take the decision that she did to dissolve the National Drug Authority Board as she termed it in her letter is Section 3 of the Act.

“3. Establishment of the National Drug Authority.

- (1) There is established a National Drug Authority which shall be a body corporate name.***
- (2) The drug authority shall consist of the Chairperson and the following other persons-***
 - (a) The director of medical services;***
 - (b) The Commissioner for Veterinary Services;***
 - (c) The Commissioner for trade;***
 - (d) The director criminal investigation department;***
 - (e) The chief of medical services Ministry of Defence;***
 - (f) The chief of pharmaceuticals and health supplies;***

- (g) The head of Natural Chemotherapeutics Laboratory;**
 - (h) The director, Mulago Hospital;**
 - (i) A representative of each of the following -**
 - i. The National Medical Stores;**
 - ii. The Uganda Medical Association;**
 - iii. The pharmaceutical society of Uganda;**
 - iv. The Uganda veterinary Association;**
 - v. The head of the school of Pharmacy, Makerere University;**
 - vi. The Uganda herbalists;**
 - vii. The Uganda Dental Association; and**
 - viii. The joint Medical Stores**
 - (j) The director general of the Uganda Aids Commission;**
 - (k) Two other persons appointed from the public**
- (3) The Chairperson and the members appointed under Subsection (2)(k) shall be appointed by the Minister**
- (4) The members appointed under Subsection (3) shall be in office for three years but shall be eligible for re-appointment (underlining provided).**

My understanding of this provision is that the Act creates an Authority consisting of persons who are on it by virtue of their various offices and others including the chairperson who are appointees of the Minister.

There is no such a body known as a board that the Minister purported to dissolve and even if such a body existed it is incorrect to state that the Minister could dismiss the three persons under her appointment because that is not what she did. Her action is explicit.

“The National Drug Authority (NDA) Board which was appointed on 5th March 2010 under even reference has been dissolved with immediate effect.”

In her reply to this application the Minister attempts to justify her action but does not address the issue as to where she derived the power to dissolve the ‘Board’ which forms the crux of this application. She cited the law under which she purported to dissolve it but the provision which has been cited in this ruling has nothing do with the dissolution of the Authority which is constituted under that provision.

It is also not correct to state that her power to dissolve the ‘board’ is derived from the fact that she has power to appoint three persons including the Chairperson whom she has power to dismiss. Her letter does not mention the three persons under her appointment but is a dissolution of the ‘board’ which in my view she has no power to dissolve. It is on that basis that the answer to the first issue is answered in the negative.

The second issue is as to whether the Honourable Minister's act of dissolving the 2nd Respondents Board amounted to dismissing the Applicant, and if so, whether the applicant's grievance is justifiable in the present proceedings.

This issue is partly resolved by the finding of this Court that the Minister had no power to dissolve the 'board' and it is not necessary to belabor the point. Secondly if the Minister's intention was to dismiss the applicant or any of three persons appointed by her there was no need to 'camouflage' the dismissal under the guise of dissolving the board. My finding on this issue is that there was no dissolution of the board and therefore the dismissal of the applicant does not arise.

The third issue is as to whether the Minister appointed a New National Drug Authority Board and if so whether her action was valid. Again this issue is answered by the finding on the first issue that the minister had no power to dissolve the 'Board'. In view of this finding the question of appointing a new Board would not arise because any appointment made subsequent to the impugned decision to dissolve the board would not be valid.

Lastly is the issue as to what remedies are available to parties. In this respect I would wish to reiterate a statement by the Court of Appeal as to the Scope of Judicial Review. This is in the case of His Worship Aggrey Bwire vs Attorney General and the Judicial Service Commission. (Civil Appeal No. 09 of 2009) where AEN Mpagi Bahigeine, Justice of Appeal as she then was held as follows:-

“It is trite that Judicial Review can only be granted on three grounds namely: illegality, irrationality and procedural impropriety - Council of Civil Service Unions vs Minister for Civil Service (1985) AC. 374. The first two grounds are known as substantive grounds of judicial review because they relate to the substance of the disputed decision. Procedural impropriety is a procedural ground because it aims at the decision making procedure rather than the content of the decision itself.....”

In the instant case two remedies are sought. These are;

1. An order declaring the decision of this Honourable Minister of Health Hon. Ondoa D.J Christine dissolving the National Drug Authority contained in her letter Reference MH/NDA/159 dated 15th July 2011 null and void and no effect having been made Ultra vires.
2. An order declaring the decision of the Dr. Ondoa D. J Christine appointing a New National Drug Authority null and void the same having been made Ultra vires.

In view of the finding of this Court on the first issue these remedies are available to the applicant and they are granted to him.

The rest of the remedies were sought in the alternative. I find it unnecessary to delve into them after granting the main orders and declarations prayed for.

Eldad Mwangusya

J U D G E

29/03/2012

29/03/2012

Kenneth Kakuru for applicant

Godwin Murungi for 2nd respondent

Applicant in court

Representative from 2nd respondent Kabuzire in Court.

Court: - Ruling read in open Chambers

Keitirima John Eudes

DEPUTY REGISTRAR

29/03/2012