



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Suit No. 0032 of 2006

In the matter between

1. OJOK ALPHONSE
2. ATTO LILLY
3. OYELLA FLORENCE
4. UOLA SIMON
5. NYEKO WALTER

PLAINTIFFS

And

1. GULU MUNICIPAL COUNCIL
2. PECE DIVISION LOCAL COUNCIL

DEFENDANTS

Heard: 9 September, 2019.

Delivered: 27 November, 2019.

Contract: — *Employment* — A Local Government has such powers only as are expressly or impliedly conferred upon it by the legislation which created it — under section 55 (1) of The Local Government Act, the power to appoint persons to hold or act in any office in the service of a district or urban council, including the power to confirm appointments, to exercise disciplinary control over persons holding or acting in such offices and to remove those persons from office, is vested in the District Service Commission — When a contract is neither expressly authorised nor a necessary or reasonable incident to the exercise of the powers specifically granted by an Act of Parliament, the contract is ultra vires — An ultra vires agreement cannot become intra vires by reason of estoppel, lapse of time, ratification, acquiescence, or delay — A Local Government therefore cannot enter into or bind itself by a contract which is expressly prohibited by the statute that created it and in the application of this principle it is immaterial that, the contract, except for the prohibition, would be lawful, for no one is permitted to justify an act which the legislature within its constitutional powers has deemed shall not be performed — As general rule, a contract which is against the mandate of a statute may not be made the foundation of any action, either in law or equity.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The plaintiffs' claim jointly and severally against the defendants jointly and severally is for recovery of accrued salary arrears and allowances under a contract of employment, general damages for breach of contract, interest and costs. Their claim is that during or around the month of November, 2005 the 2nd defendant's Executive Committee resolved to start a secondary school. The 1st plaintiff was then approached by a one Ogaba Labwor, a delegate of the 2nd defendant's Executive Committee, who made him an offer to head the school on a three-year contract at a salary equivalent to that of an "O" Level Head Teacher on government payroll. Having accepted the offer, the 2nd defendant's Assistant Town Clerk then on 18th January, 2016 wrote to the Municipal Education Officer notifying him that the 2nd defendant's Executive Committee had appointed the 1st plaintiff as caretaker head-teacher of the school (annexure "A" to the plaint).

[2] A Councillor Mr. Ogaba Labwor secured a total of forty class-room desks which he together with Councillor Hon. Kay Nyeko handed over to the 1st plaintiff who thereby assumed his duties as caretaker head-teacher of the school when it officially opened on 2nd February, 2016. The 1st plaintiff then recruited the rest of the plaintiffs to serve as teachers in the school as they awaited formal appointments. On 19th July, 2006 the 2nd defendant's Assistant Town Clerk wrote a letter querying the recruitment of plaintiffs as teaching and administrative staff for the school which he characterised as a community school. He opined that the 2nd respondent did not have the legal mandate to engage in the operation and management of secondary schools. He recommended that the plaintiff's regularise their status with the school's governing body. The plaintiffs then sued claiming salary arrears and allowances accruing from January, 2006 to December, 2008.

[3] In their joint written statement of defence, the defendants denied the plaintiffs' claim. They averred that the plaintiffs' recruitment was not compliant with the procedures established by law. The said Ogaba Labwor and Hon. Kay Nyeko were not authorised by the second defendant to recruit staff. Arrangements entered into as a result of such approaches did not give rise to enforceable contracts of service. The defendants are not responsible for the payment of salary to teaching staff in secondary schools; as that is the responsibility of the central government. They therefore prayed that the suit be dismissed with costs.

Issues

- [4] The following issues were agreed upon at the scheduling conference for determination by the court, namely;
1. Whether or not the plaintiffs were appointed by the defendants to the posts they claim to have held.
 2. Whether or not the appointments were lawful.
 3. Whether or not the plaintiffs carried out any work for the defendants.
 4. Whether the plaintiffs are entitled to the remedies claimed.

The plaintiffs' evidence:

[5] P.W.1 Ojok Achellam Alphonse testified that it is him who recruited the rest of the plaintiffs as part time teachers at Pece Pioneer Secondary School, a private secondary school founded by the 2nd defendant, at a monthly salary of shs. 100,000/= He undertook this by authority of the then Pece Division Chairman Mr. John Ogwok who had appointed him to head the school during the year 2006. He was given a three-year contract at a monthly salary of shs. 900,000/= on the understanding that the school would later be taken over by government. The terms of the contract were verbal. He worked in that capacity from January, 2006 until 26th July, 2006 when the new Assistant Ton Clerk wrote a letter disowning the arrangement. Upon receipt of that letter the teaching stopped, the school closed and the students dispersed.

- [6] P.W.2. Opwonya Alubi testified that he was the head teacher at Pece Primary School in 2006 when the school ceded two classrooms to enable Pece Pioneer Secondary School to start. He was approached by the 1st plaintiff together with the Chairman L.C.III of Pece Division Mr. Ogwok. They requested him for accommodation by way of classrooms then being used by the primary school. He allowed them to take over the eight classrooms on two blocks each of four classrooms. The school opened in March 2006 with the 1st plaintiff as the head teacher. The school was being run by Pece Division Council.
- [7] P.W.3 Komakech John Ogwok testified that he served as the Chairman of the 2nd defendant from 2002 until March 2006. Pece Senior Secondary School was started by Hon. Nobert Mao, the then Chairman Gulu Municipal Council, within the land of Pece Primary School. The Primary School was a government aided School. It was the Municipal Council that was responsible for the transfer, posting and payment of teachers for the primary school. He directed the Secretary Finance Ogaba Labwor and the Asst. Town Clerk Toolit James to convene a Division Executive Committee, to discuss the operationalisation of Pece Senior Secondary school, to engage Mr. Alphonse as the care taker head teacher, to identify available resources to purchase scholastic material for the staff ion the school. Mr. Ojok Alphonse took over management of the school as a caretaker. The school started but he could not remember the exact date. He was told that scholastic material were provided by Pece Division but he did not know exactly what was provided. Mr. Ojok Alphonse was not an employee but he was simply contracted to serve for that period. He did not know what his terms of engagement were. The letter written by the Assistant Town Clerk recommended that he be appointed caretaker head teacher. He needed instruction to recruit and in this case the instructions should have come from the Division Executive.

The defendant's evidence:

- [8] D.W.1 Opwona H. Morris, the Deputy Town Clerk of the 1st defendant, testified that the normal procedure of recruitment requires a vacancy to be declared, which is then submitted to the District Service Commission which has the authority to recruit. That procedure was not followed in the instant case. D.W.2 Oloya Gilbert, the Senior Asst. Town Clerk of the 2nd defendant, testified that the 1st plaintiff was neither employed by the Division Council nor the Municipal Council. The executive Committee made a recommendation and later Pece Division stated it was not its mandate. Pece Pioneer Secondary School is a community School. The Council oversees the management of Schools. Divisions oversee operation of Primary School. It is the District service Commission that appoints teachers. Ogwok was Chairperson of Pece Division at the time and was authorised to act on behalf of the Division but only on lawful matters.

Arguments of Counsel for the plaintiffs:

- [9] In his final submissions, counsel for the plaintiffs argued that the 1st plaintiff was duly appointed as caretaker of the school. He run the school until July, 2006 when he received a letter stopping him. He recruited the rest of the plaintiffs as teachers in the school. Had there been no contract between him and the 2nd defendant then it would not have been terminated. The 2nd defendant benefited from the plaintiffs' labour and thus equity demands that they pay for it. The 1st plaintiff was engaged informally only to start the school where after the formal processes of recruitment by government would come in. The recruitment was undertaken by agents of the 2nd defendant, its Executive Committee, Chairperson and Councillors. The plaintiffs are innocent parties that dealt with the agents of the 2nd defendant believing that they had authority to contract on its behalf. The 2nd defendant is estopped from denying a contract entered into by its agents. The defendants held out the Chairman and Councillors as there agents and they acted within the scope of their ostensible authority. The 1st defendant failed to

supervise the 2nd defendant. He prayed that the suit be decided in the plaintiffs' favour.

Arguments of Counsel for the defendants:

[10] In response counsel for the defendants submitted that the plaint does not disclose a cause of action. Although the 1st plaintiff pleaded that he had a letter of appointment, what he produced in court was a letter recommending him to the Municipal Education Officer for appointment as a caretaker head teacher for the school. The 1st plaintiff had actual notice of the irregularity of his assumption of duties before formal appointment. When the 1st plaintiff recruited the rest of the plaintiffs as teachers in the school, he had no mandate to do so. None of the plaintiffs produces a letter of appointment issued to them by any of the defendants. This was contrary to *The Public Service Standing Orders*. None of the plaintiffs was ever recruited into the public service and therefore the suit should be dismissed. For convenience, the first two issues will be considered concurrently.

First issue; Whether or not the plaintiffs were appointed by the defendants to the posts they claim to have held.

Second issue; Whether or not the appointments were lawful.

[11] By virtue of section 6 of *The Local Governments Act*, every local government council established under sections 3 (2) to (5) of the Act is a body corporate with perpetual succession and a common seal, and may sue or be sued in its corporate name. Division Councils are established as lower local governments under section 3 (4) (b) of the Act as local governments within a municipality. Hence both defendants are bodies corporate with the capacity to sue or be sued in their respective corporate names.

- [12] As a corporation, the artificial legal person has no physical existence. Apart from its incorporators it can have neither thoughts, wishes, nor intentions, for it has no mind other than the mind of the incorporators (see *Daimler Co Ltd v. Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307). Its officers act as its agents and where an agent acts within the limits of his or her actual authority and the capacity of the company, the company as principal will be bound by all contracts entered into by the agent. An agent who is authorised to do any act in the course of this trade, profession or business as an agent of the company has implied authority to do whatever is normally incidental, in the ordinary course of such a trade, profession or business, to the execution of this express authority, but not to do anything which is unusual in such trade, profession or business, or which is neither necessary nor incidental to the execution of his or her express trust (see *Scott v. Godfrey* [1901] 2 KB and *SMC Electronics Ltd v. Akhter Computers Ltd and Others* [2001] 1 BCLC 433).
- [13] Express authority is actually stated authority granted by the principal to the agent either orally or in writing. Implied authority derives either from the type of work the agent is doing (usual authority), or the place where the agent is working (customary authority), arising out of the customs of a particular place or business. Customary authority operates to authorise the agent to act according to the usages or customs of a particular place or market. Ostensible authority (apparent authority) involves the principal, by words or action, leading the third party to believe the agent has authority when in fact he or she does not.
- [14] The requirements for the existence of ostensible authority were set out in *Rama Corporation Ltd v. Tin and General Investments Ltd* [1952] 2 QB 147 where it was said to be some kind of estoppel and that therefore what was needed was representation, reliance and alteration of one's position resulting from such reliance. The representation must be made by the principal and not by the agent since an agent cannot ordinarily confer ostensible authority on himself or herself. "He cannot put himself up by his own shoelaces" (see *United Bank of Kuwait Ltd*

v. Hammoud City Trust Ltd v. Levy [1988] 3 All ER 418). It is a representation made by the principal to the third party intended to be and in fact acted upon by the third party, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract (see *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480 at 503*). The third party will not be able to plead ostensible authority if he or she was not aware of the representation, or did not actually believe that the agent had authority, or ought to have known that the agent's authority was limited (see *Overbrooke Estates Ltd v. Glencombe Properties Ltd [1974] 3 All ER 511*).

[15] In general terms, directors can only act on the company's behalf at board meetings, and in accordance with collective decisions expressed in board resolutions. Individual directors and the company's senior management may have, in appropriate circumstances and in the absence of an express authority, an authority under the common law rules of agency to make binding contracts on the company's behalf, provided the outsider has no knowledge of the lack of authority in the agent (see *Freeman and Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd [1964] 1 All ER 630*). A director may have ostensible authority to enter into particular categories of agreements generally or ordinarily incidental to his or her duties and they will be binding where the third party was not on notice of any lack of authority.

[16] Therefore, since a Local Government is the mere creature of the Legislature, it has such powers only as are conferred upon it by the relevant Acts of parliament. A Local Government has such powers only as are expressly or impliedly conferred upon it by the legislature which created it. These powers may be conferred in any one of three ways: expressly, impliedly in one sense as being incidental to corporate existence or impliedly in still another sense as being necessary or proper in order to exercise the powers expressly conferred.

- [17] According to items 1 and 7 of Part 2 of the Second Schedule to *The Local Governments Act*, subject to article 176 (2) of *The Constitution of the Republic of Uganda, 1995* and sections 96 and 97 of the Act, functions and services for which District Councils are responsible include, but are not limited to, aiding and supporting the establishment and maintenance of schools offering education services covering nursery, primary, secondary, trade, special education and technical education, and providing bursaries to assist in the education of children of persons residing in the district.
- [18] According to Items 1 (y) and 23 of Part 3 of the same schedule, functions and services for which Urban Councils are responsible include, but are not limited to, aiding and supporting, whether by the grant of money or otherwise, the establishment and maintenance of schools offering education services covering nursery, primary, secondary, trade, special education and technical education, provide bursaries to assist in the education of the children of persons residing in the area of jurisdiction. Item 1 of Part 4 of the same schedule, specifies functions and services to be devolved by a District council to lower Local Government Councils and they include the provision of nursery and primary education. According to Item 17 of Part 5 (B) of the same schedule, functions and services to be devolved by city or municipal council to Divisions include the provision of nursery and primary education.
- [19] On the other hand, under section 55 (1) of *The Local Government Act*, the power to appoint persons to hold or act in any office in the service of a district or urban council, including the power to confirm appointments, to exercise disciplinary control over persons holding or acting in such offices and to remove those persons from office, is vested in the District Service Commission. By virtue of section 55 (3) thereof, when considering recruitment of staff in the education services, the commission is required to use guidelines provided by the Education Service Commission.

- [20] When issues arise as to the validity of contracts of Local Government, they are to be determined by comparing the contract made with the Act, and if on such comparison it appears that the contract was neither expressly authorised nor a necessary or reasonable incident to the exercise of the powers specifically granted, the contract is *ultra vires*. A contract of a Local Government is *ultra vires* when such contract is beyond the powers conferred upon it by the legislature. An *ultra vires* contract is one not within the scope of the corporate authority under any circumstances. Whether it be *ultra vires* or not is determined from a consideration of the powers expressly conferred upon the Local Government by the Act of its creation, together with those other powers implied in the purposes of its creation and in the powers expressly granted.
- [21] If the act is beyond the power of the corporation to do or ratify, not even judgment obtained by the consent of the corporation treating it as authorised can remove its invalidity (see *In re Jon Beauforte (London) Ltd.* [1953] 1 Ch. 131 and *Great North-West Central Railway Co. v. Charlebois* (1889) AC 114). A company cannot do what is beyond its legal powers by simply going into courts and consenting to a decree which orders that the thing shall be done. An *ultra vires* agreement cannot become *intra vires* by reason of estoppel, lapse of time, ratification, acquiescence, or delay (see *York Corporation v. Henry Leetham & Sons Ltd.*, (1924) 1 Ch. 557 at 573). A Local Government therefore cannot enter into or bind itself by a contract which is expressly prohibited by the statute that created it and in the application of this principle it is immaterial that, the contract, except for the prohibition, would be lawful, for no one is permitted to justify an act which the legislature within its constitutional powers has deemed shall not be performed.
- [22] Whereas items 1 and 7 of Part 2 of the Second Schedule to *The Local Governments Act*, empower District Councils to perform functions that include aiding and supporting the establishment and maintenance of schools offering education services covering nursery, primary, secondary, trade, special

education and technical education, and providing bursaries to assist in the education of children of persons residing in the district, "aiding and supporting" in this context does not include the actual recruitment of teachers, which by virtue of section 55 (1) of *The Local Government Act*, is a power vested in the District Service Commission. None of the two defendants had the legal capacity to appoint any of the plaintiffs as teachers.

[23] Similarly, the plaintiffs are precluded from advancing the argument that by starting the school and appointing the 1st plaintiff caretaker head teacher, the then District Chairman Hon. Norbert Mao, the then Chairman L.C.III of Pece Division Mr. Ogwok, the Secretary Finance Ogaba Labwor and the Asst. Town Clerk Toolit James acted under the ostensible authority of the defendants since such agreements are not generally or ordinarily incidental to their duties and under the maxims of *ignorantia juris non excusat* or *ignorantia legis neminem excusat* ("ignorance of the law excuses not" and "ignorance of law excuses no one" respectively), the plaintiffs had constructive notice of their lack of authority. Both issues are accordingly answered in the negative; none of the plaintiffs was appointed by the defendants to the posts they claim to have held and none of the purported appointments was lawful.

Third issue; Whether or not the plaintiffs carried out any work for the defendants.

[24] The power of a Local Government, like that of a person under a legal disability, cannot be enlarged by the mere form of contract which it had no capacity to make. By virtue of the interest of the public that a Local Government shall not transcend the powers granted, it is the obligation of every one entering into a contract with a Local Government to take notice of the legal limits of its powers. By virtue of ancient equity maxim, *ignoranti juris non excusat* (ignorance of the law is no excuse), it is a fundamental rule in the law of contract that parties are presumed to know the law and to contract on that basis.

- [25] By necessity all persons have at a minimum constructive notice of statutes duly published. The doctrine that ignorance of the law is no defence is a substantive rule of law resting upon grounds of public policy so compelling as to override the normal requirements of evidence to prove a claim or a defence. Powers delegated by the State to Local Governments are matters of public law of which no one can plead ignorance. A party dealing with a Local Government having limited and delegated powers is chargeable with notice of those powers and their limitations and cannot plead his or her ignorance. Consequently, the plaintiffs cannot plead ignorance of the *ultra vires* character of the transaction.
- [26] An illegal contract is one that is unenforceable as a matter of policy because enforcement would be injurious to the best interest of the public. A contract may be illegal because the object or purpose of the contract is illegal. It may be illegal because it contains an illegal promise, although the performance of the promise is not itself illegal. Or, it may be illegal because a lawful promise has been or will be performed in an illegal manner.
- [27] Where a Local Government is acting within the general scope of the powers conferred upon it by the legislature Local Government as well as persons contracting with it may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action because such prerequisites might in fact have been complied with; but where the contract is beyond the powers conferred upon it by existing laws neither the Local Government nor the other party to the contract can be estopped to show that it was prohibited by those laws by consenting to it or acting upon it.
- [28] As general rule, a contract which is against the mandate of a statute may not be made the foundation of any action, either in law or equity. Contracts which are foreign to the nature and design of the Local Government, and which are hence beyond the powers conferred upon the Local Government, are therefore *ultra vires* and not enforceable but wholly void and of no legal effect whatever. The

law prohibits the performance of an *ultra vires* contract and receipt of benefits there-under from working an estoppel, the effect of which would be the precluding of the defendant from setting up the invalidity of the contract. The objection to the contract is not merely that the Local Government ought not to have made it, but that it could not make it. The contract cannot be ratified by either party because it could not have been authorised by either. When a contract is beyond the powers conferred upon a corporation by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws (see *Central Transportation Company v. Pullman's Palace Car Company*, 139 U.S. 24 at 59; 35 L.Ed. 55 at 68 (1890)).

[29] Secondly, although no formalities are required to make a contract legally enforceable in that it is not necessary for the agreement to be reduced to writing since a contract may be concluded entirely from orally-agreed terms, or even implied from the parties' conduct, however the terms are negotiated and agreed, the courts will not recognise an agreement as a contract if the terms are uncertain or incapable of being made certain (see *Baird Textile Holdings Ltd v. Marks and Spencer plc* [2001] All ER (D) 352). In the instant case, apart from the 1st plaintiff, none of the other plaintiffs articulated what the terms of their alleged contracts were. But even for the 1st plaintiff, the only term he specified was that he had been appointed to head the school on a three year contract at a monthly salary of shs. 900,000/= on the understanding that the school would later be taken over by government. The rest of the terms of the agreement are uncertain or incapable of being made certain.

[30] The letter from the Assistant Town Clerk of the 2nd defendant, addressed to the Municipal Education Officer relied upon by the 1st plaintiff as the one by which he was appointed to the position (exhibit P. Ex.1 dated 18th January, 2006) has only content that recommended him for appointment as caretaker. That too was by a subsequent letter dated 19th July, 2006 (exhibit P. Ex.2) expressly revoked and

the 1st plaintiff accordingly notified that "it would be beyond the functions of the Division as provided for under the second schedule part 4 (1) part 5 (b) (17) of *The Local Government Act, 2006* to engage in the management and administration of secondary education." Therefore, there is no evidence to show that any of the defendants ever assigned the plaintiffs any of their respective roles, or the authority to 1st plaintiff to recruit teachers for the school. For the foregoing reasons, this issue as well is accordingly answered in the negative; none of the plaintiffs carried out work for the defendants.

Fourth issue; Whether the plaintiffs are entitled to the remedies claimed.

[31] Although a party is not liable to pay according to a contract which is *ultra vires*, that fact is not permitted to work injustice where the law can afford a remedy without enforcing the illegal contract, and the courts will give relief where it can be given independent of the contract. The courts make a distinction between contracts which are *ultra vires* merely because of the disregard of mere formalities which the law requires to be observed, and those which are for want of power in Local Government, and hold that the former can be enforced while the latter cannot be under any circumstances.

[32] No relief in law or in equity will be granted to one who is a party to an illegal contract. Participants to an illegal contract who are in *pari delicto* can secure no relief based on such contract. The Court cannot lend its assistance to the consummation or encouragement of what public policy forbids. The parties are left where they are found on the principle that any resulting injustice between them is outweighed by the public interest in deterring illegal conduct.

[33] The test is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he or she has broken the law, the court will not assist him or her, whatever his or her claim in justice may be upon the defendant. The court will not grant relief to a

plaintiff who must rely upon the illegal aspect of the transaction to make out his or her case. So if a Local Government has received money or property or the benefit of services under an *ultra vires* contract the courts are virtually agreed that it may be compelled to refund the value of that which it has actually received in an action *quasi ex contractu* (*quasi contract*).

[34] The nature of the instant suit is not for money had and received with interest after demand after a contract that is not *malum in se* but *malum prohibitum*. While a claim for money had and received, which in equity and good conscience belongs to the plaintiffs and which the defendants ought to pay over, would disaffirm the contract, the current suit for the recovery of money accruing under the contract, not in effect seeks to enforce or affirm the contract. The courts recognise that the unjust enrichment of a defendant who successfully pleads illegality as a defence is tolerated not for the defendant's sake, but for the sake of the general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff. The true foundation of the doctrine of *ultra vires* lies in the proposition that every act of a corporation in excess of its powers is an act in contravention of public policy, and for that reason to be held null and void.

[35] A contract of a Local Government which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law and therefore beyond the powers conferred upon it by the legislature is, not voidable only, but wholly void and of no legal effect. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. A contract *ultra vires* is unenforceable though it has been in good faith performed by one of the parties, and the Local Government has had full benefit of the performance.

Order :

[36] In the final result, considering the findings made when resolving the first three issues, there is no merit in the suit. It is accordingly dismissed with no order as to costs.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellants : M/s Komakech-Kilama and Co. Advocates,

For the respondents: M/s Oyet and Co. Advocates