THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

MISCELLANEOUS CAUSE NO. 16 OF 2021

1. OBOL JAMES HENRY
2. AYELLA ANDREW
3. EPOLU GEOFFREY..... APPLICANTS

VERSUS

1. GULU UNIVERSITY
2. PROF. GEORGE LADAAH OPENJURU .... RESPONDENTS

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

The ruling arises from a preliminary objection raised by the 2nd Respondent with which the 1st Respondent associated. The objection was that the Judicial Review Cause No. 16 of 2021 is time-barred.

The brief facts are that the Applicants lodged the application in court on 16th September, 2021. The Applicants seek various declarations and orders. The Applicants who are employees of the 1st Respondent University also double as the workers' representatives to the Council

of the 1st Respondent however, the 2nd defendant is not a member of the Council. The 2nd Respondent applied for and was promoted by the 1st Respondent to the rank of Professor of Education (in the Faculty of Education and Humanities) on a fast track basis, effective September 1st, 2016. This was communicated *vide* a letter dated September 14, 2016.

After some time, the position of Vice Chancellor in the 1st Respondent fell vacant. The 2nd Respondent expressed interest for the job. After an internal process, following the provisions of the Universities and Other Tertiary Institutions Act, 2001 as Amended in 2006, the 2nd Respondent emerged successful and was appointed Vice Chancellor effective 1st January, 2018, *vide* the Instrument of Appointment dated 2nd October, 2017.

In their Cause, the Applicants challenge the promotion of the 2nd Respondent to full Professor, and the appointment as Vice Chancellor. The Applicants aver that the University's search Committee was constituted with a mandate to recommend suitable candidates to the University Senate for further recommendation for the job. That subsequently, the Senate was to recommend the

candidates to the University's Appointment Board, which would in turn recommend the candidates to the University Council. The Council would then approve the candidate for the job.

The Applicants averred that the Search Committee carried out its mandate and made a report and recommendation based on fraudulent academic documents of the 2nd Respondent. They contended that all the University organs acted on the reports, and therefore, the consequent appointment of the 2nd Respondent was based on irregular, forged and fraudulent documents. They prayed that on the basis of the allegations, Court declares the position of the Vice Chancellor vacant and the process of appointment be engaged immediately and executed in accordance with the law.

The Respondents lodged affidavits in reply, contesting and denying the allegations. They averred and contended to the effect that the process leading to the search, vetting, and appointment of the 2nd Respondent as Vice Chancellor was regular, valid and in accordance with the law. The allegations of fraud and forgery were denied. With regard to his promotion to full Professor, the 2nd Respondent

deposed that he met all the requirements for the promotion, alluding to several pieces of evidence in support. The 2nd Respondent denied a litany of allegations levelled against him. He also averred that the Application is tainted with material falsehoods, grossly misconceived, bad in law, an abuse of court process, frivolous and vexatious, instituted in bad faith. He further deposed that no leave of court was sought before the Application could be lodged (a plea of time-bar). The 2nd Respondent, therefore, averred that court would be moved at a preliminary stage to have the Application struck out with costs.

True to their threats, the 2nd Respondent raised a preliminary objection when the matter came up for hearing before my brother Judge on 1st March, 2022. Court was informed that written submissions in support of the preliminary objection had been lodged. The Applicants' counsel was given up to 9th March, 2022 to lodge submissions in reply, and any rejoinder was to be filed by 11th March, 2022. The Ruling was to be delivered on 24th March, 2022. Submissions were duly filed and are on court record, except for the 1st Respondent wherein Counsel informed Court he would associate

with the 2nd Respondent's. When I took over the matter, the parties appeared before me and adopted their submissions.

Representation

During the appearance of 10th February, 2023, the Applicant was represented by learned Counsel Mr. Yusuf Kagere. The 1st Respondent was represented by learned Counsel Mr. Walter Okidi Ladwar while the 2nd Respondent was represented by learned Counsel Mr. Ronald Mutalya. I have perused the submissions and the authorities cited and I am grateful to learned Counsel.

Issue

The main issue is whether Misc. Cause No. 16 of 2021 is time barred.

Arguments

For the 2nd Respondent with whom the 1st Respondent associated, Mr. Mutalya Ronald submitted that the Application is time-barred. He argued that the 2nd Respondent was appointed Vice Chancellor of Gulu University (the 1st Respondent) on 2nd October, 2017, for a five year term, commencing 1st January, 2018. Therefore, by the

time the Application for judicial review was lodged in court on 16th September, 2021, which was approximately 4 years later, without court extension of time, it was time-barred. Counsel cited section 36 (7) of the Judicature Act Cap. 13 and Rule 5 (1) of the Judicature (Judicial Review) Rules, S.I No. 11 of 2009 to support his arguments. Learned Counsel also cited several judicial decisions and prayed for dismissal of the Application with costs.

For the Applicants, Mr. Kagere Yusuf did not agree. He argued that the Application is not time barred. He raised an interesting argument, that the Application raises matters of continuous illegality and thus an exception to the law of limitation. Learned Counsel argued that the objection can only be determined after court has fully examined the facts and evidence (to determine the propriety of the remedies). Counsel also contended that Rule 5 (1) of the Judicature (Judicial Review) Rules, S.I No. 11 of 2009 is not couched in mandatory terms because the Rule does not provide sanctions for non-compliance and as such, it should be construed as being directory. Learned Counsel also submitted that the Rule gives this Court discretion to consider reasons for extension of time. Learned

counsel cited the authorities of **Kaluo Joseph Andrew & 2 others Vs. the AG & 6 Others, Misc. Cause No. 106 of 2001**, and **Nampogo Robert & another Vs. AG, Misc. Cause No. 120 of 2008**, for the proposition that Rule 5 (1) of the S.I 11 of 2009 (*supra*) is intended to ensure expeditious determination of the judicial review application than to oust court's jurisdiction to hear the parties after the lapse of the prescribed period. Those authorities were also cited for the proposition that the rule does not state the legal consequences of failure by a party to comply with it (and hence not mandatory). Learned Counsel also cited **Sitenda Sebalu & Electoral Commission Vs. Sam .K. Njuba & the Electoral Commission, Election Pet. Appeal No. 26 of 2007**, in support of the proposed interpretation of rule 5 (1) (*supra*).

In his submission in rejoinder, Learned Counsel for the 2nd Respondent reiterated his earlier submissions and cited additional authorities in support. Learned Counsel was emphatic that the Applicants should not be allowed to use the license of easy access to justice to file a misconceived and frivolous suit. Counsel contended that the Applicants do not have clean hands and a clear objective.

He reasoned that the Applicants should not be allowed to circumvent the established procedures for accessing court. Counsel concluded that, by not following the Judicial Review Rules, the Applicants were abusing the court process.

Determination

At the outset, I must state that the resolution of the above point of law does not require any further evidence beyond the pleadings and the affidavits on court record. The replying Affidavit of the 2nd Respondent shows the date when he was promoted to full Professor. Annexure "C" which is a letter dated September 14, 2016, written by the University Secretary of Gulu University, V.M. Okoth- Ogola, addressed to Assoc. Prof. Openjuru George Ladaah (as he then was), indicates that the promotion was to apply retrospectively from September, 1, 2016. Accordingly, any attempt to challenge that promotion, if at all, ought to have been taken by the Applicants within three months from 14th September, 2016, that is, not later than 14th December, 2016.

Regarding the appointment of the 2nd Respondent as Vice Chancellor, again, it is not disputed that *vide* annexure "A" to his affidavit in reply, which is an instrument of appointment signed by Professor Frederick I.B Kayanja, Chancellor Gulu University, the 2nd Respondent was appointed on 2nd October, 2017 Vice Chancellor. The effective date of the appointment was prospectively on 1st January, 2018. Therefore, the Applicants who sought to challenge the 2nd Respondent's appointment as Vice Chancellor Gulu University by way of Judicial Review should have lodged the application within three months from the date of issuance of the Instrument of Appointment (2/10/2017), thus not later than 2nd January, 2018.

In my view, the three months period for applying for Judicial Review is statutory and not merely regulatory. It is provided for first, in the statute, and later in the Rules. Section 36 (7) of the Judicature Act provides,

"An application for judicial review shall be made promptly and in any case within three months from the date when the ground

of the application arose, unless the Court has good reason for extending the period within which the application shall be made."

The Judicial Review Rules therefore reproduces almost in similar terms, in rule 5 (1) what Parliament enacted in section 36 (7) of the Judicature Act. The Rule is however more emphatic on the issue of time period, thus,

*"An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application **first arose** unless the court considers that there is good reason for extending the period within which the application shall be made."* (Underlining is for emphasis.)

In light of the foregoing analysis, it is not correct for the Applicants to argue that the three months period is only provided for in the Judicial Review Rules. As noted, the rules were made pursuant to the provision of the parent Act.

I note that two decisions of this Court were cited in support of the Applicants' arguments where Court had adopted a different construction of Rule 5 (1) of the Judicial Review Rules. With respect, the two cases are distinguishable. Beginning with the **Kalou case** (*supra*). There, the 1st and the 3rd Applicant's legal challenge to their termination were found to have been taken within the three months statutory timeline for filing judicial review application. On that point, Court held, rightly in my view, that those specific challenge were competent before court. The holding of court, which, with the greatest respect, I found problematic, relate to the finding made in respect of the time bar. The time bar argument touched the action challenging the Uganda Wildlife Authority Board appointment. The Court agreed that the action was time barred but proceeded to hold that the three months' time limits for judicial review did not affect the action. Court held that the three months limitation is intended to ensure expeditious determination of applications than to oust the court jurisdiction to hear parties where a matter is filed after the expiry of three months.

Court cited its earlier decision in **Nampogo** (*supra*), and adverted to article 126 (2) (e) of the Constitution of Uganda, 1995, holding that, court ought to administer substantive justice expeditiously without undue regard to technicalities. The Court reasoned that substance of disputes should be investigated and decided on merits and that lapses should not necessarily debar a litigant from the pursuit of his rights, referring to **Re Christine Namatovu Tebajjukira [1992-93] HCB 83.**

With the greatest respect, I am unable to follow the latter holdings of my brother Judge. I must first of all correct the view that an issue of time bar is synonymous with court lacking jurisdiction. That is not correct. When a matter is time-barred, Court still has jurisdiction but cannot proceed to hear and grant any judicial review remedy, if at all, on account of the time-bar. See: **Iga Vs. Makerere University [1972] EA 65 (CAK), at p.67, per Mustafa, J.A,** with whom the rest of the Court agreed. I do not agree with the view that a party whose action falls outside the three month's period for applying for judicial review can always be accommodated without the party applying for extension of time, and court enlarging it.

It is now clear that statutes of limitation are inflexible by their nature. Statutes of limitation are also not concerned with the merits of the case. In **Madhvani International S.A Vs. the AG, Civil Appeal No. 23 of 2010**, the Supreme Court cited with approval the celebrated dictum of Lord Greene, M.R (Master of Rolls), in **Hilton Vs. Sulton Steam Laundry [1946] 1 KB at page 81**, where the Master of Rolls observed,

"But the statute of limitation is not concerned with merits. Once the axe falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course to insist on his strict rights."

Further, the Court of Appeal of Uganda has held that time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with. See: **Uganda Revenue Authority Vs. Uganda Consolidated Properties Ltd, Civil Appeal No. 31 of 2000**.

I wish to add that by enacting Article 126 (2) (e) of the Constitution of Uganda, 1995, the Constituent Assembly delegates did not intend to do away with provisions of our laws providing for statutory time limits, such as that contained in section 36 (7) of the Judicature Act Cap. 13. Thus it has been held that failure to comply with statutory time limits are inexcusable under the law, save in exceptional circumstances as may be provided for by a particular statute. The exceptional circumstances must however be specifically pleaded. See: **Uganda Revenue Authority Vs. Uganda Communications Commission, Hct-00-CA-0011-2006, per Lameck N. Mukasa, J.**

The Courts have taken strict approach with regard to the matters of time limits. For instance, in **Re Application by Mustapha Ramathan for Orders of Certiorari, Prohibition and Injunction, Civil Appeal No. 25 of 1996 the Court of Appeal (per Berko, J.A)**, observed that statutes of limitation are strict and inflexible enactments. Court in that case pointed out that the overriding purposes is interest *reipublicae sit finis litum.* This means that litigation shall automatically be stifled after a fixed length of time irrespective of the merits of the particular case.

In **IP Mugumya Vs. AG, HC MC No. 116 of 2015**, **Stephen Musota, J.**, as he then was) in dismissing the matter, held that the time limits stated in Rule 5 (1) of the Judicial Review Rules is still good law. In **The Open Forum Initiative Vs. AG and URA, Misc. Application Cause No. 251 of 2020, Ssekana Musa J.**, observed that those who wish to use the judicial review procedure must act very quickly. The Learned Judge also held, and I agree, that time limit is imposed in order to accommodate the needs of legal certainty and good public administration. In **Muhumuza Ben Vs. AG & 2 Others, Misc. Cause No. 212 of 2020,** Court **(Ssekana Musa, J.,)** held that court ought not to consider stale claims by persons who have slept on their rights. The Learned Judge opined that any application brought by way of judicial review cannot be entertained if presented after lapse of a period fixed by limitation legislation.

In light of the majority and consistent approaches of Courts on the matter, I too find that issues of time limits should be taken seriously. They are not mere technicalities but matters of substantive law and must be strictly complied with lest the consequences are fatal.

Turning to the interpretation of section 36 (7) of the Judicature Act, it is my view that the provision is clear and unambiguous. The word ***"shall"*** therein is peremptory and not directory, considering the purpose of the provisions dealing with judicial review. Judicial review is intended to check the machinery of government and bodies or persons covered within the Judicial Review Rules, as amended and such checks by Courts must be done timeously. Matters which are amenable for judicial review, therefore, ought to be challenged without delay. This also explains why upon filing a judicial review cause and on service onto the opposite party, Court is obligated to fix the application for hearing within fourteen days. (See: Rule 6 (4) of the Rules). This is because of its urgent nature. It is, therefore, not correct, as submitted for the Applicants, that the three month's stipulation in the Judicial Review Rules is directory. I have looked at the whole purpose of the part of the Judicature Act dealing with this subject and the entire Judicial Review Rules as amended. In my view, the test for determining whether a statute is mandatory or directory is not about whether the statute imposes consequences for non-compliance with its provisions. Rather court has to consider the whole purpose of the legislation under consideration. See: **Sitenda**

Sebalu & Electoral Commission Vs. Sam .K. Njuba & the Electoral Commission, Election Pet. Appeal No. 26 of 2007. In my view, and with respect, Learned Counsel for the Applicants misconstrued the import of that decision.

In the circumstances, I find that the three months period provided for lodgment of judicial review matter is mandatory and not directory.

Having so found, I next consider whether there is good cause to extend time in this matter. Court notes that the Applicants did not ask this Court to enlarge time. They simply lodged the application on 16th September, 2021 without first seeking for extension of time when time had long elapsed. At the hearing, no application had been lodged, at least seeking for enlargement of time. The Applicants glossed over the matter, in their rejoinder affidavit. In the affidavit, the Applicants subtly concede that the application is time-barred but sought to justify the late filing, contending they learnt about the allegations which informed their action much later. I do not accede to that explanation. And at any rate the fleeting allusion to the claim

does not save the stale application, in the absence of a formal application for enlargement of time. A court of law cannot extend time without being moved by a party as Court does not act for the parties, but Counsel.

For the reasons given, I have no hesitation but to strike out Misc. Cause No. 16 of 2021 for being time barred. Misc. Cause No. 16 of 2021 is accordingly struck out with costs, to be paid to each Respondent. The Applicants shall equally share the burden of taxed costs of each Respondent.

It is so ordered.

Delivered, dated and signed in chambers this 17th day of March, 2023.

17/03/2023

George Okello
JUDGE HIGH COURT

Ruling read in Court in:

Attendance

The parties.

1st Respondent University Secretary, Mr. Obol Otori David.

Mr. Walter Okidi Ladwar, Counsel for the 1st Respondent.

Mr. Yusuf Kagere, Counsel for the Applicants.

Mr. Ronald Mutalya together with Alex Byaruhanga Asiimwe, Counsel for the 2nd Respondent.

The 2nd Respondent.

The Applicants.

Ms. Avola Court Clerk.

1st Respondent's Counsel: We are ready to receive the Ruling of Court.

Applicants' Counsel: We are Ready to receive the Court Ruling.

2nd Respondent's Counsel: We are ready to receive the Ruling of Court.

Court: The Ruling is delivered in open Court.

17/03/2023

George Okello

JUDGE HIGH COURT