

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

MISC. CAUSE NO. 120 OF 2012

PAUL KIHKA ::: APPLICANT

VERSUS

- 1. THE ATTORNEY GENERAL**
- 2. THE INSPECTOR GENERAL OF GOVERNMENT ::: RESPONDENT**

BEFORE: HON. JUSTICE ELADAD MWANGUSYA

RULING

This is an application by a Notice of Motion brought under Rules 3 and 6 of the Judicature (Judicial Review Rules) S.I No. 11 of 2009, Sections 36 and 38 of the Judicature Act, Cap 13 Laws of Uganda Article 42 of the Constitution of the Republic of Uganda and Sections 25(1), (2) and (3) of the Inspector General of Government Act seeking orders of Judicial review as follows:-

1. A declaration that the recommendations and directives therein made by the Inspector General of Government contained in the letter of the Minister of Information and National Guidance dated 28.08.2012 and the accompanying Inspector General of Government’s Report directing the applicant to refund UGX 38.025.000= (Thirty eight Million twenty five thousand shillings) was illegal irrational, ultra vires and ought to be quashed.
2. An order of certiorari to call and quash the letter, report and recommendation and orders therein.
3. An order of Mandamus directing the Inspector General of Government to desist from exercising the powers she does not have and to make illegal and/or irrational orders without affording the affected persons an opportunity to be heard.
4. An order of permanent injunction restraining the Inspector General of Government and any officer mentioned in the letter aforesaid.
5. Costs of this application.

The grounds of the application set down in the Notice of Notice are as follows:-

- a. The office of the Inspector General of Government received an anonymous complaint wherein it was alleged that the applicant had abused his authority as the acting Managing Director of Uganda Broadcasting Corporation.
- b. The Inspector General of Government made an investigation against him and without giving him any opportunity to be heard on the allegations, the Inspector General of Government went on and made a report recommending and directing the applicant to refund UGX 38.025.000= in Uganda Broadcasting Corporation where he is an acting Managing Director.
- c. The report and recommendations made without giving the applicant an opportunity to be heard is null and void and of no legal effect.
- d. The Inspector General of Government also does not have authority to direct the applicant to refund the money which he has lawfully earned.

In his affidavit in support of the application the applicant states that although he received a letter inviting him to the office of the IGG he was never informed that there was an investigation against him. He was not given the notice and particulars of the accusations against him and neither was he given a chance of asking or cross-examining any witness or any person involved in the investigation or opportunity to refute the allegations.

In an affidavit sworn by Jane Frances Nanvuma, a State Attorney of the Attorney General's Chambers, the 1st Respondent defends the 2nd Respondent's action to investigate the allegations of abuse of office or authority against the applicant as mandated by the Constitution and according to her there is nothing in the applicant's affidavit to show that he was not given a hearing.

In an affidavit in reply by the 2nd Respondent the Inspector General Mrs Irene Mulyagonja Kakooza states that the Inspectorate of Government carried out an investigation into the alleged abuse of office, causing Financial Loss and illegal dismissal and recruitment of staff by the applicant in accordance with the Constitutional mandate of the IGG. That contrary to the applicant's allegations that he was not given an opportunity to be heard he was informed of the allegations against him as evidenced by the statement recorded from him.

The applicant filed an affidavit in rejoinder in which he reiterated his earlier contention that he was never informed of the allegations against him and only went to the office of the IGG as a witness to explain as to what was happening at UBC where he was the Ag. General Manager. He averred that his statement was not an answer to an allegation against him and at the time he made

it he did not know that there was an allegation or investigation against him regarding his allowance paid in by UBC.

The application was set down for hearing on 29.10.2012 and counsel were given time to file written submissions. Mr Max Mutabingwa counsel for the applicant filed submissions in support of the application while only the second Respondent filed submissions in reply. For some reason not explained to this court the Attorney General represented at the trial by Ms Esther Nyangoma, State Attorney did not file written submissions as directed by this court. Although submissions of the Attorney General may not necessarily have had any bearing on the outcome of this application counsel appearing in this court are expected to comply with directives of the court especially when they are given in their presence like in this case.

The submissions of Mr. Maxim Mutabingwa counsel for the applicant were premised on two grounds. The first ground was that the IGG made an investigation of an allegation about the applicant of abuse of authority as the Ag. Managing Director of Uganda Broadcasting Corporation (UBC) and made a report without informing the applicant that there was an allegation against him so that he would be able to defend himself and give his defence about the accusation. This according to Mr. Mutabingwa was in contravention of Rules of Natural Justice.

The second ground was that the money ordered by the IGG to be refunded by the applicant is an allowance properly earned by the applicant as the Ag. Managing Director, Uganda Broadcasting Corporation (UBC) and the money is legally earned by and belongs to the applicant. I will start with this ground because unless the decision was irrational the arguments that the allowance was properly earned by the applicant seems to go to the merit of the decision which is beyond the scope of judicial review. The scope of Judicial Review has been defined in a number of decisions of this court including **KOLUO JOSEPH ANDREW & 2 OTHERS Vs THE ATTORNEY GENERAL & 7 OTHERS Misc. Cause No. 106 of 2010** (unreported) where his Lordship Justice Yorokamu Bamwine (as he then was) defined the scope of Judicial Review as follows:-

***“It is trite that Judicial Review is concerned not with the decision per se but with the decision making process. Essentially, Judicial Review involves the assessment of the manner in which the decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised with basic standards of legality, fairness and rationality.*”**

As Lord Halisham of St Marylebone L.C stated in **Chief Constable of North Wales Police Vs Evans [1982]3 ALL ER 141:**

***“The purpose of Judicial Review is to ensure that the individual receives fair treatment, not to ensure that the authority, after affording fair treatment reaches on a matter which it is*”**

authorized or enjoined by Law to decide from itself a conclusion which is correct in the eyes of the Court.”

I associate myself with the above defined scope of Judicial Review. Diplock J in the case of **Council of Civil Service Union Vs Minister for Civil Service [1984]3 ALL ER 935 at page 950** defines the scope as follows:-

“Judicial Review has I think developed to a stage today when, without reiterating any analysis of the steps by which the Development has come about, one can conveniently classify under three heads the grounds on which an administrative action is subject to control by judicial review. The first ground I would call ‘illegality’ the second ‘irrationality’ and the third ‘procedural impropriety’. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption of ‘proportionality’ which is recognized in the administrative law of our fellow members of the European Economic Community, but to dispose of the instant case the three already well established heads that I have mentioned will suffice.” (emphasis provided).

The instant application is also disposable on the three heads i.e ‘illegality’, ‘irrationality’ and ‘procedural impropriety’.

In the above authority Diplock J defines illegality as a ground for Judicial Review in the following terms:-

“By ‘illegality’ as a ground for Judicial Review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.”

As correctly pointed out in the 2nd Respondent’s written submissions the IGG is mandated under Article 225(1)(a),(b) and (e) of the constitution of the Republic of Uganda and Section 8(1)(a), (b) and (e) of the Inspector General of Government Act, 2002 to carry out the type of investigation that was undertaken in this matter and there seems to be no contention about it by applicant whose only concern is that he was not given a hearing.

Irrationality is defined by Diplock J as follows:-

***“By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’ (see Associated Provisional Picture Houses Ltd Wednesbury Corp [1947]2 ALL ER 680, [1948]1 KB 223). It applies to a decision which is outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our Judicial System. To justify the courts’ exercise of this role, resort I think today is no longer needed to viscount Radliffs ingenious explanation in Edwards (Inspector of Taxes) Vs Bairstow [1955]3 ALL ER [1956] AC 14 of irrationality as a ground for court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision maker. ‘Irrationality’ by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review. (emphasis added).*”**

In my view the impugned decision of the IGG cannot be described as ‘outrageous in its defiance of logic’ without indulging into the merits of the decision which as I have already stated is beyond the scope of Judicial Review. The IGG was faced with a scenario where the applicant is substantially employed as Principal Assistant Secretary in the Ministry of Gender where he has no function but continues to draw a salary and is paid by the UBC where he has no substantive appointment. The decision that the applicant should only earn a salary where he is substantially employed with the explanations given for this decision cannot be described as irrational given the definition given by Diplock J.

Lastly ‘procedural impropriety’ which is defined by Diplock as follows:-

***“I described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head also covers also the failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.....”*”**

The main thrust of Mr. Maxim Mutabingwa’s submissions was that the applicant was not given an opportunity to be heard before the impugned decision was reached by the IGG. He relied on the authority of **Kyamanywa Andrew K. Tumusiime Vs The Inspectorate of Government High Court Misc Application No. 0243 of 2008** where court found that although the applicant had been interviewed by the IGG as was in this case he should have been told about the nature of the accusation against him. This is what Justice Yorokamu Bamwine (as he then was) had to say:-

“It is in my view immaterial that the applicant was interviewed by the respondent on aspects of his academic qualifications, as long as he was not told about the nature of the accusation against him and the right to rebut it.

The Respondent exercises quasi judicial powers. It must be guided by rules of natural justice. These are rules and procedures to be followed by any person or body of persons charged with the duty of adjudicating upon disputes between or rights of others.

The Chief rules are to act fairly, in good faith, without bias and in a judicial temper; to give each party the opportunity of adequately stating his case; not to hear one side behind the back of the other. A person must have notice of accusation against him and relevant documents which are looked at by the tribunal should be disclosed to the parties interested”

In the instant case the applicant was interviewed by the respondent. The record of his interview is contained in a statement annexed as “A” to the affidavit of Irene Mulyagonja Kakooza. According to the statement the applicant had been summoned to the IGG’s office to answer a number of questions. From his statement there is no doubt that one of the questions raised with him was his appointment as Ag. Managing Director of UBC and what he earns from the appointment. He detailed the circumstances under which he was appointed as Ag. Managing Director and explained that what he earns is a monthly allowance. He stated that he earns his salary in the Civil Service.

From this explanation it is clear that there was a question put to him as to why he was earning salary in two places and it was his explanation that one was a salary while the other one was an allowance. So to me nothing was done behind his back. The oral interview and the written statement of the applicant is a clear indication that this was not a one sided decision taken behind the back of the applicant. Apart from the issue of the salary a number of other queries were put to him and he explained them. It is only the one on the salary that attracted a sanction which the IGG was entitled to impose after hearing from the applicant. This satisfies the requirement that before any decision is taken the affected party should be heard. As I have already stated it is not for this court to determine as to whether or not the IGG’s decision was correct because that goes to the merit of the decision which is beyond the scope of Judicial Review.

In the circumstances this court finds no merit in this application which is dismissed with costs.

Eldad Mwangusya

J U D G E

26.03.2013

Delivered by the Deputy Registrar this day of..... 2013

Keitirima John Eudes

DEPUTY REGISTRAR

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