

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

MISC CAUSE NO. 03 OF 2012

BEACHSIDE DEVELOPMENT SERVICES LTD ::::::::::: APPLICANT

VERSUS

1. NATIONAL FORESTRY AUTHORITY	}	::::::::::::: RESPONDENTS
2. PROF. BUYINZA MUKADISI	}	
3. GERSOM ONYANGO		

BEFORE: HON JUSTICE ELADAD MWANGUSYA

RULING

This is an application by a Notice of Motion brought under Sections 41 and 42 of the Judicature Act Cap 13 Laws of Uganda and Rules 3(2) and 6 of the Judicature (Judicial Review) Rules 2009 for orders of Judicial Review specified in the Motion as under:-

1. An order of mandamus to issue against the Respondents jointly compelling each of the Respondents to duly execute a Licence agreement in accordance with the order and judgment of the Court of Appeal of Uganda in Civil Appeal N0. 81 of 2009 dated 12th October 2009 and 28th January 2011 respectively.

2. A declaration that the Respondents are liable to the Applicant for damages for lost business for one year from the date the Licence ought to have been issued by the Respondents.
3. An order that the 1st Respondent duly compensates the Applicant for damages as such.
4. An order that the 1st Respondent pays the costs of this application.

The grounds of the application are stated as follows:-

- 1) That sometime in 2009 the Applicant instituted a suit in the High Court of Uganda vide HCCS 003 of 2009, against the National Forest Authority (NFA) for breach of contract and obtained judgment in its favour with an award of damages.
- 2) That NFA made several applications for review of the High Court Judgment and then lodged an appeal against judgment of the High Court before the Court of Appeal of Uganda vide Civil Appeal 80 of 2009.
- 3) That the Court of Appeal determined the appeal in favour of the 1st Petitioner and upheld the decision of the High Court.
- 4) That on 28th January 2011, 1st Respondent entered and filed in Court a Consent Settlement with the Applicant.

- 5) That on agreed point No. 2, it was agreed that the 1st Respondent would within two (2) months of that date issue to the Applicant a licence.
- 6) That whereas the 1st Respondent has continued to satisfy the orders of the court of Appeal it has not issued the said licence upto now.
- 7) That the only thing the 1st Respondent has done in this regard is to issue to the Applicant a copy of the proposed licence which remains unexecuted upto date.
- 8) That it is clear that the intended assigned signatories for 1st Respondent are the 2nd and 3rd Respondents.
- 9) That as recent as the 2nd January 2012 the 2nd and 3rd Respondents had not executed the Licence agreements.
- 10) That the delay in executing and providing the licence agreement in accordance with the terms of the Court orders has led the Applicant to lose one year worth of prospective business as projected in the feasibility study for the project.
- 11) The 1st Respondent is liable for the loss and is liable to compensate the Applicant in damages for the said loss.
- 12) The applicant also contends that it just and convenient for the declarations and injunction to be granted on an application.

The application is accompanied by an affidavit in support dated the 5th January 2012 and filed on the same day deposed to by Charles Henry Twagira, the Managing Director of the Applicant. He filed a further affidavit in support dated the 20th February 2012 and filed on the same day. The affidavit in support is mainly respective of the grounds stated in the application cited above. The grounds are self explanatory but where it is warranted specific averments of Mr. Twagira's affidavits will be cited in the course of this ruling as they relate to the remedies sought.

In reply to the application Prof. Buyinza Mukadasi (2nd respondent) Chairman of the Board of Directors, National Forest Authority swore an affidavit on his own behalf and on behalf of the National Forest Authority (1st Respondent). Gershom Onyango (3rd Respondent) also swore an affidavit in opposition to the application which, in content is similar to that of Professor Buyinza Mukadasi. In their affidavit in reply both of them acknowledge that the 1st respondent entered into a consent judgment/settlement with the Applicant Company in which it was stipulated that the 1st Respondent would execute a licensing agreement with the Applicant for 2.6 Hectares of Land at Kyewaga Central Forest Reserve for twenty five years within two months of the execution of the agreement. Both of them contend that the delay to execute the consent was attributable to the Attorney General who was required under the constitution to approve the licensing agreement. They both deny personal responsibility for the delay in execution of the consent judgment but as far as the prerogative order of mandamus sought is concerned the most significant feature of their affidavits stated in paragraph 14 of both affidavits is *"That licensing Agreement now stands executed as of 11th January, 2012"*. The significance of this averment will be explained when the essence of an order of mandamus in judicial review has been discussed.

It should be noted that when Mr. Charles Twagira made a reply to affidavit of Prof. Buyinza Mukadisi which he filed on 05.03.2012 nothing is mentioned of the fact that the Licence for which the applicant seeks an order of mandamus had been executed as of 11th January 2012.

Under Section 36(1) of the Judicature Act (Cap 13) Laws of Uganda, the High Court may, upon an application for Judicial Review, grant any one or more of the following reliefs in civil or criminal matter;

- (a) An order of mandamus requiring any act to be done.*
- (b) An order of prohibition, prohibiting any proceedings or matter.*
- (c) An order of certiorari, removing any proceedings or matter in to the High Court.*
- (d) An injunction to restrain a person from acting in any office or matter.*
- (e) A declaration or injunction not being the injunction referred to in paragraph (d) of this Section.*

This remedy has been discussed in a lot of decisions of this Court but it will suffice to quote a definition by Justice Bamwine (as he then was) where in the case of **SEMWO CONSTRUCTION COMPANY Vs RUKUNGIRI DISTRICT LOCAL GOVERNMENT HC MC 30 of 2010** he stated as follows:-

“..... mandamus is a prerogative writ to some person or body to compel the performance of a public duty. From the authorities, before the remedy can be given, the applicant must show a clear legal right to have the thing sought by it done, and done in the manner and by a person sought to be coerced. The duty whose performance is sought to be coerced by mandamus

must be actually due and incumbent upon that person or body at the time of seeking the relief. That duty must be purely statutory in nature, plainly incumbent upon the person or body by operation of law or by virtue of that person or body's office, and concerning which he/she possesses no discretionary powers. Moreover, there must be a demand and refusal to perform the act which it is sought to coerce by judicial review" (underlining provided).

In the first place there has been no refusal to perform the act which this application seeks to coerce because according to the affidavits of Prof. Buyinza Mukadisi and Gershom Onyango the Licensing Agreement stands executed as of 11.01.2012. Secondly if this application was to be granted "to compel the performance of a public body" when that public duty has been performed it would not serve any purpose and S. 36(5) of the Judicature Act must have had this in mind. It provides as follows:-

"An order of mandamus, prohibition or certiorari shall not be made in any case in which the High Court is empowered by the exercise of the powers of review or revision contained in this or any other enactment, to make an order having the like effect as the order applied for or where the order applied for would be rendered unnecessary." (underlining supplied).

So on account of the fact that there has been performance of the act this application seeks to enforce the prerogative writ of mandamus is not available to the applicant.

There are other matters which Mr. Mwaka Philip, Principal State Attorney raised by way of a preliminary point of law that will be resolved in this application. These matters are

related to the 2nd and 3rd Respondents being sued in their personal capacities and yet they were executing their duties as members of the Board who according to Section 69 of the National Forestry Authority and Tree Planting Act 2003 are protected from personal liability.

“Section 69

A member of the Board or an employee of the Authority or person acting on the direction of such a person is not personally liable for any act or omission in good faith in the exercise of the functions of the Authority.”

The applicant submitted that “the 2nd and 3rd Respondents are named as officers upon whom the duties fall to execute the agreement and against whom the compelling order of mandamus is sought. Neither of the two is sued in his personal capacity.”

The first issue arising from the above preliminary point is whether the 2nd and 3rd Respondent should have been brought into this action on the ground that they are the ones with the responsibility to grant the licences. I do not think so. One of the leading authorities where an order of mandamus was sought to enforce a court judgment like in this case was the case of **SHAH Vs ATTORNEY GENERAL (No. 3) 1970 E.A** where the applicant had obtained a judgment against the Government for shs 67.500=interest and costs. The Government failed to pay and the applicant brought the motion for an order of mandamus directed to the officials responsible for making the payment, to pay the amount of the judgment and it was held that mandamus could issue to the Treasury Officer of Accounts to compel him to carry out the statutory duty to pay cast upon him by S.20(3) of the Government Proceedings Act. Although the order of mandamus was directed to the Treasury Officer of Accounts he had not been made party to the

application. The party remained the Attorney General against whom the judgment had been delivered. The individual or individuals in the Treasury office of Accounts that were going to effect the payment were not named like in this application. An order of mandamus issued to the 1st Respondents would trickle down to the officials responsible for issuing the Licence and not necessarily the 2nd and 3rd Respondents. In fact when the 2nd Respondent declined to sign the Licence in this case someone else did. It was unnecessary to draw the 2nd and 3rd Respondent into this action because an order of mandamus could be issued without their presence and it would be enforceable against the 1st Respondent.

The second matter raised is as to whether or not Section 69 of the Act affords the 2nd and 3rd Respondent immunity from acts or omissions performed in good faith. A similar objection was raised in the case of **LUKWAGO ERIAS, LORD MAYOR Vs JENNIFER MUSISI, THE EXECUTIVE DIRECTOR KCCA High Court Misc. Cause No. 116 of 2011** (unreported) where under S. 81 of the KCCA which is similar to Section 69 of the National Forestry Act a similar objection was raised. This Court opined as follows:-

“In the view of this Court the immunity enjoyed by the Executive Director under Section 81 f the KCCA Act does not extend to matters where this court is required to exercise its supervisory role which in essence is what judicial review is all about. Judicial review is concerned not with a decision but with the decision making process. Essentially judicial review involves an assessment of the manner in which a 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 in accordance with the basic standards of legality, fairness and rationality. The key words are legality,

fairness and rationality and if court was to find that anybody holding a public office acted illegally, unfairly and irrationally it would intervene to put things right so to say. The other key word is vindication of rights. In exercise of its jurisdiction this court is not required to vindicate anybody's rights but merely to examine the circumstances under which an act is done and determine as to whether the standards set out above have been met and if not prescribe the remedies in form of prerogative orders set out in the Rules. In this way there would be no infringements of privileges enjoyed by the Executive Director under the KCCA Act."

Although the above case was dealing with the prerogative order of certiorari, the principle set out is applicable to all cases of judicial review including cases where the order sought is one of mandamus like in this case. The order of mandamus could generally issue without necessarily infringing on the privileges enjoyed by the two defendants under the Act because the essence of the order would be to command performances of a public duty which would be within the mandate of the two respondents if court was to find that an order of mandamus was applicable. So if it had been found necessary that they should have been included in this action they would be commanded to perform their statutory duty notwithstanding the provision of S. 69.

Lastly I wish to comment on the issue of damages and observe that even if court was to issue the order of mandamus I do not see how the damages prayed for would arise if the Licence issued is to run for a period of twenty five years irrespective of when it starts running. The applicant's profits would still accrue for twenty five years. Secondly the cause of the delay to issue the Licence was adequately explained. On receipt of the court order the respondents thought it fitting to consult the Attorney General on the

applicability of Article 119(5) of the constitution of the Republic of Uganda to the Licence. It is provided in this Article that:-

“Subject to the provisions of this constitution, no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as parliament may by law prescribe.”

Although to me the above article would not apply to cases where there is a court order like in this case it was prudent of the respondents to seek counsel of the Attorney General before enforcement of the consent judgment which caused some delay. In any case the Licence is time bound and takes effect from the date of issue as already stated in this ruling.

In the circumstances this court declines to grant this application which is dismissed with costs to the Respondents.

Eldad Mwangusya

J U D G E

21.01.2013

Enock Barata for applicant

MD Twagira for applicant in Court

Respondents, absent

Clerk – Milton

Court:

Ruling read in open Chambers

Keitirima John Eudes

DEPUTY REGISTRAR

21.01.2013