THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-MC- No. 237 OF 2013

(ARISING OUT OF MISC. CAUSE No. 281 OF 2013

LUKWAGO ERIAS, LORD MAYOR
KAMPALA CAPITAL CITY AUTHORITY ::::::::::::::: APPLICANT

- VERSUS -

1. THE ATTORNEY GENERAL
2. THE TRIBUNAL INVESTIGATING
   A PETITION FOR THE REMOVAL OF THE LORD MAYOR :: ::::::: RESPONDENTS
   KAMPALA CAPITAL CITY AUTHORITY

BEFORE: HON. MR JUSTICE V.T. ZEHURIKIZE

RULING:-

This application is brought under S. 98 of the Civil Procedure Act, S. 33 of the Judicature Act, O. 52 rule 1 and 3 of the Civil Procedure Rules and all other enabling laws.

It seeks the following orders namely:

a) An interim order restraining the 2nd respondent from continuing to investigate the petition without regulations provided for by law and from proceedings in excess of its jurisdiction and in abuse of the Rules of natural justice pending the determination of the main application (Miscellaneous Cause No. 281 of 2013).

b) An interim order restraining Mr. Daniel Rutiba, Mr. Titus Kamya and Mr. Robert Kirunda from acting as members and/or officers of the tribunal established to investigate the petition for the removal of the applicant as Lord Mayor of Kampala Capital City Authority pending the determination of the said Miscellaneous Cause No. 281 of 2013.

c) That costs of this application be provided for.

The grounds of the application are contained in the affirmation of the applicant annexed to the application and are mainly as follows:-

1. That the Minister received a petition by 16 Councilors of the Authority and acted on it without serving a copy to the applicant and appointed a Tribunal to investigate allegations against the applicant without providing for Regulations governing its conduct as required by law.
2. That the Tribunal in excess of its powers, appointed three non members to wit; Mr. Daniel Rutiba as lead Counsel, Mr. Titus Kamya as co-counsel and Mr. Robert Kirunda as Secretary.
3. That the Tribunal went ahead to make and issue Rules without the mandate to do so which Rules deny the applicant the right to effective legal representation.
4. That the Tribunal started working in a hurried manner before the members took oath and has fixed the petition for hearing on the 20th day of June 2013.

5. That the applicant has filed an application for judicial review vide Misc. Cause No. 281 of 2013 seeking among others an injunction restraining the 2nd respondent from proceeding in excess of jurisdiction and in abuse of the Rules of natural justice, an order of prohibition and stopping the 2nd respondent from continuing to investigate the petition without Regulations provided by law and an injunction restraining Mr. Daniel Rutiba, Mr. Titus Kamya and Mr. Robert Kirunda from acting as members and/or officers of the Tribunal established to investigate the applicant as Lord Mayor of Kampala Capital City Authority.
6. The application for judicial review has higher chances of success as the Tribunals proceedings with the hearing of the petition is in utter violation of the applicant's rights.
7. That unless the Tribunal is restrained from proceeding with the hearing of the petition, the applicant is likely to suffer irreparable damage as his right to a fair hearing shall be compromised rendering the main application nugatory and useless.

In response the respondents filed an affidavit in reply sworn by one Robert Kirunda who described himself as the Secretary to the Kampala Capital City Authority Tribunal.

The main averments in this affidavit are that the tribunal is mandated to investigate the allegations against the Lord Mayor and to determine whether there is a prima facie case for the removal of the Lord Mayor, but that it is not mandated to make a finding of innocence or guilt against the applicant.

That the tribunal is mandated in its terms of reference to determine its rules of procedure.

That the persons the applicant seeks to restrain are not members of the Tribunal but are officers appointed and dully sworn in before the members of the Tribunal.

It is further contended that this application is an abuse of process as a similar application i.e. Misc. Application No. 32 of 2013 Lukwago Erias Vs Attorney General arising out of Constitutional Petition No. 28 of 2013 seeking the same remedies was filed in the Constitutional Court. A copy of the application with the accompanying affidavit is attached and marked annexture “B”.

When the matter came up for hearing on 19/6/2013 and in a bid to expedite the disposal of this matter court directed that both parties file written submissions which was dully done.

In their written submissions, counsel for the applicant reiterated the contents of the application and in addition outlined the history of the matters leading to these proceedings.

Then citing a number of decided cases like ***Humphrey Nzeyi Vs Bank of Uganda Constitutional Application No. 1 of 2013*** it was contended that the principle governing the grant of injunctive reliefs are that the party must show that there is a prima facie case, that the party stands to suffer irreparable loss should the injunctive order not be granted, and in case of doubt, the matter can be resolved on a balance of convenience.

It was submitted that the sum total of the applicant's case is that the Tribunal is not constituted and operating in accordance with the Kampala Capital City Authority Act, Interpretation Act, and above all, the Constitution.

It was stressed out that if this application is not granted, it will drive the application for judicial review in a limbo of legal muteness and render it nugatory unless this application is granted to preserve the rights in issue.

That the continued operation of the Tribunal infringes gravely on the fundamental and inherent as well as non derrogable right to a fair hearing.

They prayed the application be allowed with costs in the cause.

On the other hand counsel for the respondents in their written submissions observed that the applicants in this application are seeking almost the same remedies as in the main application for judicial review and contended that the granting of this application will have the effect of disposing of the main application.

It was further contended that no grounds, in this application, have been demonstrated to warrant the issuance of an interim order. That court can only invoke its inherent powers in clear, critical and deserving situations to prevent the abuse of the process of the court.

They also contended that the application is premature for judicial review could only be made against a decision of the Tribunal. They prayed for the dismissal of this application.

I have considered submissions by counsel for both parties.

On the outset I wish to observe that our Civil Procedure Rules no longer provide for the application and grant of interim orders.

Originally Order 37 r 3 of C.P.R had room for the granting of interim orders of injunction.

It stated thus:

> ***"3. The court shall in all cases, <u>except where it appears that the object of granting the injunction would be efeated by the delay,</u> before granting an injunction direct notice of the application for the same to be given to the opposite party."*** (The underlining added).

The main objective of this rule was clear. In all cases before granting an injunction court had to direct notice to the opposite party.

However this requirement could only be dispensed with if court considered that the object of granting the order would be defeated by the delay which would be caused by notifying the opposite party.

It was in view of this consideration that court could grant an interim order exparte.

But this allowance was so abused that the Rules Committee had to intervene. It did so by Statutory Instrument No. 217 of 1994 by removing the underlined Clause. This amendment left Rule 3 of the then Order 37 of the C.P.R to read as follows:

> ***"3. The court shall in all cases before granting an injunction, direct notice of the application for the same to be given to the opposite party."***

This amendment in effect abolished application and grant of interim orders.

The above presently is the law under O. 41 r 3 of the Civil Procedure Rules.

Further and more particularly, it must be noted that there is no longer any provision for applying and granting of an interim order in applications for judicial review.

Under O. 41A of the Civil Procedure Rules, there was a requirement for seeking leave of the court before making an application for judicial review. This was so by virtue of rule 4(1) of that order.

Sub rule 10 of the said Rule 4 was emphatic on the grant of interim orders. It provides:

"10. Where leave to apply for judicial review is granted then –

(a) if the relief sought is an order of prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the court otherwise orders;"

(b) if any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ."

The above provisions allowed for, as it were, automatic interim orders at the time of granting leave to apply for judicial review or at any stage in the proceedings.

The procedure now applicable to applications for Judicial Review is The Judicature (Judicial Review) Rules 2009 S.I No. 11 of 2009. The above provisions for interim orders were left out. There is no provision for interim orders in these new rules.

The reasons for abolishing provisions for interim orders in application for Judicial Review could be many but are not difficult to find.

The main object of the supervisory powers of the High Court under Judicial Review is to ensure that the machinery of Government operates properly and in accordance with the law.

In quite a number of cases these automatic experte interim orders only served to obstruct the smooth functioning of government machinery contrary to their intended objectives.

In other cases, after obtaining such orders, applicants had no longer the desire to pursue the substantive application. The interim orders in majority of cases had the effect of effectively disposing of the main application. These, among others, were the reasons for dealing away with provisions for interim orders in applications for Judicial Review.

Be that as it may, the position now is that under our Civil Procedure Rules and in applications for Judicial Review there are no direct provisions for interim orders. They have been deliberately removed.
But because of the hardship that this state of affairs may cause and has caused, in some deserving circumstances court has been invoking the inherent powers to meet the ends of justice.

The most cited provision to invoke the court's inherent powers is S. 98 of the Civil Procedure Act.

But I think the more relevant provision is S. 14 (2) (c) of the Judicature Act which provides:

"2) Subject to the Constitution and this Act, the jurisdiction of the High Court shall be exercised –

(a) ……

(b) ……

(i) …….

(ii) ……

(iii) ……

(c) Where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice, equity and good conscience."

Since no express rules are applicable to the grant for interim orders, in my view, the above provision comes into aid as a basis for an application for interim orders.

But what does the removal of express provisions for the grant of interim orders amount to?

In my view it means that court will only invoke its inherent powers in clear, critical and deserving situations. This was my view in ***Hussein Badda Vs Iganga District***

Land Board & others Misc. App. No. 479/2011. I have had no reason to change this stand.

The granting of interim orders as a matter of course would go against the spirit of our Procedure Rules as they are today.

In other words the common practice by litigants to apply for interim orders as a matter of course in every suit is, by virtue of those developments, out moded.

In absence of rules of procedure for the grant of interim orders court will invoke its inherent powers only in situations where failure to grant the order would defeat the purpose for which the application for temporary injunction or other matter is made.

For instance if the suit property is in danger of being destroyed or irretrievably aliened the issuance of an interim order would be appropriate.

In matters like the instant case, where is it alleged that the applicant's rights are in danger of being violated, it must be proved to court that if the order sought is not granted the applicant will suffer irreparable injury or loss which cannot be compensated by way of damages.

Court will also intervene if it is proved that the pending matter will be rendered nugatory in the sense that no useful remedy will be available to the applicant if the interim order is granted.

The applicant must adduce evidence to show that the matter is so urgent that it deserves an interim intervention to meet the ends of justice.

In the instant case, as properly summarized by counsel for the applicant in their written submissions, the sum total of the applicant's case is that the Tribunal is not constituted and operating in accordance with the Kampala Capital City Authority Act, the Interpretation Act and the Constitution.

It is for this reason that he seeks an interim order to restrain the Tribunal from continuing to investigate the petition for his removal as the Lord Mayor of Kampala Capital City Authority.

There is no evidence that if the interim order is not granted he will suffer irreparable injury if the investigations continue.

It is not contended that continued investigations will obliterate any remedies that are available to him.

In the main application the applicant seeks orders of certiorari, prohibition, injunction, declaration and an award of general and exemplary damages.

It has not been shown that in absence of an interim order, the proceedings of the Tribunal cannot be halted at any stage.

I do find that if the applicant succeeds in the main application, then the Tribunal can be stopped at any stage of the proceedings without in any way causing any injustice to him.

But if on the other hand court issues the order sought and later finds that the main application has no merit there will have been unnecessary delay of the process which is prejudicial to other interested parties.

Further if the main application succeeds when the Tribunal has finalized its investigations, the results thereof can easily be quashed by an order of certiorari.

In short, all the orders sought cannot be defeated by disallowing this application. They are capable of being effective at any stage of the investigations and apart

from prohibition and injunction all the other remedies remain useful even if the decision of this court is made after the Tribunal has made its decision. Its decision can be quashed and the whole process declared a nullity.

I do agree with submission by counsel for the respondents that the remedies sought in the main application and this application are substantially the same. It is to stop the Tribunal from investigations. It could be because of this that both sides, in their submissions, delved into the merits of the main case and missed the point relevant to an application for an interim order. They concentrated on the merits and demerits of the substantive matter.

I find that granting this application would in effect dispose of the main matter.

I do further find that no ground has been advanced to warrant the issuance of the interim order as I have tried to explain above.

The total effect of all this is that no case has been made out to warrant this court to exercise its discretion by invoking its inherent powers to grant the orders sought. Instead all effort should be made to expeditiously dispose of the main application which is fixed for hearing on 27/6/2013.

Consequently this application is dismissed for lack of merit.

Given the circumstances of this matter I will make no order as to costs.

VINCENT T. ZEHURIKIZE

JUDGE

DATE: ……21st day of June 2013