**THE REPUBLIC OF UGANDA**
**IN THE HIGH COURT OF UGANDA**
**HOLDEN AT MBALE**

**HCT-04-CV-MA-0225-2011**

**WANYAMA GEORGE STEPHEN.....APPLICANT**
**VERSUS**
**BUSIA DISTRICT LOCAL GOVERNMENT.....RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**RULING**

This is an application for prerogative order of certiorari to issue against the Respondent quashing a decision to rescind the appointment of the applicant as Accounts Assistant on Probation in the service of the Respondent, Respondent pays substantial damages from date of breach till final determination of the matter in court, and costs be provided for.

The application was brought by Notice of Motion under Rule 3(1) 4, 5, 6, and 8 of the Judicature (Judicial Review) Rules 2009. It was supported by the affidavit of the applicant **Wanyama George Stephen**.

In his affidavit, the deponent **Wanyama George** averred that; he was appointed on probation as Accounts Assistant by the Respondent's District Service Commission under DSC/Min/255/2011 on 5th July 2011.

On 27th October 2011 or thereabout he was served with a letter rescinding his appointment. He was embarrassed and imperilled by the said acts of the

respondent where after he was informed by his lawyers M/s Nagemi & Co. Advocates that the said acts were contrary to established norms and principles of natural justice.

The Notice of Motion is premised on five grounds whose import is as deponed by the applicant in his aforesaid affidavit, with prayers for a grant of the orders of certiorari, damages and costs.

It is important to point out at this stage that though dully served, the respondent did not file an affidavit in rebuttal.

In arguing the case, counsel for applicant addressed the court in the following terms:
The applicant was employed by Respondent on probation as an Accounts Assistant. He was later relieved of his duties by Respondent unfairly. It was sought therefore from this court an order of certiorari removing the record and decision of the respondent which refused to lift the decision to terminate his services. Counsel argued that the decision was taken without him being given an opportunity to be heard. He (applicant) held academic certificates that according to him were valid and issued to him by well recognised institutions in Uganda. The action or rescinding the applicant's appointment was done illegally according to counsel. The action to rescind the job offer was an abuse of the powers and authority and was in breach of the Rules of natural justice. He further argued that the decision was taken basing on a non-existent law.

He referred the law as it relates to Judicial Review correctly referring to the decided cases of ***Chief constable of North Wales Police v. Evans (1982) 3***

***ALLER 141***, as quoted Approvingly in ***Across Africa clearing and forwarding Co. Ltd v. URA & Sarah Kashekwa. H/C CM DV. MISC. 3/2012***.

He cited Article 42 of the Constitution on the right for fair treatment of individuals appearing before administrative bodies. He also referred to Article 44(c) on the right to a fair hearing.

Referring to the Legal Principal laid down in the case of ***Council of Civil Service Union v. Minister for Civil Service [1985] A.C. 374***, he argued that the failure to observe rules for natural justice, and failure to act with procedural fairness towards a person who will be affected by a decision were proof of procedural impropriety.

In this case the applicant was never called to clear his name which was found a fatal omission.
It was argued by counsel that denying an applicant natural justice renders the decision complained of null and of no effect.

In Reply **Lumbe** for Respondents averred that though he filed no affidavit in rebuttal he would respond to the matters of law raised. He argued that the District Service Commission as a creative of Government, recruits and fires civil servants; basing on provisions of the Public Service Act, and Regulations. He cited regulation 38 (a) which empowers the District Service Commission to review its own decision; especially when the DSC discovers an illegality. That it does not provide for calling of the affected party. He argued that the above regulation takes precedence over common law. He also argued against the claim for damages, since applicant was a salary earner and was not entitled to any salary during period

he was terminated since he was not "working." He faulted the salary scale used to calculate the amount sought as it was the NET salary yet it had to attract taxes.

In cross reply, applicant reiterated his earlier position.

The issues for determination here are;

1. Whether there is a cause of action warranting review.
2. Whether applicant is entitled to the reliefs sought.

I resolve the issues as herebelow.

1. **Whether there is a cause of action warranting review**.

The complainant by appellant is that Respondents unfairly terminated his employment thereby causing him pain, embarrassment and loss.

The particulars of the unfairness according to paragraphs 4, 5 and 6 of his affidavit are that:

(i) The decision was reached without him being heard.

(ii) The decision was reached basing on a non existing law.

(iii) That the decision infringed his right to a fair hearing, was irregular, illegal and improper.

Basing on the above uncontroverted statements, and explanations thereof by counsel for applicants it's my finding that, the application before me is brought under the provision of Rule 3 (1) (a) (4) (5) and (6) (8) of the Judicature Review Rules 2009. Such an application under Rule 3 can be for an order of certiorari. It's by Notice of Motion under Rule (6); and by affidavit evidence under rules (7) and (10).

It was held in the case of ***SAMWIRI MASSA V. ROSE ACEN HCCA.3/1976*** that where certain facts are sworn in an affidavit, the burden to deny them is on the other party and if he does not, they are presumed to have been accepted and the deponed need not raise them again but if they are disputed then he has to defend them.

The above position of the law when applied to this case shows that, given the fact that Respondent filed no affidavit in rebuttal of the applicant's averments, the affidavit of applicant has proved the fact that he was unfairly terminated without being given a hearing, and basing on a nonexistent law.

This then leads me to examine if in being terminated the said Respondents are guilty of the conduct appellant raises in this application.

According to the case of ***FR. FRANCIS BAHIKIRWE MUNTU AND 15 OTHERS VS. KYAMBOGO UNIVERSITY HCMSC. APP.643 OF 2005***. **Justice Kasule** held that the right to apply for judicial Review is now Constitutional in Uganda by virtue of Article 42; which empowers anyone appearing before an administrative official or body a right to be treated justly and fairly with a right to apply to a court of law regarding an administrative decision taken against such a one. This right, to a just and fair treatment in administrative decisions cannot be derogated according to Article 44. Referring to ***CHARLES KABAGAMBE UEB HIGH COURT (KAMPALA) MCS. APP. 928 OF 1999.***
If infringed, it cannot be rectified by inferior laws.

This legal position answers **Mr. Lumbe** for respondent's assertion that the Respondent's actions are not subject to review because the Public Service

regulations empower them to act without informing the affected party. Suffice to note that he quoted no section of the law, to support his argument; but fatally though, the letter of termination annexed on applicant's pleadings as 'WGS2', shows that the Respondent's action was based on the "Public Service Cap.277,38A and regulations made thereunder." There is no such Act known in the laws of Uganda as "cap.277, 38A...." There is no justification therefore in **Mr. Lumbe**'s assertions that the common law remedy of review cannot be invoked to undo Respondent's action. It is clear that as rightly held in the Kyambogo case above this right is now enshrined in the Constitution under Articles 42, 44, and 50 thereof.

Having found as above that appellant was entitled to apply to court for review, this court now has to determine if indeed the Respondents infringed any of his rights as laid out in Articles 42, 44, and 50 of the Constitution.

In the case of ***Fr. F. Bahikirwe Minth v. Kyambogo University*** (supra). The Judge further held that the grounds a combination or anyone of them that an applicant must satisfy in order to succeed in a Judicial Review application are;

(i) Illegality
(ii) Irrationality and
(iii) Procedural impropriety.

(i) Illegality is when the decision making authority commits an error of law in the process of making a decision.

It has been proved that Respondents quoted and were guided by a nonexistent law dubbed CAP. 277, 38A and regulations made there under. Their decision was therefore illegal.

(ii) Irrationality is when the decision making authority acts so unreasonably that in the eyes of the Court no reasonable authority addressing itself to the facts and law before it would have made such a decision.

(iii) Procedural impropriety is when the decision making authority fails to act fairly in the process of its decision making. It includes failure to observe the basic rules of natural justice or to act with procedural fairness towards one to be affected by the decision. The essence of procedural impropriety is the violation of the Cardinal rule of natural justice. "AUDI ALTERAM PARTEM", the right of a party to a cause not to be condemned unheard. See ***KAMURASI CHARLES V. ACCORD PROPERTIES LTD & OR (Civil Appeal 3 of 1996)*** quoting with approval R. V. University of Cambridge (1723) where the ratio *decidendi* is that a decision arrived at in breach of the "*Audi Alteram Partem*" rule is void absolutely and of no consequence at all.

This position was restated in Council of ***Civil Service Union v. Minister for the Civil Service 1985 AC 374*** held that it's a fundamental principle of natural justice that a decision which affects the interests of any individual should not be taken until that individual has been given an opportunity to state his or her case and to rebut any allegations made against him or her.

From evidence on record, the applicant was denied the fundamental right to be heard; which amounts to a denial of natural justice. The overall effect of a denial of natural justice to an aggrieved party renders the decision void and of no effect as was held in the case of ***Pascal R. Gakyaro v. Civil Aviation Authority CACA 60/2006***.

I therefore find that applicant has a cause of action, he has proved existence of an illegality and impropriety which renders the decision against him null and void. The issue terminates in the affirmative.

**2. Whether applicant is entitled to the reliefs sought**

The applicant seeks substantial damages equivalent to the upper salary scale due to him per month from the date of breach till the final determination of the matter before court. He prayed for costs of the application. Counsel for applicant prayed in submissions for shs. 8,361,000/= at a rate of shs.267,687/= per month from 26.02.2011. General and aggravated damages of 15 million and 5 million respectively arising from Respondent's breach. He prayed for the costs.

**Lumbe** argued that the applicant is not entitled to the salary refund. He argued that no proof of damages was done.

Rule 8 of S.I 11/2009, recognises the grant of damages if pleaded in the motion; and if court is satisfied that applicant is entitled to the damages.

The law on damages is that aggravated damages are awarded by the court as compensation for the defendant's objectionable behaviour. On the other hand exemplary damages go beyond compensating for actual loss and are awarded to show the court's disapproval of the defendant's behaviour.

The facts said to establish the grounds for each claim must be stated. (see O. Hare & Hill Civil Litigation, Sweet and Maxwell 10th Edition page 227).

From the record the applicant annexed a copy of letter of appointment dated July 05, 2011and annexed as "WGSI". The letter shows that his appointment was for a

"probationary period of 6 months "for which he was to earn a salary (26,690,260/= = 3,212,238) U7 upper. His starting salary was shs.2,690,260/= per annum, translating to shs.224,188/= per month.

He was appointed on the 5th of July 2011, and was expected to work for six month which would click on 5th Jan.2012. however he got terminated on 26th October 2011, a period of about 3 months before the expiration of the said probation period of six month.

It is my holding that the contract between the appellant and the Respondent according to the letter of appointment was specifically for six months. Contrary to what applicant's prayed for. Appellant will recover salary lost for 3 months at rate of shs.224,188/=, which totals to shs.672,564/=. He cannot recover the rest of the months because his contract did not cover them.

Appellant prayed for shs.12 million as aggravated damages and shs. 5 millions as exemplary damages. Aggravated damages are awarded to compensate loss occasioned by the defendant's objectionable behaviour. The question here is what other loss, save salary, did the appellant suffer when terminated? Apart from loss of peace, and self esteem among society and fellow employees as alluded to in paragraph 4 of the affidavit of **Wanyama**, I find no other loss.

I will therefore condemn the Respondents to pay compensatory damages for embarrassing the appellant of shs. 2,000,000/= (Two millions) only.

In handling the case of the appellant, there seems to have been a total disregard of procedures and rules of law and natural justice. There is no reason that was

advanced why the Respondent terminated the appointment, what findings etc. No hearing was conducted. Appellant was ambushed and his rights violated. This behaviour is the type which calls for an award of exemplary damages to punish the Respondent for his rush, negligent and irrational conduct towards the appellant. Given the circumstances of this case being, aware that the Respondent is a local authority who should build confidence in the public by abiding by the law, constitutions and Natural justice; an award of 3 million (3,000,000/=) shall suffice.

The applicant in perusing his right in this court incurred costs. He is entitled to the costs of this application.

I find that applicant has satisfied the standard of proof in this application and the application is hereby granted with orders that:-

(a) A prerogative order of certiorari does issue against the Respondent quashing a decision to rescind, the appointment of Applicant on probation as Accounts Assistant in the service of the Respondent.

(b) The Respondent pays to Applicant shs. 2,000,000/= (Two millions) as aggravated damages; and shs. 3,000,000/= (three millions) as exemplary damages.

(c) Respondent pays applicant shs. 672,564/= (six hundred seventy two, thousands, five hundred sixty four shillings) in lieu of lost salary.

(d) Respondent pays costs of this application to appellant.

I so order.

**Henry I. Kawesa**
**JUDGE**
**10/07/2014**