THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO. 96 of 2016

(Arising from Miscellaneous Cause No. 32 of 2016)

MRS. GERALDINE SSALI BUSUULWA :::::::::::::::::::: APPLICANT

VERSUS

1. **NATIONAL SOCIAL SECURITY FUND**
2. **PATRICK BYABAKAMA KABERENGE ::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING:

This is an application for a temporary injunction against the respondents restraining their officers, principals, agents and any other person who acts under their authority or on behalf of the 1st respondent from implementing or otherwise affecting the directives of the respondents contained in a letter dated 9th March 2016 and costs of the application.

The application is brought by way of Chamber Summons under section 38 of the Judicature Act and Order 41 rules 2 and 9 of the Civil Procedure Rules.

The grounds of the application are set out in the application as follows that:

1. The applicant is the Deputy Managing Director of the 1st respondent.
2. The respondents have vide a letter dated 9th March 2016 directed the applicant to go on forced annual leave without affording her a hearing.

3. The applicant has filed an application for Judicial Review against the respondents which has high chances of success.
4. If this application is not granted, the applicant shall be forced to go on annual leave thereby tampering with the prevailing status quo and thereby making the application for Judicial Review nugatory.
5. Unless this application is granted, the applicant will be forced to go on annual leave thereby affecting her carrier in a way that cannot be atoned to in damages.
6. It is in the interest of justice that the status quo be maintained until the hearing and disposal of the main application.
7. The balance of convenience favours the applicant who still occupies her office as Deputy Managing Director of the 1t respondent.

(During the pendency of this application, Misc. Cause 32 of 2016 was amended by consent of the parties introducing new grounds)

The application is supported by the affidavit of the applicant. The opposing affidavit was sworn by Richard Wejuli Wabwire the 1st respondent Corporation Secretary. The affidavit in reply reveals the genesis of the complaint by the applicant which appears to be disciplinary in nature.

At the hearing of this application, Prof. Fredrick Sempebwa, Mr. Bikala Rogers and Rashid Semambo appeared for the applicant while Mr. Segawa, Luswata and Ecimu appeared for the respondents.

The brief background to this application is that in 2014, the applicant was reappointed Deputy Managing Director of the 1st respondent fund by the appointing authority who happens to be the Minister responsible for Social Security i.e. The Minister for Finance Planning & Economic Development. She took maternity leave from work and on her return was directed to go on forced leave by the 2nd respondent, the Chairman of the Board of Directors. The applicant rejected the directive to go on forced leave on ground that she did not need it because she had just returned from maternity leave.

Having rejected the leave offer, the Chairman of the Board wrote a letter suspending her from her job allegedly on grounds of lack of respect for her superiors. This suspension came on 14th of March 2016, the same day on which an interim order was granted by this court.

The applicant filed an application for Judicial Review of the decision making process adopted by the respondents which is still pending hearing before this court. At the same time she filed the instant application and one for an interim injunction which I alluded to above which was granted by court.

In his submission, learned counsel for the applicant submitted that the status quo in this controversy is that the applicant is still the Deputy Managing Director of the 1st respondent fund. That she had never been served with the suspension letter by the time of the hearing of this application. He also submitted that the applicant has never handed over the office. That the law for grant of temporary injunctions is laid down in several case authorities. He particularly referred to the case of ***American Cynamid Co. Vs Ethicon Ltd (1975) 1 ALL E.R 504*** and ***Kiyimba Kagwa Vs Katende [1985] HCB 43.***

Learned counsel further submitted that in those cases the requirement is that the applicant must establish a *prima facie* case with triable issues. That the main suit or application must not be frivolous or vexatious. That reading paragraphs 10,11,12,13 of the affidavit in support and paragraphs 4, 5, 6, 19, a, b, c, d as well as the second respondent's reply in paragraphs 7,8 and 12 already show that there is a serious dispute between the parties that requires a hearing which means that there is a prima facie case. That therefore court should avoid rendering the main application nugatory.

Regarding status quo, learned counsel for the applicant submitted that status quo refers to the existing conditions at a given time. It does not confer any legal rights to parties but is rather a factual establishment of the circumstances. Further that the applicant has at all material times been the Deputy Managing Director of the 1st respondent fund and this is undisputed. Learned counsel revealed that during the hearing of the interim application is when the respondent hurriedly tried to oust the applicant from the office and the learned Deputy Registrar in his ruling granting the interim injunction recognized this development and faulted the respondents for hurriedly trying to remove the applicant from office. That the respondent cannot be allowed to go on and alter the status quo and get away with it just to frustrate a court process.

Learned counsel for the applicant further submitted that court cannot just look on as the respondents continue to violate due process of the case. He referred to the case of ***Salim Aoude Vs Mobil Oil Corporation 862 F 2nd 890 (1st Cir 1988).***

On irreparable loss, learned counsel submitted that the applicant as a person has a reputation to protect and the alleged decisions of the board cannot be allowed to affect the reputation of the applicant because it is the subject of the main cause. He pointed out that the 1st respondents' Human Resource Manual provides for discrete medication steps to ensure that the applicant gets to be heard. That the 1st respondent is a statutory body on whose reputation learned counsel relied on the case of ***Legal Brain Trust Vs Attorney General & Anor HCMA 638 of 2014.***

On balance of convenience learned counsel submitted that by the disputed conduct of the respondents, the applicant continues to suffer damage whereas the respondents continue to enjoy the fruits of their impunity. That as such the balance of convenience is in favour of the applicant. Learned counsel relied on the case of ***Benjamin Leonard Mafoe Vs UA Co. Appeal No. 67 of 1960 Privy Council*** which states that if an act is void it is a nullity. That as such whatever proceedings the respondents purported to conduct, running parallel to the instant proceedings are incurably bad with no legal effect and are clearly an abuse of court process. Therefore, he prays

that court makes it clear to the respondents that their actions were invalid and grant the application with costs to the applicant.

In his submissions in reply, Mr. Segawa for the respondents opposed the application. He agreed with the principles for the grant of a temporary injunction as presented by learned counsel for the applicant and as enunciated in the case of ***Robert Kavuma Vs Hotel International CA 8 of 1990.*** Regarding the principle of *prima facie* case he submitted that the directive to take forced leave was not a disciplinary measure but rather was a directive directing her to take her accrued leave. That annual leave is an ordinary right for an employee. When taken is in the discretion of the employer. Learned counsel relied on section 62 of the Employment Act which did not include annual leave amongst the disciplinary measures that can be taken against an employee.

Mr. Segawa further submitted that the actions of the chairman were not a public function amenable to Judicial Review. The source of the decision by the Managing Director arose from the employment contract and not the NSSF Act and as such it is a matter of private law not public law. Therefore the remedy for the applicant lies in the Industrial Court under the Employment Act. Therefore there is no prima facie case brought out by the applicant in this case.

Regarding *status quo* learned counsel for the respondents submitted that this was as at the time of filing of the application. That the actions of the respondents were valid since there was not injunction at the time, so there was no impediment to holding of the meeting to handle the insubordinate behavior of the applicant. He referred to **Muller on Civil Procedure Vol. 111 p. 2134** for the principle that only status quo at the time of filing the matter is the only one to be preserved.

Concerning irreparable damage Mr. Segawa submitted that there can be no damaged by requiring the applicant to take annual leave or being subjected to disciplinary proceedings. That there would be no injury even if there are damages which can be atoned for in damages. He referred to the case of ***Geoffrey Kisembo Vs Standard Chartered Bank HCMA 344 of 2014.***

On Balance of convenience, learned counsel for the respondents submitted that this is in favour of not granting this application since by time of filing it she was out of office. That granting the application would dispose of the reliefs sought in the main application.

Mr. Luswata supplemented the submission by Mr. Segawa's and said that a prima facie case is not for opposing arguments. That if the opposing argument is solved by law there is no prima facie case. That employment penalties are in the Employment Act and taking annual leave is not among them. That the irreparable damage in the case of ***Legal Brain Trust*** (supra) is distinguishable from the instant case since in this case the action of the respondents was not a disciplinary proceeding requiring a hearing. Therefore irreparable damage is not established.

On status quo, Mr. Luswata submitted that the case of ***Salim*** is not applicable because in that case the status quo was restored by court order by restoring land to the applicant which is not the case here. That court does not make sweeping orders so court cannot make orders generally stopping proceedings in the respondent fund. As such the application should be dismissed with costs.

In rejoinder Mr. Semambo for the applicant submitted that the Deputy Registrar made observations on the conduct of the respondents which have not been appealed against or varied. That the board meeting suspending the applicant was intended to defeat the application pending in court. Further that the employment Act does not make leave mandatory and even the Human Resource Mannual 7.1 and 7.2 supports this position as there is no provision for forced leave. So it is not a private right of the employer respondent to force leave on to the Deputy Managing Director.

Learned counsel for the applicant further rejoined that the letter annexed to the affidavit in support of the application which shows the leave directive was being used as a disciplinary measure. That all submissions of the respondents were going to the root of the main application and not temporary injunction. That the grant of this application will not determine the matter in favour of the applicant since the suspension has left the applicant in office. Therefore the status quo is that the applicant is still in office.

I have thoroughly considered the application, the respective affidavit and submissions by respective counsel. From the submission by learned counsel for the respondent, they appear to suggest that the 1st respondent is not a public body. I think I should handle this issue first.

According to **Macmillan Online Dictionary**, a public body is an organization whose work is part of the process of government but is not a government department. NSSF is established by an Act of Parliament. It is a quasi-government agency responsible for the collection, safe keeping, responsible investment and distribution of retirement funds from employees of the private sector in Uganda who are not covered by the Government Retirement Scheme. This clearly makes NSSF a public body and that is why government appoints the NSSF top management. It is therefore not accurate for learned counsel for the respondents to allege that NSSF is a private body and therefore not subject to Judicial Review. Perhaps this wrong perception of their status is the reason we are having this litigation in the first place.

Having resolved that issue I am in agreement with the principles outlined governing the grant or refusal of a temporary injunction. These are well settled as ably submitted by respective counsel and as per the case of ***American Cynamid*** (supra) and ***Kiyimba Kagwa*** (supra).

In my considered view however when it comes to temporary injunctions in matters of Judicial Review the rules of the game have to change a little.

The focus of court should shift immediately to balance of convenience first since it is always difficult to solve the matter at the time/stage of *prima facie* case and irreparable damage. I have come across jurisprudence that has persuaded me to agree that it is time those principles are made applicable in Uganda in view of the changing times.

For example in the case of ***R Vs MAAF Exp. Mousanto [1999] QB 1161*** court emphasized while commenting on interim reliefs in public law matters that there is a strong presumption against interim reliefs in public law matters because it is in public interest that decisions of public bodies are respected unless and until they are set aside. The adequacy of damages is unlikely to be the key issue in public law cases because breach of public law does not in itself give rise to a claim in damages. Therefore given these factors, the balance of convenience is the key factor for the administrative court when deciding whether or not to grant an injunction. When a court is asked to grant a temporary injunction in a public law case, it should approach the matter on the lines indicated by the House of Lords in the ***American Cynamid*** case but with modifications appropriate to the public law element of the case, which might consist of special factors.

While doing this, court has a wide discretion to take a course of action which seems most likely to produce a just result or minimize the risk of an unjust result.

The House of Lords in ***R Vs Secretary of State for Transport exparte Factortame Ltd (No.2) [1991] 1 AC 603*** Lord Goff recognized that Lord Diplock in ***American Cynamid*** case had approached the question of whether to grant an injunction in two stages; first the availability of an adequate remedy in damages and secondly where that stage did not provide an answer, the balance of convenience. Lord Goff stated that;

> ***"It follows that as a general rule, in cases of this kind involving the public interest, the problem cannot be solved at the first stage, and it will be necessary for the court to proceed to the second stage, concerned with the balance of convenience. Turning to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that one must look at the balance of convenience more widely and take into account the interests of the public in general to whom these duties are owed."***

I agree with this pronouncement.

Therefore if a public authority seeks to enforce what is on the face of it the law of the land and the person against whom such action is taken challenges the validity of the law or action matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing the law and therefore justify the refusal of a temporary injunction in favour of the authority or to render it just or convenient to restrain the authority for the time being from enforcing the law.

The discretion conferred upon the court cannot be fettered by any rule. I doubt whether there is any rule that a party challenging the validity of a law must first prove a *prima facie* case before getting a temporary injunction. If this was to be the case then such a party may suffer such serious and irreparable harm in the event that the law being enforced is not restrained by a temporary injunction.

While considering the grant or not of a temporary injunction, court must consider the strength of the applicant's case. It can grant a temporary injunction even after a decision of a tribunal or authority has been made and is in the process of being implemented. This jurisdiction however has to be exercised sparingly and were it is exercised the court should decide the Judicial Review application expeditiously.

In the instant case I find that the balance of convenience tilts in favour of the applicant and also this court finds that the applicant has a strong *prima facie* case with a high likelihood of success. Judicial Review is all about fairness and in this case the applicant claims she was unfairly directed to go on forced annual leave at a time when she had just returned from her maternity leave. The reason for the forced leave smacks of suspension because the 2nd respondent justified it as necessary

> ***"……. To save the fund from further business disruption and paralysis at the Top Most Strategic Level of the Funds Management, while a lasting solution is sought."***

> ***"You are also directed to hand over the business and instruments of the office of the Deputy Managing Director to the Managing Director."***

There is nothing in these phrases to suggest that the order to go on leave was aimed at assisting the applicant exercise her right to leave.

But from the facts of this case, there is an undisputed fact that the applicant is still the Deputy Managing Director of the 1st respondent Fund since going on annual leave does not amount to dismissal.

I have also found paragraph 8 of the affidavit in reply of the 1st respondent not to be truthful because it sharply contradicts the facts of the case. The attempts to justify the actions of the respondents in paragraph 19 is unspecific and unconvincing. Although the respondents have tried to spin their whole activity and actions as being in the best interest of the applicant they have miserably failed. Further in the affidavit in reply, the 2nd respondent appears to propose in paragraph 4 that he came to NSSF Board to solve the problem of intrigue but in the whole

affidavit there is no single example of an incident that fits the magnitude of the allegations against the applicant or intrigue.

In paragraph 5 the 2nd respondent states that there is an impasse that needs to be dealt with but does not demonstrate to this court what he means by an impasse or show any evidence to prove that the applicant was dealt with that way in the interest of the fund or that the fund was in danger if the application for a temporary injunction is granted.

After stating that the 2nd respondent's actions in directing the applicant to go on forced leave was intended to solve an impasse, the 2nd respondent in paragraph 8 contradicts himself and stated that he was being philanthropic trying to enforce the rights of the applicant. This cannot be philanthropy i.e voluntary promotion of human welfare.

A general look at the pleadings in this cause raises a lot of suspicion surrounding all the events that have been unfolding and this court is convinced that the balance of convenience is in favour of granting this application since the controversy has a lot of triable issues.

This is the kind of application for a temporary injunction where the court cannot dispose it of except by considering where the balance of convenience would be if the application is not granted.

That notwithstanding, the applicant has demonstrated to court that she has a prima facie case with high likelihood of success and the balance of convenience is in her favour.

I find that although the decisions of a public body must be given the greatest respect, the particular decision in this case creates a lot of doubt as to its integrity and legality if one looks at the laws of the land and public policy.

Finally this court finds that the case for the respondents in opposing this application was very unconvincing in as far as the respondents' arguments seemed like afterthoughts to justify their suspicious action.

This court will therefore take the course which seems most likely to produce a just result. This course is the granting of this application. The implications of the respondent' actions on the applicant's reputation might not be atoned for in award of damages.

For the reasons I have given in this ruling, this application is allowed. The respondents shall pay the applicant the costs of this application.

I so order.

Stephen Musota
J U D G E
21.4.2016.

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