

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE NO. 25 OF 2017

ESTHER MARY SEKASI.....APPLICANT

AND

KYAMBOGO UNIVERSITYRESPONDENT.

BEFORE HON. LADY JUSTICE H. WOLAYO

RULING

The applicant through her advocates Jogo, Tabu & Co, sought orders under articles 28 and 42 of the Constitution ;sections 56 and 57 of the Universities and Other Tertiary Institutions Act 7 of 2001 as amended and Judicial Review Rules 2009.

The orders sought are as follows:

1. A writ of prohibition stopping the respondent from carrying out interviews and filling the posts of deputy academic registrar.
2. A writ of mandamus compelling the respondent to facilitate the sitting of the Kyamboggo University Staff Tribunal (KUST) to hear the applicant's appeal within 45 days.
3. General damages and costs.

The respondent who was represented by Kalenge, Bwanika, Ssawa & Co. Advocates filed an affidavit in reply of Peter Madaya, acting University Secretary.

Both counsel filed written submissions that I have carefully considered.

During hearing in court, two issues were proposed .

1. Whether the decision of the respondent declining to confirm the applicant in the post of deputy academic registrar entitles the applicant to orders in judicial review.
2. Whether the respondent can be compelled to constitute the tribunal to hear the applicant's appeal.

The applicant's counsel framed a different set of issues to which the respondent's counsel replied. I will therefore go by the issues as framed by counsel for the applicant in his submissions.

1. Whether the respondent acted ultra vires when it commenced recruitment of deputy academic registrar when there was a pending appeal before KYUST ?
2. Whether the respondent should be compelled to call the Tribunal to dispose of the applicant's pending appeal?
3. Remedies.

The applicant's case.

It was the applicant's case that she has been the acting deputy academic registrar for over 30 months contrary to Public Service Regulations which states that a person can only be in acting position for six months, renewable once after which that person is either confirmed or reverts to the former position.

It was her case that although she was issued with a certificate of recognition for the dedicated service, she was kept in acting capacity beyond statutory period.

The applicant complains that the respondent advertised her position and listed candidates for interviews on 9.2.2017 but she was not invited.

Furthermore, that she appealed the decision not to short list her to the Kyambogo University Staff Tribunal (hereinafter referred to as the tribunal) on 25.4.2016. That the tribunal sat on 10.11.2016, 12.12.2016 and 30.1.2017 but on all occasions, the hearing of her application for an interim order did not take off yet the interviews were to take place on 9.2.2017.

The respondent's case

It was the respondent's case that it run an advert for promotional interviews to fill position including that of deputy academic registrar and that on 3.3.2016, applications were considered by the Appointments Board and the applicant was not considered for interviews.

According to Mr. Madaya, the respondent reserves the right to appoint or not appoint the applicant and therefore the respondent cannot be forced to confirm the applicant and that moreover, the applicant did not possess the requisite qualifications.

The respondent concedes that the applicant filed an appeal to the tribunal against the Appointments Board for not shortlisting her but before the appeal could be heard, the applicant filed MA 71 of 2017 in the High Court in which she obtained an interim order stopping the recruitment process until further orders.

From the foregoing, it is clear that the respondent does not deny the applicant's case that she was in acting position for 30 months when the position of deputy academic registrar was advertised.

It is also conceded by the respondent that the applicant was not shortlisted. Annexure A to the respondent's affidavit in reply refers.

I also find that although the applicant filed her appeal to the tribunal on 25.4.2016, the same had never been disposed off by 8.2.2017 when the applicant filed an application for judicial review.

I further find as a fact that the interviews for the contested post were to be held on 9.2.2017 before the applicant's appeal was disposed off hence the interim order stopping the recruitment process.

The law

The applicant brought her application under article 28 of the Constitution on the right to a fair hearing and article 42 on the right to just and fair treatment by administrative bodies when making administrative decisions respectively.

The tribunal is one of the institutions of the respondent and established by section 56 (1) of the Universities and Tertiary Institutions Act (hereinafter referred to as UOTI) as amended as amended. This tribunal is under a statutory obligation in section 57(2) to take a decision in the appeal within 45 days of lodging an appeal lodged by a staff member.

Under section 57(3), an aggrieved staff member may apply to the High Court for judicial review within 30 days of the decision by the tribunal.

The Appointments Board is a Committee of the University Council and is responsible to the Council. It is responsible for appointment, promotion, removal from service and discipline of staff.

Although neither counsel addressed me on whether this case is susceptible to judicial review, I find it necessary to review some of the guiding principles on when the High court can review decisions of administrative bodies.

Halsbury's laws of England 4th edition vol. 1(1) page 100, states that

'Judicial review is designed to prevent the excess and abuse of power by public authorities . In most cases powers of public authorities are conferred by statute. It is therefore statutory power that judicial review is primarily concerned with.'

It is now trite law that Judicial review will be available to an applicant who establishes that the decision of the public body is illegal, tainted with procedural impropriety or procedural unfairness and is irrational.

In **High Court MC NO. 18 OF 2012 Mugabi Edward v Kampala District Land Board** , Justice Bossa J as she then was quoted a text book on Administrative Action by Hilary Delony Maxwell page 5 and 6 where the author states as follows:

' essentially, judicial review involves an assessment of the manner in which a decision is made, but it is not an appeal and jurisdiction is exercised in a supervisory manner, not to vindicate rights as such but to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality...'

1. Whether the respondent acted ultra vires when it commenced recruitment of deputy academic registrar when there was a pending appeal before the tribunal .

The applicant lodged her appeal against the decision not to shortlist her on 25.4.2016. By the time she came to court on 8.2.2017, a decision had not been made.

Counsel for the respondent submitted that the Appointments Board was within its powers to commence recruitment process.

Counsel cited **Mbarara High Court MA 55 of 2009 Lawrence Nuwagira v Public Service Commission and two others** where the High Court held that the 1st respondent did not exceed its powers when it advised that the appointment of the applicant be rescinded on grounds that he did not possess required qualifications.

I agree with counsel for the respondent that the Appointments board was within its powers when it commenced the recruitment process.

This notwithstanding, the applicant's complaint as captured in her affidavit in support is that her appeal to the tribunal against the decision of the appointments Board has not been disposed off yet recruitment to fill the position she holds in acting capacity commenced.

By commencing the recruitment process for a position in which the applicant expressed interest having acted in it for 30 months, and before the tribunal had rendered a decision, the recruitment process became tainted with unfairness which entitles the applicant to an order in judicial review.

While the Appointments Board was empowered to conduct recruitment of staff, it had to do so within the confines of the Universities and Tertiary Institutions Act that established it and also established the tribunal that handles appeals of aggrieved staff members.

By shortlisting candidates before the tribunal arrived at a decision on the applicant's appeal, the Appointment's Board acted unfairly and if it had been allowed to continue, the applicant was to be locked out of the recruitment process to her prejudice.

Counsel for the applicant submitted that the applicant had a legitimate expectation that she would be shortlisted but I find this argument premature because that is a matter to be raised only after the tribunal has rendered its decision .

In conclusion, the respondent through one of its institutions , the Appointment Board acted unfairly when the recruitment process commenced before the applicant's appeal to the Tribunal had been concluded.

With respect to the tribunal, its failure to comply with time within which to render a decision in the applicant's appeal was a breach of section 56(2) of the UOTI Act .

The tribunal's failure to render a decision within time prescribed by law coupled that the decision of the Appointments Board to commence recruitment process amounted to unfair treatment within the meaning of article 42 of the Constitution .

It was the responsibility of the respondent to ensure that all its institutions execute their respective mandates in tandem and in a manner that did not prejudice the applicant.

Obviously, counsel for the applicant found difficulty framing issues but that does not take away the residual powers of this court conferred by section 33 of the Judicature Act to grant such remedies as a party is entitled to in respect of matters before the court so that in as far as possible, all matters in controversy are finally determined.

In exercise of these powers, I find that while the Appointments Board was within its powers to commence recruitment, it was unfair to do so before the tribunal had pronounced itself on the applicant's appeal against the board's decision.

2. Whether the respondent should be compelled to call the tribunal to dispose of the appeal.

As one of the institutions of the respondent with a mandate derived from statute, the tribunal is duty bound to comply with the UOTI Act in the discharge of its function.

Counsel of the respondent submitted that no evidence has been adduced to show that the respondent has failed or refused to perform its statutory duty of facilitating the tribunal.

As one of the respondent's structures, the respondent cannot escape responsibility or even liability for the tribunal's omissions or commissions.

But because the tribunal derives its mandate from the UTI Act this court will issue orders directing it to perform its statutory duty.

3. Remedies

The applicant sought general damages for inconvenience suffered.

Under rule 8 of the judicial review rules, the court is empowered to award damages if the claim arises from any matter to which the application relates and if the applicant would have succeeded in an ordinary suit.

The applicant's claim for general damages could not have succeeded in an ordinary suit. Furthermore, there is no nexus between the claim for damages and the specific complaint in this application. Moreover, the fact that her application generally succeeded is sufficient satisfaction. I therefore decline to award damages.

Having found that the applicant was treated unfairly by the respondent's appointment board and the tribunal, I make the following orders:

1. A writ of mandamus will issue compelling the tribunal (KYUST) to hear and determine the applicant's appeal within 45 days from the date of this order.
2. An injunction shall issue stopping recruitment for the position of deputy academic registrar until the determination of the appeal pending before the tribunal but not later than 45 days from the date of this order.
3. Thereafter, the applicant will have recourse to courts of law if there is non compliance.
4. Each party will bear its own costs as the applicant and respondent are still in an employee/employer relationship.

DATED AT KAMPALA THIS 16TH DAY OF JUNE 2017.

HON. LADY JUSTICE H. WOLAYO