THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 155 OF 2017

FAMILY CARE HOSPITAL :: APPLICANT

VERSUS

1. **ATTORNEY GENERAL**
2. **PERMANENT SECRETARY MINISTRY OF HEALTH**
3. **ACCOUNTING OFFICER MINISTRY OF HEALTH :::::::::::::::: RESPONDENTS**

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

a) Introduction

1. The Applicant brought this judicial review application under sections 33, 36 and 39 of the Judicature Act and Rules 3, 4, 6 and 7 of the Judicature (Judicial Review) Rules of 2009 and Order 52 Rule 2 of the Civil Procedure Rules. The Applicant seeks:

    i. An order for certiorari against the 2nd and 3rd Respondents jointly and/or severally quashing the decision of the Minister of Health suspending a grant of Ug Shs: 570,832,829/= (Five hundred seventy million eight Hundred Thirty Two Thousand

Eight Hundred Twenty Nine Shillings only) allocated to the Applicant during the financial year 2016/2017.

ii. An order of mandamus compelling and directing the 2nd and 3rd Respondents to immediately release the said grant.

iii. A declaration that the 2nd and 3rd Respondents acted *ultra vires* and illegally and thus occasioned a miscarriage of justice to the Applicant when they refused to honor their obligation to remit the grant to the Applicant.

iv. An order prohibiting the 2nd and 3rd Respondents from further preventing the Applicant from accessing the grant.

v. An injunction restraining the 2nd and 3rd Respondents as representatives of the Ministry of Health from interfering with the financial activities of the Applicant in any way.

vi. General damages.

vii. Costs of this application.

viii. Any other consequential relief the court may deem fit.

2. Mr. Peter Kahindi of M/s. Kahara & Co. Advocates represents the Applicant and Mr. Johnson Natuhwera from the Attorney General's Chambers represents the Respondents. The Attorney General is sued in his representative capacity under section 10 of the Government Proceedings Act for the actions of the 2nd and 3rd Respondents who are Government officials.

3. The application is supported by the affidavit of Mr. Richard Muhangi, the president and founder of the Applicant. The grounds for the application are briefly that in or about June 2013, the management of the Applicant hospital approached the office of the President to request for financial aid targeted towards rehabilitation of the hospital as well as purchase of equipment required to improve services rendered. On 4th June 2013, the then Minister for the Presidency Frank Tumwebaze wrote a letter to the Minister of Health requesting that the Ministry meet the proprietors of the Applicant with a view of going into partnership with the Applicant should the Ministry have in place a policy that can accommodate the Applicant's proposal.

4. The Applicant was advised to submit a proposal to the Permanent Secretary Ministry of Finance/ Secretary to the Treasury and on 22nd January 2015 the Applicant through the office of the 2nd Respondent wrote to the Secretary to the Treasury requesting for a release of a grant of Ug. Shs: 570,832,829/=. On 10th March, 2015, the Secretary to the Treasury wrote a letter to the Permanent Secretary Ministry of Health advising that the Ministry of Health should consider supporting the facility within the available sector budget over the medium term within the Public Private Partnership frame work for the health sector.

5. By letter dated 28th June 2016 the Permanent Secretary of the Ministry of Health Dr. Lukwago Asuman communicated to the Chief Administrative Officer Wakiso District (where the Applicant is situated) indicating that the Ministry of Health had made a budget provision of Ug. Shs: 500,000,000/= (Five Hundred Million) to cater for the rehabilitation and expansion of the Applicant hospital. It was also noted in the letter that the support may not be extended beyond FY 2016/17 as the Ministry will be addressing infrastructure challenges in other facilities in the medium term. Based on this communication, the Applicant commenced the process of expansion and rehabilitation of the hospital and incurred costs as a result.

6. However on 5th July 2016, Wakiso District Chairperson Mr. Matia Lwanga Bwanika wrote a letter to the Minister of Health challenging the decision to allocate the grant to the Applicant a privately owned hospital which was not part of the District Private Not For Profit (herein after PNFP) facilities yet the public health facilities in the district were in a very sorry state.

The Applicant was not copied in to this letter. Following this letter, on 19th July 2016 Mr. Ssegawa Ronald Gyagenda for the Permanent Secretary Ministry of Health wrote to the Secretary to the Treasury informing him of the institution of an investigation into the matter and requesting a suspension of the allocation to the Applicant until investigations were completed. On 8th August 2016, Mr. Muhangi on behalf of the Applicant wrote to Dr. Lukwago elaborating the nature of the Applicant's operations, legal status, accreditations, and recommendations from various government and non- government organizations but there was no response. On 13th February 2017, the Secretary to the Treasury wrote a letter to the Permanent Secretary Ministry of Health forwarding the Applicant's concern that they had already incurred some commitments and expenses like architectural designs which was likely to leave the Applicant with outstanding arrears which would negatively affect the operations of the Applicant if not addressed for review and appropriate action. Still the Applicant was not paid any money by the Ministry.

7. The Applicant contends that the decision to suspend the grant was reached without according the Applicant audience, carrying out investigations or even responding to the Applicant's letter indicating its eligibility for the grant.

8. The application was opposed by the Respondents. Mr. Ssegawa Ronald Gyagenda the Under Secretary/Accounting Officer in the Ministry of Health deponed the affidavit in reply to this application. He averred that on 5th July 2016, the Ministry of Health received a complaint from the LCV Chairperson of Wakiso District indicating that the Applicant is not a PNFP facility and therefore does not qualify to benefit from the Government funding Primary Health Care (PHC) program. That when the Ministry received several complaints regarding non- compliance to the PHC guidelines a review of the beneficiaries was undertaken.

9. Mr. Ssegawa further deponed that during the review process, it was discovered that a total of 196 health facilities did not meet the eligibility criteria under the guidelines and upon thorough investigations, only 39 of the 196 units were cleared while the rest of the health units totaling 156 were deleted. That the Applicant was one of those that did not meet the eligibility criteria and the Ug. Shs: 570,832,829/= originally meant to be released to them

was suspended. He also deponed that the Ministry of Health maintains that the Applicant does not meet the eligibility criteria to benefit from the Government funding PHC program and that if the Applicant is allowed to benefit from this program, it would be against the set PNFP eligibility guidelines.

b) Law

10. In **Owor Athur & Ors v. Gulu University HCMA No. 18 of 2007** Justice Remmy Kasule noted that the overriding purpose of judicial review is to ensure that the individual concerned receives fair treatment, that lawful authority is not abused by unfair treatment. Further that it is not for the court to take over the authority and the task entrusted to that authority, by substituting its own decision on the merits of what has to be decided.

11. In **Fuelex Uganda Ltd v. The Attorney General & Ors MA No. 48 of 2014** Justice Stephen Musota held that in order to succeed in an application for judicial review the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

12. In **Stream Aviation Ltd v. The Civil Aviation Authority Misc. Application No. 377 of 2008 (Arising from Misc. Cause No. 175 of 2008)** Justice V. F. Musoke Kibuuka held that the prerogative order of *certiorari* is designed to prevent the access of or the outright abuse of power by public authorities. The primary object of this prerogative order is to make the machinery of Government operate properly, according to law and in the public interest

13. In **Semwo Construction Company v. Rukungiri District Local Government HC MC 30 of 2010** Justice Bamwine (as he then was) explained that: "**...** 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."

14. Prohibition lies to restrain authorities or bodies which are inferior to the High Court from assuming jurisdiction where there is none or from doing what they are not authorized to do. It does not correct the practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.[1]

15. **In Republic vs. The Honourable Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** the High Court expressed itself as follows; "….In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation."

16. Similarly in **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553** the High Court expressed itself as follows; "…An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from

[1] Peter Kaluma "Judicial Review Law Procedure and Practice" second edition, p.119.

essential principle of justice. The decision must be declared to be no decision**.**" Court further observed that "The principle of legitimate expectation lies in the proposition that where a person or a class of persons has previously enjoyed a benefit or advantage of procedure which, on reasonable grounds, seemed likely to be continued as a standard way or guide, with respect to the resolution or disposal or certain questions a claim of legitimate expectation may arise. Put differently, legitimate expectation is but one variant aspect of the duty to act fairly and natural justice is but a manifestation of a broader concept of fairness."

c) Analysis

17. I have read all the pleadings and submissions of the parties. The Respondent raises two preliminary objections which I will address first. In the first preliminary objection, the Respondents claim that the application should be dismissed because it is time barred as it was not filed within three months and neither was there an application for extension of time for the same. They also state that the Applicant never advanced any good reason for this delay. The applicable law to this objection is R. 5 (1) of the Judicature (Judicial Review) Rules, 2009. It provides that "An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the Court considers that there is good reason for extending the period within which the application shall be made.

18. In my discernment, R. 5 leaves it in the discretion of the court to determine whether or not there is good reason for extending the period within which the application is filed. Although an application by an applicant is the more common way of initiating extension of time, it is not the only way by which the Court exercises its discretion under R.5. Besides, my understanding of the mischief behind R. 5 is that it was never meant to be prohibitive where there is a good case for judicial review. Rather, it was meant to emphasize the urgency with which judicial review applications are to be filed, heard and disposed of in correcting administrative wrong doing.

19. In the case before me the Applicant's annexure J demonstrates that on 19th July 2016, the Respondent Permanent secretary wrote to the Secretary to the Treasury asking for a suspension/cancellation of the allocation of the funds to the applicant pending investigation. This communication is copied to the Applicant but I have no acknowledgement of receipt of the same by the Applicant so I cannot safely say that it was communicated to the Applicant on this date or another date by which to determine the 3 months under R. 5. Annexures M1 and M2 referred to in paragraph 17 of the Applicant's affidavit in support is the press release issued cancelling the grant to the Applicant and other facilities. I will take this date which the Applicant acknowledges when he says the suspension/cancellation shocked the Applicant when it learnt of the same from the press release. This press release is dated 5th August 2016. If I count three months from this date, they'd end around 5th November 2016. The judicial review application filed on 21st March 2017 can therefore be said to be outside the 3 months stipulated.

20. However, the Applicant expressed that this application was urgent since in the first place it needed to be determined before the end of the financial year 2016/2017 which ended in June 2017. The reason given by the Applicant was that there was a threat of the funds being returned and it losing out completely. In these circumstances, to avoid a miscarriage of justice, this is a good reason for extension of time. I therefore, hereby in my discretion allow extension of time to cater for this late filing. To dismiss the application on this aspect of late filing would in my view subvert the substantive justice envisaged in A. 126(2) (e) of the Constitution. It is against the justice of this case. This preliminary objection is therefore dismissed.

21. In the other objection the Respondents seem to say that the alternative remedy the Applicant had but did not exercise was taking steps to rectify the anomalies or ambiguities in his application for a grant which was a quicker and faster remedy. They also seem to say that the Respondents have not banned the Applicant from applying for a fair hearing or explanation where his application was lacking so that they can lift the suspension/cancellation. Clearly these suggestions are not the kind of alternative remedies envisaged by the judicial review jurisprudence.

22. The Respondents do not demonstrate that the Applicant had other statutory and/or meaningful remedies. In any case even if there were other remedies, the existence of other remedies is not necessarily a bar to judicial review. A court seized of an application for judicial review at present does not have to look behind its back or peruse through statutes or other laws to ascertain the existence or otherwise of an alternative remedy before issuing appropriate orders. Instead, the courts determine whether or not to issue judicial review orders as may be applied for by a party based on the matters raised in the application, the evidence adduced and the position of the law on the issues under consideration. So although it is a relevant factor to consider in deciding whether or not to grant relief, the existence of an alternative remedy is not itself a bar to judicial review.[2] In this case, I'm not convinced that, in the circumstances of this case, the Applicant had an alternative, speedy and meaningful remedy given that the deadline for the grant was fast approaching with no sign that the suspension/cancellation was going to be lifted or the Applicant being heard. This preliminary objection is also dismissed.

23. I will now turn to the substantive judicial review application. It is not disputed that the Applicant's request for the grant of 500,000,000/= in issue was considered, allowed and funds allocated for the same as demonstrated in annexure E. It is also not in dispute that after such allocation, the grant was first suspended as demonstrated in annexure J and then cancelled as demonstrated in annexures M1 and M2 in decisions by the Respondent agent dated 19th July 2016 and 5th August 2016 respectively. It is these two decisions that the Applicant challenges.

24. The Applicant claims that the suspension/cancellation was unfair since it was taken without giving the Applicant an opportunity to be heard. The right to be heard as enshrined in Articles 28 and 44 of the Constitution is non derogable. In this case, the Respondent does not respond to this specific aspect of denying the Applicant the opportunity to be heard. I have looked at all the annexures of the Respondent. Nowhere is it demonstrated in any way that the Applicant was heard before the suspension decision was made.

[2]Ibid p. 285.

25. Although the Respondent claims to have carried out extensive investigations leading to the investigative report annexed, it is not clear what kind of investigations were carried out. It is also not demonstrated that these alleged extensive investigations involved hearing from the Applicant or having it exercise its right to be heard in any way. The Applicant wrote to the Respondent seeking to be heard and inquiring why the grant was suspended/cancelled but it received no response from the Respondents. This was unfair and arbitrary. As a result, the suspension/cancellation decision resulting from this process which disregarded the Applicant's constitutional right to be heard was illegal. In fact, the Respondents do not deny this denial of a fair hearing to the Applicant. For this alone, the decision is null and void.

26. It was also an act of procedural impropriety and irregularity to first offer the grant then allegedly investigate, suspend and cancel it. Normally investigations are part of the due diligence checks carried out before the grant of this nature is approved, allocated and/or awarded. Once the grant is approved and communication made, the presumption is that all due diligence checks were done timely prior. In this case, it appears the suspension/cancellation decision after the offer was initiated by actions of the LC V Chairperson who wrote a complaint. It is okay to receive and act on complaints. But in the circumstances of this case, it can easily be inferred that the Respondents in their suspension/cancellation acted backwards to suit the LC V Chairman complaint. It is not too far off to infer in these circumstances that in their actions the Respondents' officials were influenced by the said LC V chairman more than acted impartially as required of them. This too was procedurally improper and unfair.

27. As demonstrated by annexure E, by offering and communicating to the Applicant that its grant had been approved, awarded, and funds earmarked for the same set aside, the Respondents officials created a fiduciary relationship and thus a legitimate expectation to fulfill the Applicant's grant request. By this legitimate expectation, the Applicant incurred expenses and started the construction of its clinic in anticipation of the grant which would in turn pay off the said expenses. The arbitrary suspension/cancellation without causing the Applicant to be heard was also in breach of this fiduciary relationship and legitimate

expectation earlier created. It caused the Applicant unanticipated financial loss and anxiety. This was unnecessary and unfair in the circumstances of this case.

28. Without hearing from the Applicant and giving him a chance to present the documentary evidence he claims to have had as proof of its eligibility for the grant, it is difficult to consider that the Respondents' investigations in the circumstances of this case were fair or properly carried out. In these circumstances, the Respondents officials reached their decision without proper basis to safely conclude the Applicant did not qualify for the grant. What is easily inferable is that the Respondents acted largely, if not only on the LC V Chairperson's complaint to disqualify the Applicant. This too was improper.

29. Overall, based on the above, in the circumstances of this case, I am inclined to find that the Respondents acted unfairly and illegally when they indefinitely suspended/cancelled the grant earmarked, allocated and set aside for the Applicant. The application therefore succeeds with the following declarations and orders:

i. The cancellation of the grant prior offered to the Applicant was illegal and unfair.

ii. Through the cancellation the second and third Respondents acted illegally, unfairly and occasioned a miscarriage of justice to the Applicant when they refused to honor their obligation to remit the said grant to the Applicant.

iii. An order of certiorari is hereby issued quashing the decision of the Minister of Health suspending the grant of Ug Shs: 500,000,000/= allocated to the Applicant in the financial year 2016/2017.

iv. An order of mandamus compelling the 2nd and 3rd Respondents to immediately release the said grant funds to the Applicant.

v. The Respondents and/or their agents are prohibited from preventing the Applicant from accessing the grant funds or interfere in the Applicant's use of the same unnecessarily.

vi. The Respondents and/or their agents should desist from illegally interfering with the financial activities of the Applicant.

vii. For the inconvenience occasioned, the Applicant is awarded general damages of 50 Million.

viii. The Applicant is also awarded costs to be paid by the Ministry of Health.

I so order.

LYDIA MUGAMBE
JUDGE
18TH SEPTEMBER 2017.