

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC. CAUSE NO. 090/2016

FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY

1. MUNDALA BOOYA AYORA

2. SIBUGYO AGNES.....APPLICANTS

VS

BUNDIBUGYO DISTRICT LOCAL GOV'T.....RESPONDENT

BEFORE: HON MR. JUSTICE OYUKO. ANTHONY OJOK

RULING

This is an application brought under S.33, 36 of the Judicial Act Cap 3, Rules 6,7,10 of the J. (Judicial Review) Rules S.1 11/2009, Section 6, 10, 17 (a), 27, 28, 54 of the Local Government Act and S.98 of the CPA Act. The Application is for the following reliefs by way of Judicial Review

- a. A declaration that the former Bundibugyo LCV chair person illegally appointed Mr. Rukurato Ngwabusa Sylvester, Kaija Gideon, Muhindo Samuel, Mbusa Benezeri and Bangeyi Joyce to District Service Commission Bundibugyo.
- b. A declaration that the appointment of Mr. Rukurato Ngwabusa Sylvester, Kaija Gideon, Muhindo Samuel, Mbusa Benezeri and Bangeyi Joyce to the District Service Commission Bundibugyo did not follow proper procedure as stipulated by the law hence void.
- c. A declaration that the issuance of appointment notices/letters to Mr. Rukurato Ngwabusa Sylvester, Kaija Gideon, Muhindo Samuel, Mbusa Benezeri and Bangeyi Joyce as legally appointed members to District Service Commission Bundibugyo by the Chief Administrative Officer Bundibugyo was illegal as it emanated from an illegal appointment.
- d. An order directing the Respondent to cause the proper/legal appointment of new members to the District Service Commission.

- e. Costs of the application be provided for.

The grounds are;

1. The former Bundibugyo LCV person illegally appointed Mr. Rukurato Ngwabusa Sylvester, Kaija Gideon, Muhindo Samuel, Mbusa Benezeri and Bengeyi Joyce to District Service Commission without following the proper procedure and/acted ultra vires.
2. That the District Executive Committee never convened to formulate the appointment of Mr. Rukurato Ngwabusa Sylvester, Kaija Gideon, Muhindo Samuel, Mbusa Benezeri and Bengeyi Joyce for the approval by the council to the District Service Commission Bundibugyo.
3. That the then Bundibugyo LCV chairperson illegally appointed persons to the District Service Commission who were not eligible for appointment.
4. That the urban authorities were never consulted in the purported appointment of Mr. Rukurato Nwabusa Sylvester, Kaija Gideon, Muhindo Samuel, Mbusa Benezeri and Bengeyi Joyce to the District Service Commission Bundibugyo and no member from the urban authority was appointed to the district service commission.
5. That a representative of persons with disability was not appointed to the District Service Commission and their complaints were ignored.
6. That illegally appointed persons were on the 1st day of October 2016 issued appointment letters as legally appointed to District Service Commission.
7. That it is just, equitable and in the interest of justice that the application be granted.

The application is supported by the affidavit sworn by the applicants and its annexures and opposed by Oloya Stephen (Chief Administrative Officer), Kugonza Bakamanyaki Veronica (Member and Secretary of Gender representing Busaru) and Twesigwa Sunday Jackson (Deputy Speaker of the Respondent) together with annexures, Bagonza William affidavit in rejoinder Chairperson of Bundibugyo union of disabled persons of Uganda (Budipo) and Sibugyo Agnes in rejoinder.

Bale Musa and Tamale Michael of Ms. Baale, Lubega & Co. Advocates appeared for the applicants and Ndibarema Grace M (Principle State Attorney) assisted by State Attorney Rita Kalemba represented the Respondent.

The brief facts are that the chairperson LCV Bundibugyo appointed Mr. Rukurato Ngwabusa Sylvester to represent the disabled, Kaija Gideon, Muhindo Samuel, Mbusa Benezeri and Bengeyi Joyce to District Service Commission in Bundibugyo, issued appointment letters on

the 1st October 2016 and was due to swear the above named persons without following the proper procedures and laws.

Before the commencement of the application, Counsel for the Respondent raised 4 preliminary objections. I have carefully considered the detailed submissions of all the counsel as far as the preliminary objections are concerned. I shall start with 1-4.

1. In the case of Kihunde Sylvia & Another Vs Fort Portal Municipal Council & Another HCMA 061/20156

“Whereas I agree that High Court has unlimited jurisdiction, it does not mean that High Court should also involve itself in administration matters and its clogged up with many serious cases to handle of serious magnitude. High Court should be the last resort having explored and exhausted all internal mechanism put in place. I believe this is an administrative matter that can best be handled by the Permanent Secretary Ministry of Local Government for guidance, and or even District Service Commission”

Whereas I agree that Public Service Commission would have first handled this complaint, the time frame of 3 months was almost coming to an end by the time this applicant was filed, secondly it was the very commission that approved some members and yet the law still gave itself powers to investigate and more so the applicants made several complaints to the commission but failed to get reply by the time this application was filed.

In my view, the decision of Justice Madrama Christopher in the case of **Uganda Crops Industries Vs URA HCCS No. 5/2009** is distinguishable from the facts and circumstances of the present case. In that case the party did not as mandatory required go to The Tax Appeal Tribunal but straight to High Court and secondly it was a Civil Suit and not an application for Judicial Review. This Preliminary objection therefore fails.

2nd preliminary Objection Wider Public Interest: In the case of **Kasibo Joshua versus the Commission of Custom, URA CA No. 44/2007**, it is stated that;

“Judicial Review involves an assessment of the manner in which a decision is made it is not an appeal and the jurisdiction is exercised in a supervisory manner.....”not to vindicate rights as such but to ensure that the public powers are exercised in accordance with the basic standard of legality, fairness and rationality, therefore should be quashed.

Judicial Review describes the process by which the courts exercise a supervisory jurisdiction over the actions of public authority in the field of public law. This means that courts see the activities of a tribunal or public body when making decision and ensure that it is in line with the required standards within the law.

In the instant case there was nothing of Wider Public Interest to justify the illegality and irrationality in appointing members of the District Service Commission of Bundibugyo.

With due respect the case of **Hon. Jim Muhwezi Vs AG & IGG Case NO. 056/2000** had nothing to do with Wider Public Interest and it was an application for an injunction not Judicial review. This ground also collapses.

3rd preliminary objection, Wrong Party

S. 54 (i) of Local Government Act states that there shall be a District Service Commission.

(ii). The District Service Commission shall consist of chairperson and such other members of a District Council shall determine, atleast one of whom shall represent urban authorities and all of whom shall be appointed by the district council on the recommendation of the District Executive Committee with the approval of the Public Service Commission.

This implies that Public Service Commission only interviews and approves names of the members of the District Service Commission after satisfying itself that all the legal requirements have been fulfilled and then the members are forwarded to the Chief Administrative Officer for official appointment. Therefore you cannot sue the Attorney General but the district.

The applicant rightly sued Bundibugyo District Local Government not Attorney General.

4th preliminary objection: overtaken by events

Remedy for Judicial Review is not concerned with the merits of the decision complained of but rather the decision making process itself. The purpose is to ensure that the individual is given a fair treatment by the authority to which he has been subjected. 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 (**See Twinomuhangi Vs Kabale District & Ors (2006) HCB Vol. 1130,131.**)

The applicants are challenging the process of appointment of members of the District Service Commission. It does not matter whether the members have received their appointment letters, sworn in and or even started work.

Judicial review is concerned with reviewing at the merits of the decision in respect of which the application for Judicial Review is made but the decision making process itself. The duty of court is concerned with whether the decision making authority exceeded its powers, committed an error of law, committed breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its power.

This was not the case with the appointment of the members of the District Service Commission.

Therefore with due respect this objection fails.

Be it as it may Article 126 (2)e of the Constitution states that Substantive Justice shall be administered without undue regard to technicalities. I entirely agree that the 4 preliminary objections lacked merit and intended to suffocate the instant application.

During the hearing of the main application, Counsel of the applicants filed in many annexures namely;

- A. Council meeting dated 1/4/2016/2 .. the 2016/2017 budget.

B. Bundibugyo Council Minutes dated 1/4/2016

C. Petition letter dated 12/4/2016

D1 to D3 Application letter, acceptance letter & minutes of the District Land Board ... to Bakuweponi Joyce

E1. A letter from the Permanent Secretary Ministry of Local Government dated 4/8/2003.

E3. A letter dated 2/6/2016

E4. A letter dated 29th/08/2016

F1. A letter dated 21/9/2016.

F2. A letter dated 1/11/2016

G1. A letter dated 1/10/2016

G2. A letter dated 1/10/2016

G3. A letter dated 1/10/2016 (Application letter)

Counsel argued grounds 1,2, & 4 concurrently and grounds 3 and 5 separately while counsel of the Respondent argued all the grounds together;

In order for court to effectively and efficiently resolve this matter in contention, I have condensed the grounds from 7 to 2 grounds and argued them separately.

- 1. Whether the appointment of Mr. Rukurato Ngwabusa Sylvester, kaija Gideon, Muhindo Samuel, Mbusa Benezeri and Bengayi Joyce to District Service Commission followed the proper procedure laid down under the law and was regular.**
- 2. Whether the appointed persons to the District Service Commission were eligible for appointment.**

It is pertinent for this court to re-appraise itself on the principles of Judicial review. Judicial Review is concerned with reviewing out the merits of the decision in respect of which the application for Judicial review is made, but the decision making process itself.

The duty of the Court in Judicial review is to confirm itself to the question of legality. Its concern is whether a decision making authority exceeded its powers, committed an error of law, committed a breach of the rules of Natural Justice, reached a decision which no reasonable tribunal could have reached or abused its powers.

The traditional test for determining whether a body of persons is subject to Judicial review is the same of its power. If the source of power is a statute or subordinate legislation under statute like for the applicants the source of power is spelt in the Constitution and Local Government Act as amended. Then it means the applicants are amenable to Judicial review.

These principles are well articulated by Ssekana in his treatise on Public Law in East Africa (Law Africa Kenya As, 2000) at Pp 37-47 where he discusses the availability of Judicial Review.

For avoidance of doubt, I wish to reproduce some of the expositions by the learned author in detailed.

Judicial review describes the process by which the courts exercise a supervisory Jurisdiction over the structures of public authorities in the field of public law. This procedure is generally regarded as a public law remedy; the remedy of Judicial review is only available where an issue of public law is involved. The application for Judicial review is only available where an issue of public law is involved. The application for Judicial Review is a specialized procedure by which an applicant can seek one or more of the existing prerogative remedies, which can now only be claimed under same application.

Judicial review is only available against a public body in a public law matter. In essence, two requirements need to be satisfied. First, the body under challenge must be a public body whose actions can be controlled by Judicial review.

Secondly, the subject matter of the challenge must involve claims based on public law principles not the enforcement of private law rights.

Halsbury's law of English defines a "Public authority" as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private profit.

In the past, the Courts focused primarily on the source of the power in determining whether a body was a public are subject to Judicial review.

In the present case, the decision or directive which is the subject matter of Misc. Case No. 090/2016 for Judicial review was made by the applicants under Art. 42 of the Constitution, S. 33, 36 or Judicial Act, Rules 6,7,10 of J (Judicial Review) Rules S. 1 11/2009

In *Kasibo Joshua Versus The Commissioner of Customs URA*, Criminal Appeal No. 44/2007

It was held that;

"Judicial Review involves an assessment of the manner in which a decision is made, it is not an appeal and the Jurisdiction is exercised in a supervisory manner not to vindicate rights as such but to ensure that the public powers are exercised in accordance with the basic standards of legality, fairness and rationally " .

In the case of *Namuddu Haniffa Vs The Returning Officer Kampala District & 2 Others HCCM 69/2006* where Court held that;

"An application for Judicial Review must show that the decision sought to be quashed is tainted with illegality and or irrationally and or procedural impropriety".

S. 54 Local Government Act

(i). There shall be a District Service Commission for each district.

(2) A District Service Commission shall consist of a chairperson and such other members as the District Council shall determine, at least one of whom shall represent urban authorities and all of whom shall be appointed by the district council on the recommendation of the District executive committee with the approval of the Public Service commission.

S. 19 of the Local Government Act (Amended) states that in appointment of members of the District service Commission under subsection (2), the district council shall ensure that at least one third is reserved for women and at least one member of the commission shall be a person with disability.

S.28 Local Government Act The meetings of Local Government Councils and their executive committees shall be conducted in the manner specified in the third schedule to this Act.

Regulation 9 (The Local Government Councils regulations) (2) A notice calling a meeting together with the agenda for the meeting shall be circulated to each member of the council at least 7 clear days before the date of the meeting and a written notice may be supplemented by a public over the radio or placed at a place of commission interest or by any other means.

In the instant case there was no notice (7 clear days) before the meeting, no supplementary public announcement through the radio, no agenda and no proof tendered in court. What was tendered in court was the Bundibugyo district council minutes of laying of the budget of F/Y 2016 on the 1st April 2016 at the District Community Hall though in the minutes, the chairperson appointed members of the District Service Commission and the members approved yet he had no powers under S. 54 (s). See Annexure A,C,F & G

S. 19 (2A) of Local Government Act (as amended) In appointing the members of the District Service Commission under subsection (2), the district Council shall ensure that at least one third is reserved for women and at least 1 member of the commission shall be a person with disability.

There was only one woman and the very woman was still a serving public servant See D1,D2 and D3 which even she was not eligible under S. 56 (2) of the Local Government Act. A Member of Parliament, a Local Government Council or an Executive Body of a Political Party or Political Organisation or a Public Officer shall not be appointed a member of a District Service Commission.

Thirdly despite several complaints from the organisation of the disabled called (BUDIPU) See E3&E4 and the affidavit of the chairperson Budipu Mr. Bagonza William, there was no representation from the disabled.

Fourthly there was no representation from the urban authorities as clearly put in S. 54 (2) of the Local Government Act. In fact Annexure B attached to the Chief Administrative Officer's affidavit is not worth mentioning due to the fact that the extract was for the previous term ending 2012 appointing Mr. Kaija Gideon not for 2016 which the Respondent want to rely on.

Fifth the nomination and eventual appointment of Hon. Muhindo Samwiri to the district service commission while he was still a councillor for Mirambi sub-County was contrary to the law and indeed a petition was lodged dated 12/4/2016 (See Annexure C)

Lastly the District Executive Committee never sat and no prove tendered recommending names for appointment to the District Council.

Therefore the appointment of the above members of the commission by the chairperson L.C V was tainted with illegality, irrationality and procedural impropriety. It was very irregular and high handed.

The issue of eligibility

The appointment of Muhindo Samwiri while still a serving councillor for Mirambi Sub-County was illegal. In fact he even petitioned in Annexure C challenging his appointment.

The appointment of Bengeyi Joyce a member of the District Land Board in annexure D1, D2 and D3 of the applicant’s annexures was wrong.

S. 27(2) and S.56 (2) Local Government Act is very clear. This evidence was not challenged or rebutted by the Respondent and I take it that it was admitted as in the case of Erunasani Kivumbi & 3 Ors Vs The Registrar of Titles (MIOSC. Case No. 102/2009) held that

“It is settled law that when facts are deponed to in an affidavit and the same are not challenged in rebuttal, the same facts are presumed to be admitted by the other party” .

Therefore Muhindo Samwiri and Bengeyi Joyce were not eligible for appointment.

R.53 of the Standard Rules of procedure for Local Government would not apply since there was no meeting in the first place.

In conclusion therefore the appointment of members of the Bundibugyo District Service Commission was not in accordance with the law and irregular, Muhindo Samuel and Bengeyi Joyce were not eligible for appointment. Their appointment was irregular, null and void ab-initio. This application is therefore allowed with costs with all the prayers.

Dated at fort Portalthis day2017

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Oyuko Anthony Ojok
Judge
23/03/2017