

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 354 OF 2013

EDWARD RONALD SENTENZA SEKYEWA
T/A HUB FOR INVESTIGATIVE MEDIA ::::::::::: APPLICANT

VERSUS

ATTORNEY GENERAL OF UGANDA::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING:

The applicant brought this application for judicial review under ***Rules 3, 6 and 7 of the Judicature (Judicial Review) Rules S.I No. 11 of 2009.*** The application is for;

1. Declaration that the delay, failure or refusal by the respondent to cause the making of a statutory form which the public can use to access information concerning the contents of Wealth Declarations submitted by Scheduled Leaders under the Leadership Code Act 2002 is unjustifiable.
2. Mandamus commanding the respondent and its servants or agents to cause the making of the requisite Statutory Form which the public can use to access information concerning the contents of Wealth Declarations submitted by Scheduled Leaders under the Leadership Code Act 2002 not later than 6 months from the date of this Court's ruling.
3. Declaration that the delay, failure or refusal by the respondent and its servants or agents to implement Article 235 (A) of the Constitution by taking appropriate actions that would bring the Leadership Code Tribunal to life is unjustifiable.
4. Mandamus commanding the respondent and its servants or agents to implement Article 235 (A) of the Constitution by taking appropriate actions that would bring

the Leadership Code Tribunal to life not later than 6 months from the date of this Court's ruling.

5. Declaration that the respondent's non-enforcement of the Leadership Code of conduct as by law establishment is an infringement of the fundamental principles of good governance which are enshrined in the Constitution and the law, including but not limited to adherence to Democracy and the Rule of Law, Promotion and Transparency and Accountability in Public Affairs, Promotion and Protection of Human Rights and Freedoms, and the provision of adequate resources for organs of Government especially the checks and balances provided for in the Constitution.
6. Order that quick actions should be taken by the Government of Uganda to implement the Leadership Code of conduct by providing the applicant and other interested persons with an effective statutory mechanism to ensure that Wealth Declarations submitted to the IGG by Leaders are freely scrutinized and available to the public at all times by operationalising the Leadership Code Tribunal; and
7. Any further or better reliefs as the court may think fit.

The grounds of the application are briefly set out in the application. In summary they are that the applicant unsuccessfully requested for access to the contents of Wealth Declarations of all Permanent Secretaries in charge of Government Ministries, Departments and Agencies which they submitted to the Inspector General of Government. That in refusing the applicant access to this information the reason the IGG gave was that there was no mechanism in force under the Leadership Code Act 2002 and that divulging the information would expose the IGG to unnecessary litigation. That the applicant is aggrieved with the actions of the Minister responsible and the IGG who have for the past 11 years failed or refused without lawful justification or reasonable excuse to cause the making of a statutory form that could be used by the applicant and other members of the public to access the contents of Wealth Declarations regularly submitted by Scheduled Leaders to the IGG under the Leadership Code Act 2002. That the delay in making of the form tantamount to gross dereliction of an important Statutory Duty

clearly imposed upon them by sections 7 and 38 of the Leadership Code Act 2002 and buttressed *inter alia* by the National Objective 26 (3) and Articles 17 (1) (i), 41 and 20 (2) of the Constitution among other provisions of the Constitution and the Law. Further that this failure and delay has crippled the efforts of the applicant and other anti-corruption activists who want to investigate Wealth Declarations. Further that Parliament amended the Leadership Code Act in 2005 to establish the Leadership Code Tribunal but the Tribunal has not been formed. That it is in the interest of promoting Fundamental Principles of Good Governance enshrined in the National Objectives and directives principles of State Policy and elsewhere in the Constitution and the Law and that it is just and convenient for the Court to allow this application and grant the reliefs sought by the applicant.

The application is supported by the affidavit of the applicant dated 11th November 2013.

The respondents filed an affidavit in reply sworn by Gantungo Daniel a State Attorney in the Attorney General's Chambers dated 24th March 2014, acknowledging the request by the applicant but denying that the IGG refused to give the information. That the IGG responded giving good and detailed explanation why the applicant cannot get access to the documents requested for. That this did not violate the applicant's right or freedom to access information. That the Government is working towards plugging the loopholes and strengthening the Leadership Code Act.

The applicant swore an affidavit in rejoinder dated 9th April 2014.

The applicant also filed a 2nd affidavit in support of the motion dated 21st December 2015 sworn by Prof. Joe Oloka-Onyango whose request for information of the Declarations of Wealth was also rejected by the IGG.

Briefly the background of this application is that the applicant wrote to the IGG seeking access to the declaration of wealth statements submitted to the IGG by all Permanent Secretaries of Government, Agencies, Departments and Offices; Annexure “B” in support of the application. The IGG in a letter dated 14th February 2013 wrote back to him declining the request for reasons that it could not be lawfully done because the necessary form has not been put in place and allowing access would open up flood gates of litigation as it would cause private information on relations of the said officials to go public.

The applicant was aggrieved by the state of affairs and filed this application for Judicial Review.

When the matter came up for hearing this court referred it for mediation before the Hon. Principal Judge (PJ) Hon. Justice Yorokamu Bamwine. He managed to extract a settlement from the parties and the PJ communicated to this court that the matter be stayed until the lapse of one year to enable Cabinet consider or approve and gazette the Leadership Code (Amendment) Bill. The parties also agreed that the applicant withdraws the matter if the amendment bill is approved and gazetted within one year from the date of agreement. Further that the withdrawal of the matter shall be with no order as to costs and if not approved the matter would be re-instated and set down for trial.

The agreement failed and the application was re-instated and set down for hearing. The applicant at this point filed an additional affidavit in support of the application by Joe Oloka-Onyango who made a similar request as the applicant and the IGG referred him to these proceedings.

At the hearing again the Attorney General on 21st April 2016 while being represented by Batanda (SA) in the presence of Mr. Ssemakadde informed this Court that the amendment to the Leadership Code Act was discussed in Cabinet on 13th April 2016 and was sent to the Attorney

General for publication. That his strong belief was that this would go a long way to address the matters arising in this application.

Learned counsel for the applicants Mr. Semakadde was not pleased by this submission and added that the amendment the State was referring to is the same amendment annexed to the affidavit in reply which they discussed in the mediation and that it does not in any way satisfy the applicant's case because the applicant seeks to enforce existing law by holding the State and Officials accountable for inaction and delay in enforcing the laws in the application. That the applicant is interested in the jurisprudence of the Court on timelines for enforcement and secondly that the bill is a process and may take 7-8 years. That this means that the grace period agreed upon at mediation was not utilised.

This Court then adjourned the matter for further updates from the Ministry of Ethics and Integrity. On 7th July 2016, in absence of the Attorney General but in presence of representative from Directorate of Ethics and Integrity Court directed parties to file written submissions.

The applicant filed submissions on 18th August 2016 together with a bundle of authorities. The applicant filed submissions in rejoinder on 8th September 2016.

The principles governing Judicial Review are well settled. Judicial Review is concerned with Prerogative Orders which are basically remedies for the control of the exercise of power by those in public offices. They are not aimed at providing final determination of private rights which is done in normal Civil Suits. The said orders are discretionary in nature and Court is at liberty to refuse to grant any of them if it thinks fit to do so even depending on the circumstances of the case where there had been clear violation of the principle of natural justice; see: **John Jet Mwebaze Vs Makerere University Council & 2 Ors Misc. Cause No. 353 of 2005.**

The discretion I have alluded to here has to be exercised judicially and according to settled principles. It has to be based on common sense as well as justice. See **Moses Ssemanda Kazibwe Vs James Ssenyondo Misc. Application No. 108 of 2004.**

Factors that ought to be considered include; whether the application has merit or whether there is reasonableness, vigilance without any waiver of the rights of the applicant. Court has to give consideration to all relevant matters of the cause before arriving at a decision in exercise of its discretion. It was held in the case of **Koluo Joseph Andres & 2 Ors Vs Attorney General Misc. Cause No. 106 of 2010** and I agree that:

“It is trite law that Judicial Review is not concerned with the decision in issue per se but with the decision making process. Essentially Judicial Review involves the assessment of the manner in which the 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 public powers are exercised in accordance with the basic standards of legality, fairness and rationality.”

The purpose of Judicial Review was summed up by Lord Hailsham St Marylebone in **Chief Constable of North Wales Police Vs Heavens [1982] Vol. 3 All ER** as follows:-

“The purpose of Judicial Review is to ensure that the individual receives fair treatment not to ensure that the authority after according a fair treatment reaches on a matter it is authorized or enjoined by law to decide from itself a conclusion which is correct in the eyes of the court.”

This court agrees with the above principles.

In this case there appears to be no decision. The applicant actually faults the Government and Parliament for failure to prescribe a form that would enable citizens’ access to Wealth Declarations filed by specified leaders holding political and public offices as obligated under

sections 7 and 38 of the Leadership Code Act 2002 and Article 235 (A) of the Constitution as amended in 2005.

I am inclined to find that this is not a proper case for Judicial Review. As I have already stated Judicial Review is all about the process leading to a decision and so where there is no decision then there can't be Judicial Review. Generally a Government Agency's failure to implement a Statute is considered an action not suitable for Judicial Review. The reason why this is so is because usually:

1. There is lack of a person harmed by a particular action or decision.
2. There is lack of a timeline within which the action has to or had to be taken.
3. There is inability of the Courts to analyse the problem.
4. Lastly that there is a presumed availability of political controls over general non-implementation.

I hold the view that unless the applicant shows in the application that the respondent has made a decision not to implement the Act then this court cannot exercise its prerogative power of Judicial Review.

According to **Jack M. Beerman in his book Administrative law at page 51** he states that if an agency (in this case the Government) answers a request for action with a firm statement that it has decided not to act, that decision can be a final agency action or decision subject to Judicial Review. However, if it has not answered a request for action or has explained its inaction as necessary to further study whether the action is appropriate, then inaction may not be treated as a decision to warrant being subjected to Judicial Review.

To make the judgment whether or not inaction can be treated as a final decision is a question of fact concerning the significance of the inaction in the particular context of the case. See the USA decision of **Oil Chemical Atomic Workers Union Vs OSHA, 145 F 3d 120 (3rd Cir 1998).**

Courts should be reluctant to exercise their Judicial Review power for excessive delay because such review infringes on the Government Agencies' discretion. However, in extreme cases in which an Agency has delayed excessively when it is statutorily required to act, a court may treat the delay as a decision and find it amenable to Judicial Review and order the Government to act. See the case of **Public Citizen Health Research Group v. Chao , 314 F.3d 143 (3d Cir) 2002.**

I think this is the reason why this court in the case of **General David Sejjusa Vs Attorney General, Miscellaneous Cause No. 176 of 2015** entertained the application and the Court exercised its power of Judicial Review. In that case the UPDF Act section 66 (2) provided that a decision had to be made on the applicant's application to retire within 90 days and the approval of such application to resign shall not be unreasonably withheld. However in that case the applicant applied to be retired from Military service in 2004 but up until 2016 which was a period of almost one and a half years (1½ years) later no reply or decision had been made on his application. So he filed the application for Judicial Review to challenge the inaction which was contrary to the Act. The Attorney General argued that the application was prematurely before Court because there was no decision. The Hon. Judge Oguli Oumo found that the case was one amenable to Judicial Review.

It is also my well considered opinion that if the Agency or Government body is required to act in an emergency, inaction might be treated as a final decision if a member of the public petitions for the action claiming that there is an emergency. See: **Environmental Defense Fund v. Hardin, 428 F 2d 1093, 1097 (D.C Cir 1970)** and **Environment Defense Fund Vs Ruckleshaus, 439 F. 2d 584 (D.C Cir 1971).** In these cases the Secretary of Agriculture had the power in a finding of

imminent hazard to the public to order an immediate suspension of the registration of a Pesticide and continue the suspension during a process to determine whether the registration should be cancelled permanently. Environmental Groups petitioned for the immediate suspension and ultimate cancellation of the registration of the Pesticide DDT which was found to be unsafe for humans and some animal species such as large birds. More than a year after the petition for suspension was filed the Secretary had not acted on it. It was held by the Court of Appeals that the delay in granting a suspension is amenable to Judicial Review because it was tantamount to a denial of suspension since the delay indicates that the Secretary does not agree with the petitioner that there is an imminent hazard to the public. That however, the Agency's inaction made it impossible to conduct any meaningful Judicial Review since there was no final decision to be reviewed but rather a mere statement that further study was necessary.

Although the Court found that inaction was tantamount to a denial of the petition to suspend, the Court found it necessary on two occasions to reserve the suspension issue to the Secretary for finding so that it could effectively review the Secretary's decision. This shows that Courts are very reluctant to exercise their Judicial Review Power in cases challenging inaction.

It is also important to note that even if all the possible requirements for inaction to be amenable for Judicial Review exist the Court may decline to exercise that power, if the inaction occurs in an Agency's discretion unless the Act or the Agency's Statute contains a criteria under which the Agency is required to act like it did in the UPDF Act section 66 (2) in the case of **General David Sejjusa Vs Attorney General, Miscellaneous Cause No. 176 of 2015.**

In this case the applicant seeks Judicial Review of the inaction of the Government and Parliament to prescribe a form that would enable citizens' access to Wealth Declarations filed by specified leaders holding political and public offices as obligated under sections 7 and 38 of the Leadership Code Act 2002 and the Constitution Article 235 (A) of the Constitution as amended

in 2005. These provisions do not prescribe timelines within which the required action by the applicant should be done.

Section 7 of the Leadership Code Act 2002 as amended states that:

7. Declaration to be public

The contents of a declaration under this Code shall be treated as public information and shall be accessible to members of the public upon application to the Inspector General in the form prescribed under this Code.

Section 38 states that:

38. Regulations

- (1) The Minister may in consultation with the Inspector General by statutory instrument, make regulations for better carrying out the provisions of this Code.***

- (2) Regulations made under this section may prescribe as a penalty for contravention of any of the regulations, imprisonment not exceeding twelve months or a fine not exceeding one hundred currency points.***

All these do not specify timelines within which to act. The applicant has also not demonstrated that the action is an emergency or that the Government has in a final manner decided never to implement this law. In fact the Government has explained that it is in the process of reforming the law and it attached and presented to Court a copy of a draft Leadership Code Amendment Bill which seeks to reform the Code. This means that the issue is still being considered and the Government should be given a chance to do their work.

I therefore find that this is not a proper case warranting the exercise of the prerogative orders of Judicial Review.

For those reasons this application is dismissed with no order as to costs.

I so order.

Stephen Musota

J U D G E

02.03.2017

2/03/2017:-

Mr. Semakadde Isaac for the applicant.

None for the respondent.

Milton for Clerk.

Mr. Semakadde:-

The matter is for the ruling.

Court:-

Ruling read and delivered.

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AJIJI ALEX MACKAY
DEPUTY REGISTRAR

2/03/2017