

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

**CIVIL REFERENCE NO. 611 OF 2016
(ARISING OUT OF CIVIL MISC APPLICATION NOS. 609 AND 610 OF 2016)
AND
(MISC CAUSE NO. 039 OF 2016)**

1. JINJA DISTRICT LOCAL GOVERNMENT

2. NAKYANZI OLIVE HOPE.....APPLICANTS

VERSUS

ODOMOCH DIANA KIWANUKA RESPONDENT

RULING

BEFORE HON LADY JUSTICE EVA K. LUSWATA

On 23/9/16, the Registrar of this Court issued an interim order in Miscellaneous application No. 455/16 to restrain the Chief Administrative Office (CAO) of the respondent from transferring the 1st respondent from her position as Senior Community Development Officer (SCDO) and Ag. Town Clerk, Kakira Town Council, Jinja District until the main cause, Miscellaneous Cause No, 039/16 is determined.

The applicants then proceeded by motion to seek an order to set aside that interim order and the contempt order issued subsequently, by the same Registrar on 16/12/16 and for costs.

The grounds in the motion are briefly that the respondent who is employed as a community development officer was transferred from Kakira Town Council to the Jinja headquarters on 21/5/16, a transfer that took immediate effect on the transfer date. That before her transfer, the respondent in addition, held the position of acting Principle Town Clerk. The applicants argued that any interim order granted should have been to maintain the status quo of the respondent in the position of Community Development Officer yet, she is using that order to maintain herself as the acting Principle Town Clerk, which has caused a stalemate in the operations of the Kakira Town Council administration. The application was supported by two affidavits of the 2nd respondent generally giving substance to the above grounds. The respondent filed her affidavit in

reply on 4/1/17, and both counsel filed written submissions as directed. The contents of both affidavits will be keenly referred to in my ruling.

5 However, before considering the merits of the application, I noted that respondent's counsel in his written submissions, raised an objection that the application is misconceived as being a manifestation of procedural irregularities. In his view, the proceedings before the Registrar were conducted inter parties and his order was delivered judiciously after listening to both sides. It was then open to the applicant to have appealed the same under Order 44 CPR or sought an order of review under Order 46 CPR. He continued, that under Order 9 rr. 12 and 27 CPR, one may
10 apply to set aside an order that has been delivered *ex parte* and nothing more. He concluded that whether the Registrar was correct in granting the interim order or not, would not be a ground to have it set aside, but rather, a ground of appeal or review basing on the evidence adduced at the hearing.

15 Applicants' counsel filed a late response to that objection. He admitted citing the wrong law and failing to cite the proceedings as an appeal. Quoting much authority, he argued that quoting the wrong law was an oversight of counsel and a mere technicality which does not go to the root of the application. That his incorrect act is not of a fundamental nature, and the Court should instead of dismissing the application, investigate the substance of the dispute in favour of the
20 applicants who are seeking justice from a Court that has wide and discretionary powers to hear and entertain matters to meet the ends of Justice.

I believe the submissions made for the respondent do hold merit. It is a well established principle that appeals are a creature of statute, and therefore, this Court has to be satisfied that the right was
25 open to the applicant and if so, that it was properly pursued as provided.

Miscellaneous application No. 455/16 under which the interim order was granted, was filed as a precursor to the main application in which the respondent sought judicial review of the decision of the first applicant with respect to her employment contract with them. The Registrar thus
30 heard the application as an interlocutory matter, pursuant to his powers under Order 50 rr. 1, 3 and 6 CPR. As rightly argued by respondent's counsel, those proceedings were heard inter

parties and a decision accordingly handled down inter parties. Under Order 50 rr. 8, *any person aggrieved by any order of a registrar may appeal against the order to the High Court. The appeal shall be by motion on notice.* (Emphasis of this Court). That provision is fortified by the

5 Registrar sitting in an interlocutory matter, even without leave of court.

On the contrary, these proceedings were presented not as an appeal against the order of the Registrar, but as an application to set aside that order and a contempt order issued subsequent to it. Although the application was presented under a notice of motion as allowed by Order 50, the

10 provisions relied on do not refer to the powers of the High Court sitting as an appellat Court. In fact, I am persuaded that applicant's counsel did not address his mind to the correct laws providing for appeals against orders of a Registrar, and it was only good chance that the procedure of motion, is available to such appeals, as well as applications. I say so because, why would, Ms. Nakyanzi Olive Hope, be added as party to the appeal, without leave, yet she was not
15 party to the proceedings of which resulted into the interim order in the lower Court?

That said, the main thrust of the objection is that the applicants have approached my Court in material contravention of the procedure allowed in case of an appeal against orders of a Registrar. Indeed under Order 43 rr.1, an appeal shall be preferred in the form of a memorandum
20 of appeal which ordinarily would require that the grounds of appeal are relayed in consecutive paragraphs. However, the Rules direct an appeal against the decision of the Registrar to be by Notice of motion. It was therefore not envisaged that a motion by its very nature can be drafted in the same manner as a memorandum of appeal.

25 Again, under Section 80 CPA, this court sitting as an appellate court has inter alia powers to re-evaluate and determine the case finally. Therefore, irrespective of how the applicant approached this Court, the correct procedure would be by motion and both parties do agree that the remedy sought is for the Court to investigate the propriety of the decision of the Registrar, and if found to be erroneous, to set it aside and in its place, issue the correct order in the circumstances.

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Article 126(e) of the Constitution which has been quoted by the applicant, enjoins my Court to administer justice without undue regard to technicalities, especially those of a procedural nature and do not go to the root of the remedy being sought. The authorities supplied by the applicants are also instructive:-

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In the case of **Francis Wazarwahi Bwenge vs. Haki W. Bonera Civil Appeal No. 33 of 2009** where the contention was against use of the wrong procedure and quoting the wrong law, Justice Yorokamu Bamwine (PJ) noted that;

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”The general rule is that where an application omits to cite any law at all or cites the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity or omission can be ignored and the correct law inserted”.

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The learned Justice relied on the case of **Tarlol Singh Saggi vs. Roadmaster Cycles (U) Limited CACA No. 46/2000** where court observed and citing with approval the decision of the former East African Court of Appeal in **Nanjibhai Probahusdas & Co. Limited vs. Standard Bank Ltd (1968) EA 670** that;

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“The Court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”

In addition the Supreme Court in the case of **Re Christine Namatovu Tebajjukira (1992-1993) HCB 85 at 87** it was held that;

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“The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights.”

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Again, I consider the fact that the dispute before the Registrar and indeed in the main application involves the functions of senior staff in the Kakira Local Administration, which falls within the 1st applicant’s jurisdiction, a public body with important statutory powers and duties affecting not only the respondent, but staff and other members of the public in general. In my view, the

procedural irregularities, notwithstanding, the provisions of Section 98 CPA and Section 33 of the Judicature Act, would apply to allow my Court to exercise its inherent power to investigate the findings of the Learned Registrar and thereafter, provide a remedy that suits the justice of the matter. I thereby overrule the objection and will instead consider this application in its form and
5 if satisfied that it has merit, set aside the decision of the Registrar and in its place, issue an order that suits the justice of the matter.

I hasten to add however that Ms Nakyanzi Olive Hope should never have been made a party to these proceedings. She was never a party to Misc. Application No. 455/2016. The interim order
10 was directed to her specifically in her capacity as the Chief Administrative Officer (CAO) of the 1st respondent. She may have been the respondent in Misc. Application No. 536/2016 (the contempt proceedings) but, I have not seen any indication that Misc. Application No. 455/2016 and Misc. Application No. 536/2016 were ever consolidated to enable the present applicants file a common appeal against those two independent orders. As there was no leave for Ms. Nakyanzi
15 to be added as a party to the appeal, she cannot be maintained in these proceedings and her presence would be a serious breach of court process.

Under Section 2(x) CPA, an appeal/application is equated to a suit. I am empowered under Order
1 rr 10(2) to strike out a party who is improperly added to a suit. I therefore move to strike off
20 Ms Nakyanzi from these proceedings with costs to the respondent. Likewise, her prayer for orders to set aside the contempt order cannot be entertained under these proceedings and is also struck off with costs to the respondent.

The two affidavits in support of the application that were sworn by Ms. Nakyanzi are redeemed
25 by the fact that she is the 1st respondent's CAO and would still be the correct person to give evidence in support of the application.

I have held that the Registrar made his orders pursuant to Order 50 rr. 1, 3 and 6 CPR. In that regard, he had powers similar to those that would be exercised by a Judge sitting to hear a
30 temporary injunction under Order 41 rr. 1 CPR to deter or stay a breach of an employment contract pending hearing of a substantive suit. I believe that principle was a matter of contention

before the Registrar who held rightly in my view that, an application for an interim order would be a correct pre cursor to an action for judicial review which is a form of substantive application “upon which an interim order lingers”

5 In his decision, the Registrar considered and followed part of the decision in **ALCON INTERNATIONAL LTD VRS NEW VISION PRINTING AND PUBLISHING CO. LTD & ANOR S.C. CIVIL APPL. NO. 4/2010** in which it was held that;

10 “.....for an Interim order of stay, it is sufficient to show that a substantive application is pending and that there is a serious threat to do the act complained of pending the substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application.....”

15 The Registrar proceeded to allow the application for he believed the respondent faced imminent danger of a contested transfer by the applicant’s CAO.

20 With due respect, in view of the facts, that was not a correct observation. In her letter of 27/5/16 (Annexure “DD” to Ms. Nakyanzi’s additional affidavit), the CAO issued a ‘transfer instruction for compliance’ against the respondent with a request that she makes immediate arrangements to report to her new station. In the same letter, one Simon Lubaale Kiloobe, was given the same instructions to take over duties in the Community Based Services Department of Kakira Town Council, I believe, the applicant’s former post. Although disputed by the applicant, it appears an official hand over was done w.e.f. 24/6/16. Likewise, according to a letter by the same CAO dated 30/7/15, one Magemeso Moses was assigned duties of Care Taker Town Clerk Kakira
25 Town Council, a post that the applicant had previously held in an acting capacity.

30 It remains in dispute whether the above transfers were valid or whether the hand over process was ever completed. However, those two communications, of which the respondent denies knowledge in her affidavit, were in existence before Miscellaneous application No. 455/16 was filed and decided. In my view then, the status quo at the time the Registrar’s decision was made, was that the CAO had already made the decision and had by letter transferred the applicant. It is

that status quo that the Registrar should have maintained but not to seek to give an order that would reverse that administrative action, of a statutory body. In fact, it was for that very reason that the applicant filed the main cause for judicial review and it is within all her rights for the High Court to pronounce herself on her rights as the respondent's employee, including, reversing
5 the transfer instructions with respect to both positions.

Having found as above, it was enough for the applicant to have shown the existence of a pending main application with triable issues to investigate, which she did. I do not agree with applicant's counsel arguments that much emphasis should have been made by the Registrar of the probability of success of such application as this would entail delving into its merits, which is
10 usually discouraged at this stage. His point that the main application was filed out of time would hold some merit as that is a question of law. However, the Judicature Act he quoted, does allow an extension of time by leave of Court. I believe the Registrar did not have jurisdiction to make deep inquiry in such matters, which are the preserve of the Judge and can be readily raised at the
15 main hearing.

I believe in making his decision, the Registrar should also have been guided by some of well settled principles of granting such orders. For example, he should have considered the possibility of the respondent suffering irrepeable damage. In **Francis Kanyanya Vs Diamond Trust Bank**
20 **HCCS No. 300 of 2000** Hon Justice Lameck N. Mukasa relying on **Kiyimba Kaggwa Vs Hajji Nassar Katende (1988) HCB 43** stated that irreparable injury means that the injury must be substantial or a material one, that is, one that cannot be adequately compensated for in damages.

According to the applicant, the decision of the respondent to continue holding out as the Acting
25 Town Clerk, has paralyzed her powers and the result is that there are now two persons acting in the same office with the resultant confusion. On the other hand, that the applicant who has been paid all her emoluments has not suffered any injury. Conversely, the respondent claims that the issue of her powers as the Acting Town Clerk are still the subject of investigation in the main application, and she has not received her emoluments for that particular post.

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In her affidavit, Ms Nakyanzi claims that the applicant has with the force of the interim order written to the applicant's banks with the effect of freezing her accounts which will and has impeded the applicant from honouring her statutory and contractual duties, towards her staff and the public. Further that the respondent is using that order to confuse the public into believing she has been reinstated as the Principle Town clerk causing confusion and disrupting administration of the Kakira Town Council. The respondent only offered a general denial to those allegations. I have noted that in Annexure HH1, HH2, and HH3 to Ms. Nakyanzi's affidavit, the respondent admits to having halted all transactions on the 1st applicant's accounts and asking several offices to accept her interpretation of the interim order. Although none of the respondent's annexure were marked, there is communication to the effect that the dispute now before this Court, is still the subject of investigation by the Inspector General of Government and advise of other statutory bodies has previously been sought.

With due respect to the respondent, her claims to irreparable damage are far outweighed by the need to have the operations of the 1st applicant normalized, at least in the interim. I believe the respondent's claim of loss, if at all, will be very well addressed in the main application. On the other hand, the applicant stands to suffer irreparably in public embarrassment and ridicule for failing to honour statutory obligations that may involve payments and possibly law suits from her employees and members of the public for a myriad of breaches which may have a far reaching impact on her administration, and the services she is meant to extend to the public.

In the face such conflicting interests, I find that if the interim order were to stay on record, the administrative impasse would continue which would lead to serious consequences on operations of the applicant and the public that she is meant to serve. It is important therefore, and that should have been the keen interest of the Registrar that, an order is made taking into consideration the varying interests of the parties, and the peculiar facts of the case. In my view, he failed to do so.

The justice of the matter therefore requires that the interim order issued on 23/9/16 be set aside and I order that it is set aside in part.

In its place, I hold that no further step should be taken by the applicant to further her decision to transfer the respondent. Since it is only the office of the Town Clerk Kakira Town Council that appears to be in dispute, likewise, the Respondent should forthwith desist from carrying out any of the duties attendant to the office of the Acting Town Clerk of the Kakira Town Council. In her place, Mr. Moses Magemeso who was on 30/5/2015 assigned those duties, should perform all the duties of the Town Clerk, as caretaker, including the duty to sign against all cheques issued by the respondent. The rest of the Registrar's orders with regard to the respondent as Senior Community Development Officer shall remain in place.

10 This order shall remain in place only in the interim until a final decision is made in Miscellaneous application No. 039/16.

Although, this application has succeeded in part, I decline to grant costs to the applicant because of the errors made in its institution and filing. However, they are still bound to pay the costs to the respondent as herein ordered.

I so order

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EVA K. LUSWATA
JUDGE.
19-01-2017

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