THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-MC-0012-2016

1. **OKOTH UMARU**
2. **ALI OKOMBA**
3. **BWIRE MUHAMMAD**
4. **NYAKAKE HAFSWA.....APPLICANTS**

VERSUS

1. **BUSIA MUNICIPAL COUNCIL**
2. **THE TOWN CLERK BUSIA MUNICIPAL COUNCIL**
3. **THE REGISTRAR COOPERATIVE SOCIETY**
4. **BUSIA TAXI DRIVERS' COOPERATIVE SOCIETY.....RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

When this application came up for hearing on 23.3.2017, **Counsel Mutembuli, counsel Ojambo** and **Counsel Masaba** for Respondents raised a preliminary objection on the competency of the application before court.

This was an application for Judicial Review brought under Article 42 and 50 of the Constitution, public Service regulation 36, section 98 of the Civil Procedure Act, for orders that a writ of certiorari be issued against the administrative action/decision of 1st, 2nd and 3rd Respondents compelling them to cancel the 4th Respondents' tender agreement for 2015/2016/17, for collection of revenue from Busia Taxi/bus park dated 11th November 2015, and also cancel 4th Respondent's registration as a cooperative society.

b) An order compelling the 1st and 2nd Respondent to recall the tender granted to the 4th Respondent and declare the same vacant.

c) 1st, 2nd and 4th Applicants be awarded interim management of Busia taxi/bus park.

d) Declaration that tenders awarded to 4th Respondent is null, void and contrary to Public policy

(e) compensation (f) damages

(g) Refund of collected revenue (h) costs.

The Respondents' counsel by their preliminary objection, argued that the application was filed out of time, contrary to Rule 5 of the Judicial Review Rules 2009; which requires that such an application must be filed within 3 months short of which the applicant must apply for extension of time. They argued that any application made outside that time frame, without order for extension by court was incompetent. They referred to decided cases of;

- ***Prime Contractors v. Public Procurement and Disposal of Public Assets Authority and Ors HC Misc. 91/2014.***
- ***Muwanguzi Mugalu v. Uganda Railways Corp & Or. HC-04-MC-003/2012.***
- ***Dr. James Akampumuza & Or. V. MUK-Business School & 2 Ors. MSC. App. 514/2012***.

Their arguments arising from the cases above, and the law generally was that the fact that from the pleadings under Annex 'A' to the affidavit by applicant, it was a fact that the agreement was signed on 11th November 2015; meant that the application was outside the time allowed to file for review.

They further pointed out that the application was seeking for orders which are subject of another Suit No. 19/2016 of the High Court in Mbale between similar parties which is an abuse of court process.

It was further argued that the orders sought were not in the realm of Judicial Review. The applicant was contesting a contract/agreement between 1st and 4th Respondent yet Review is concerned with challenging decisions of an administrative body.

They argued that the contract in issue was not a **decision** of an administrative body; but a **product** of a procurement process.

The application accordingly did not challenge the **process**, but the **decision**, and was hence incompetent. They prayed that court dismisses the application with costs.

In reply counsel for the applicant cited the following authorities:

- ***Philadelphia Trade Industries Ltd v. KCCA H/CR No. 3 of 2002***,
- ***Kuluo Joseph Andrew & 2 Ors. V. AG. And 6 Ors HCM MSC. 106/2010***.

- ***Gen. David Sejusa v. AG MCA 176/2015***.

Counsel argued that arising from the quoted authorities, and the subsisting law, Rule 5 of Judicial Review Rules is discretionary not mandatory. He argued that though out of time, the application is competent in view of Articles 42 of the Constitution; where it is provided that social and economic rights are not derogable. He cited the need to approach the matter with a "human rights based approach" so that the rights of the applicants are protected, as per Article 50 of the Constitution.

He maintained that the application raises a different set of interests separate from C/S 19/2016. He argued that the motion challenges the process of the tender award and not the decision. He prayed that the preliminary objection be dismissed with costs.

I have internalised all the above arguments. They raise two basic issues as follows:

1. Whether the application is time barred.
2. Whether the application is incompetent and violates the rules of Judicial Review.

Issue 1: Whether application is time barred.

Rule 5(1) of the Judicature (Judicial Review Rules) 2009: 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*."

The meaning of that Rule has been persuasively determined by the learned Judges in all the cases quoted by the counsel herein. **Hon. J. Akiiki Kiiza** in **Dr. Akampumuza v. Mubus** (supra) found that Rule 5(1) above is of mandatory application, and an applicant who is outside the 3 month deadline ought to apply for extension of time.

Hon. J. Yasin Nyanzi in ***Prime Contractors Ltd v. PPDA*** (Supra), also followed similar reasoning and held that as per **Green MR** in ***Hilton Sutton Steam Landry (1946) 1 KB 61 at P.81***.

> "*But the Statute of limitations is not concerned with merits. Once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights*."

The Judge found that the proper procedure should have been for the applicant to apply for extension of time within which to apply for Judicial Review under Rule 5(2) of the Judicature (Judicial Review) Rules; which was not done. He found the application incompetent and struck it out.

Hon. J. Musota in ***Muwanguzi Mugalu Uganda Railways Corpn & Or.*** (Supra); also found that the applicant before him ought to have applied for Judicial Review within 3 months as per Rule 5(1) of the Judicature (Judicial Review) Rules 2009. Or would have applied for extension of time within which to file the application. He struck out the application.

On the other hand, though the Respondent/applicant, referred this court to other decisions where for example **Hon. J. Bamwine** in ***Kulolo Joseph & Ors v. AG & Ors*** (supra), applied a liberal human rights approach, referring to ***Re Christine Namatovu Tabajukira (1992-93) HCB 85***, and applied article 126 of the Constitution, and Section 98 of the Civil Procedure Rules to allow the application to proceed though brought outside the 3 month limitation. I however notice that this case involved gross abuse of human rights and the Judge points out so as follows;

> "*In a case such as this involving alleged violation of human rights such a course would further serve to violate the human rights of the applicants*."

A similar consideration was raised in the ***Gen. David Sejusa v. AG*** (Supra) case. I however further note that the Judge at page 12 ruled that:

> "*Court is satisfied that the applicant has shown good reason for court to exercise its discretion to <u>extend</u> time in which the application had to be filed*."

It appears the court listened to arguments regarding that point, which this court has not. This authority though persuasive is therefore distinguishable.

The question therefore appears to be did the applicants apply for extension and if so did they have good reason?
I have not found any good reason on record to justify why the applicants sat on from 11th November 2015 to 15th December 2016 a period of almost a year since their rights were allegedly violated.

Counsel for the Respondent/applicants stated that the court should invoke its discretionary powers and allow the application.
However I do not find any justifiable reason for invoking these powers in view of the precedents I have reviewed above. Statutes of limitation are statutes of strict interpretation. Unlike the positions in the quoted cases where good cause was shown to court to warrant such exercise of discretion, I do not find any such good case here. I do find that the application was and is time barred, and accordingly cannot stand.

Issue 2: Whether application violates Judicial Review and is incompetent
Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other bodies and other persons holding quasi judicial functions or who engage in the performance of public acts and duties.

The first question to pursue is was there a decision made by the Respondent/applicants in pursuit of a quasi judicial function?
Perusing the pleadings and arising from the submissions; I do not find any decision the subject of a Judicial Review on record.

All pleadings by Applicants/Respondents, indicate that they complain about a “tender agreement granted to 4th Respondent/Applicant.

The subject of Judicial Review is the decision making process, and not the decision perse. There is no indication from applicants/ Respondent regarding what the decision making process being complained of was. There are no minutes or records of proceedings attached for the court to

peruse and ascertain what transpired during the process. There are no actual details of the decision complained of; how it was reached; who instigated it etc.

The applicant prayed for a writ of certiorari. According to **Grahame Aldous** and **John Alder** in their text **Applications for Judicial Review- Law and Practice of the Crown office** (Butterworth-1993) it states:

> "*The function of certiorari is to quash an invalid decision. Even where a decision is a nullity so that certiorari is strictly unnecessary, certiorari can be granted so as to remove any question of the decision being ostensibly valid*."

For certiorari to issue,

a) The decision must be of a public interest as opposed to a private character. According to ***Law v. National Grey Hound Racing Club Ltd (1983) 3 ALLER 300***, Certiorari does not lie in respect of contractual powers nor powers derived from property rights, these being regarded as private law matters. In the above case, the Court of Appeal refused to strike out originating summons issued in the Chancery Division to restore greyhound trans licences which were needed by the applicants for their livelihood, on the ground that the basis of the licenses and such rights to them as the applicants may have had was contractual and therefore enforceable as a matter of "private" rather than "public" law. In these circumstances no prerogative order would lie.

Similarly in ***R. V. East Berkshire health Authority exparte Walsh (1985) QB 554*** the Court of Appeal reasoned that where private rights have been breached under a private arrangement like a contract, judicial review can't apply, rather a party should proceed by ordinary action.

From the facts of this application it is shown that there was a contract signed between the 4th Respondent and the 1st Respondent, following a bidding process. (See attachment of **J. Hamz Wabwire**) (paragraph 16). This was a contract, and there is no indication that any public decision was involved in order to warrant a Judicial Review order of certiorari.

The matters raised in this application are purely matters arising out of private contractual obligations. Applicant/Respondent does not show how these decisions came about save showing that they were all interested parties in the contractual functions which 4th Respondent was awarded. Therefore being matters of contract, this is not a matter correctable by way of judicial Review. It is therefore incompetently before court.

For all reasons and findings under the above two issues, I uphold the preliminary objection. I do find that the application is both time barred and incompetent. It is dismissed and struck out, with costs.

Henry I. Kawesa

JUDGE

23.05.2017