

argue his case. He referred to the case of ***John Jet Tumwebaze Vs. Makerere University Council & 3 Ors CIVIL APP.353 of 2015.***

He argued that the orders of mandamus, certiorari and prohibition are discretionary in nature and while granting the said orders court must act judicially according to the settled principals which includes:

- Common sense and justice.
- Whether the application is meritorious.
- Whether the application is reasonable.
- Level of vigilance.

He referred to other cases of ***Kings V Electricity Commissioners Expert London Electricity Joint Committee 1924 1 KB171, Adam Mustafa Mubiru and Another versus Law Development Center Misc. App N0. 279 of 2013 and Ostraco Ltd vs. AG HCCS 1380 of 1986 CA 37/2002.***

He also referred to Article 200 of the Constitution, Section 55(1) Local Government Act, Section 58 Local Government Act, and Article 166(1) (b) of the Constitution, and Article 170 (1) (d) of the Constitution.

In Response, the Respondents argued that according to Establishment Notice 2 of 2014, dated 1st July 2014 from the Ministry of Public Service, all accounting officers, signed by the Permanent Secretary Ministry of Public of service (annex 'D') provided the law is that before recruitment of an officer, there must be a clearance and approval or recruitment from the Ministry of Public Service and confirmation of availability of wage.

He argued that the post of District Planner, Pallisa District Local Government is a vacant post which needs clearance from the Ministry of Public Service before filling it .

After clearance and approval from Ministry of Public Service, the District Service Commission can advertise the vacant post to be filled.

He referred to “A” and “B” annexed to the affidavit in reply to argue that filling of that post was never cleared by the Ministry of Public Service.

He further argued that the remedy of mandamus cannot be resorted to by the applicant to try and force the Respondents to perform an illegal act.

He referred to the authority of ***Makula International V. Cardinal Nsubuga*** , and argued that what applicant was seeking to enforce is an irregularity and court cannot be used as a means to enforce an irregularity.

He referred to establishment Notice No. 2 of 2014, to pray that the application is incompetent and should be dismissed.

I have gone through, the above arguments. The law regarding the writ of mandamus has been rightly recited by the applicant in submissions. I however wish to add that mandamus which is from latin word **Mandare**, which means “We command” is a command issued by the High Court to an administrative authority or inferior tribunal directing it to perform a peremptory duty imposed upon it by law. According to ***R V Minister of Local Government & Anor ex parte Mwalima(2002) 2 KLR 559,***

“The order of Mandamus issues against any kind of authority in respect of any type of function- be it administrative, legislative , quasi judicial or judicial to enforce a duty the performance of which is imperative and not optional or discretionary.”

In ***Jothan Malati Welamondi V Chairman Electoral Commission of Kenya (2002) 1 KLR 486,*** It was further held that:

“When an authority fails in its legal duty to implement an order of a tribunal, mandamus can be issued compelling it to do so.”

To maintain an application for mandamus the applicant must satisfy the court that he has a right to compel the public authority to perform the duty in question. In the absence of any such right mandamus cannot be granted (per holding in ***Churchill Meshack and others V Egerton University MSC. APP 929 of 1996*** (unreported) Kenyan authority).

Also *John Jet Tumwebaze V Makerere University Council & Ors CV App. 353/2013.*

The question to answer now is whether the applicant herein had the above right.

From the genesis of this case and the response from the Respondents it would appear that the applicant did not have the said right. This is so because, the power to have him promoted by the Respondents is not vested in them solely. It has been shown that for the exercise of promotion to happen there must be specific steps to be followed as contained in **Mboga Isa**'s affidavit in reply and **Otim Charles**' affidavit in reply. In the supplementary affidavit of **Otim Charles** under annex "D" it is shown that according to establishment Notice No.2 of 2014, from the Ministry of Public Service dated 1st July 2014,

"before the recruitment of an officer in the District Local Government, there must be a confirmation of availability of wage, a clearance, and approval of the recruitment must be sought from the Ministry of Public Service."

It was shown that when such clearance was sought (see paragraph 6 of **Otim**'s affidavit) the same was not approved as per annex "A" and "B".

I notice from annex "A" and "B" that the post of 'Planner' though submitted for. Recruitment was not cleared.

However annex 'B' also limited the clearance to "availability of funds".

Therefore the applicant who was not substantively appointed as a Planner could not force government to recruit him.

From that position therefore, am in agreement with counsel for the respondents that any attempt to do so would be engaging in an illegality. There is no way the applicant can force the respondents to recruit him to a position not cleared by Public Service.

Secondly even if the position was cleared, there is no way this court can force the Respondents to engage into a recruitment exercise which has budgetary implications whose funds are allegedly not available.

On the authority of *Makula International V Cardinal Nsubuga* this court cannot enforce an illegality.

This application is not proved. The remedies sought for are not available to the applicant.

For all the above reasons this application fails and is dismissed with costs to the Respondents. I so order.

Henry I. Kawesa

JUDGE

07.04.2017