

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0015 OF 2017

THUGITHO FESTO **APPLICANT**

VERSUS

NEBBI MUNICIPAL COUNCIL **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application under the provisions of Article 21 (1) and 12, 44 (c) and 50 of *The Constitution of the Republic of Uganda, 1995*, section 98 of *The Civil Procedure Act*, sections 33, 36 and 39 of *The Judicature Act* and rules 3 (1) (a), 2, 4, 6, 7 (1) and 8 of *The Judicature (Judicial Review) Rules*, S.I. 11 of 2009 and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicant seeks the prerogative order of certiorari to quash decisions of the respondent taken at its meeting of 22nd December 2016 to suspend the applicant and order him to refund certain funds to the respondent, and order of prohibition stopping the respondent from appointing anyone to the position of Town Clerk, a mandatory injunction order requiring the respondent to refrain from enforcing the impugned decisions and actions consequent thereupon, a declaration that the respondent's actions regarding the office of Town Clerk following the suspension of the applicant were illegal and ward of costs.

In the affidavit supporting his claim, the applicant deponed that at all material time, he was appointed by the Ministry of Local Government as the Town Clerk of the respondent and subsequently by the Permanent Secretary of the Ministry of Finance as the Accounting Officer for vote 794 in respect of the 2016 2017 Financial Year. At its meeting of 22nd December 2016, under Min. COU/05/12/16/17, the respondent suspended the applicant, ordered him to refund some funds purported to be missing and declared the office of Town Clerk vacant. The applicant contends that he was denied his right to a fair hearing. He contends further that the respondent in taking those decisions acted illegally since it had no disciplinary powers over him.

In an affidavit in reply sworn by the respondent's Deputy Town Clerk, Mr. Anecho Stephen, the respondents oppose the application and contend that in taking the decisions it did, the respondent was lawfully exercising its supervisory powers over the applicant. The applicant was accorded his procedural rights in that; he was notified of the allegations against him and he was given ample time to prepare and to present his defence. He prayed that the application therefore be dismissed with costs as it is misconceived.

The background to the impugned decisions as can be gathered from the pleadings filed by both parties are that on or about 23rd February 2016, by a letter to that effect written by the Permanent Secretary to the Ministry of Local Government referenced HRM/22/92/01, the applicant, then serving as the Town Clerk of the then Nebbi Town Council, was "assigned duties" as the Acting Town Clerk of the newly created Nebbi Municipality as from 1st July 2016, "until a substantive Town Clerk is recruited by the Public Service Commission in accordance with Article 200 (4) of *The Constitution of the Republic of Uganda* and *The Local Governments Act.*" He was subsequently by a letter referenced BPD/77/222/02 dated 6th June 2006 signed by the Secretary to the Treasury / Permanent Secretary to the Ministry of Finance, appointed as an Accounting Officer for vote 794 for the 2016/17 Financial Year in respect of the then newly created Nebbi Municipal Council.

While still constituted as a Town Council, the respondent had sometime during or about June 2016 tendered out the management and revenue collection from the main markets within the Town Council, to a company known as Almntu Investments Limited. The award of a six months' contract was communicated to that company by a letter dated 30th June 2016 but before the contract could be signed, the Town Council was by operation of law transformed into a Municipal Council as from 1st July 2016. Under the new status, the various Divisions constituting the municipality became self-accounting and the authority to execute service contracts was devolved to the Municipal Division Councils. Without any contract having been executed yet, Almntu Investments Limited began collecting revenue from the main and minor markets within the Municipality.

That notwithstanding, during the month of August 2016, Almntu Investments Limited requested the respondent to review the suggested monthly payments downward in accordance with section 74 (1) of *The Public Procurement and Disposal of Public Assets Act*. As a condition precedent to consideration of the request, the respondent demanded that Almntu Investments Limited deposits with the respondent, a sum of shs. 25,000,000/=. In compliance with that condition, Almntu Investments Limited issued a cheque in the sum of shs. 30,000,000/= which it handed over to the Nebbi Central Division Council. Upon the cheque being returned unpaid, Nebbi Central Division Council during or around October 2016 terminated Almntu Investments Limited's contract and contracted another service provider. The applicant was on compassionate leave when this happened.

At its Council meeting convened by the respondent at the Municipal Council headquarters on 22nd December 2016, one of the items on the agenda was "loss of Council Money worth shs. 38,360,000/=". That matter came up for discussion under minute COU/05/12/16/17. Explaining the circumstances of the loss, the Secretary Finance, planning and administration in summary informed the meeting that the money was due from Almntu Investments Limited as proceeds from the contract it was awarded, but had not signed yet, to manage and collect revenue from the main and major markets within the Municipality for the 2016/17 Financial Year. The company remitted only shs. 10,000,000/= and had not made any remittances since then. In his letter of 2nd September 2016, the Auditor communicated to the applicant the circumstances which he classified as mismanagement of the respondent's funds. Subsequent efforts by the applicant to recover money owed by Almntu Investments Limited had not yielded any positive results.

In response to that briefing, the applicant stated that in accordance with the Financial Guidelines issued by the Ministry of Local Governments on 10th May 2016, service contracts of the nature awarded to Almntu Investments Limited had to be signed with the Municipal Division Councils but that Almntu Investments Limited had not signed such a contract. Almntu Investments Limited had nevertheless begun execution of its duties until they were terminated by Nebbi Central Division Council on 6th October 2016. The company had remitted only shs. 10,000,000/= amidst complaints that the stipulated amount stated under the terms of offer of the contract was unrealistic and needed to be reviewed downward. Almntu Investments Limited's cheque of shs.

30,000,000/= was returned unpaid for exceeding the limit set by the Bank of Uganda for across-the-counter withdrawals by cheque. Efforts for recovery of the money from Nebbi Central Division Council were still ongoing.

Under minute COU/09/12/16/17, the Council then resolved that “the Accounting Officer / Town Clerk – Municipal Council must remain out of office until he recovers the shs. 38,360,000 (PFM Act 2015, Sec. 80, Sub-section 1).” In his closing remarks, “Mr. Speaker declared the office of the Town Clerk vacant and informed members that the office would be occupied by one of the Divisional Town Clerks to care-take.”

In his submissions, counsel for the applicant, Mr. Madira Jimmy argued that the illegality in the respondent’s proceedings is that it removed the applicant from office without legal authority to do so. The law governing the removal of Town Clerks from office is Article 200 (4) of *The Constitution of the Republic of Uganda, 1995* and the powers are vested in the Public Service Commission. Originally the powers were vested in the District Service Commission but the principal Act was amended by Act No. 16 of 2010 which repealed section 68 of the Act. That section was repealed and replaced thereby vesting the power in the Public Service Commission. The council therefore had no authority and acted *ultra vires*. On the other hand, the power to discipline Accounting Officer is in The Secretary to the treasury under *The Public Finance Management Act* of 2015. If the applicant had committed any wrong he would have been referred to the Secretary of Treasury as the appointing authority. He would then cause the disciplinary proceedings in accordance with Section F-R of *The Government Standing Orders* therefore his dismissal is challenged on grounds of illegality.

He submitted further that there was procedural unfairness in that he was not given a hearing. There was no notification of the allegations against him. The decision was unreasonable in that the Municipalities and Divisions are self accounting, the law that operationalised them made the Divisional Town Clerks to be the accounting officers. The money is sent to the divisions and the Divisional Town clerk held the cheque which expired in his hands. The applicant was not notified and there was no loss of funds. The cheques were issued as security and not in payment for services and the Division cashed them over the counter contrary to policy and it all happened

in the applicant's absence. He therefore prayed that the application be allowed and a writ of certiorari issues to quash the decision and also to invalidate all such actions undertaken in furtherance of the resolution. It is necessary to quash them in order to relieve him of the illegal order to refund the money and to clear his name. He prayed for the costs as well.

In response, counsel for the respondent, the learned State Attorney Ms. Diana Mudoola opposed the application. Regarding the issue illegality, she submitted that the Council has supervisory power under s. 30 of *The Local Governments Act*. The applicant was not suspended. There was no interdiction. Money was supposed to be on the account but for over three months he could not explain why it was not. When he was asked to step aside for investigations he was present before the Council and had ample opportunity to defend himself.

As regards the decision being unreasonable, she argued that in the prevailing circumstances shs. 38,000,000/= was missing from the municipal account and when the applicant failed to explain to the Council, they deemed it fit to investigate the matter further prompting the Council asking him to step aside. The resolution was not unreasonable. The applicant being the accounting officer had the duty to bank the money and account for the funds. Upon failure to account, he had to refund the money. The Permanent Secretary to the Ministry of Finance has the duty to appoint Accounting Officers for each financial year but the various Councils have the power as one of their functions to ask for a refund from an Accounting Officer who has misused public funds. She therefore prayed that the application is dismissed with costs since the applicant is substantively a Deputy Town Clerk who had been appointed as an Acting Town Clerk.

In rejoinder, counsel for the applicant submitted that although counsel for the respondent contended that the respondent was simply exercising its supervisory function over the applicant, the effect of its decision was to remove the applicant from office. No disciplinary action was taken thereafter and not even prosecution and therefore the decision of the respondent was a final decision. His office was declared vacant at the point of adjournment of the Council meeting.

Certiorari lies to bring the decisions of an inferior court, tribunal, public authority or any other body of persons, before the High Court for review so that the court may determine whether they

should be quashed or to quash such decisions (see *Halisbury's Laws of England* 4 Edition Vol.1, Paragraph 109). An order of Prohibition is directed to an inferior court, tribunal, or other public authority which forbids that court, tribunal or authority to act in excess of its jurisdiction or contrary to the law. Whereas certiorari is concerned with decisions in the past, prohibition is concerned with those in the future. Certiorari is sought to quash the decision and prohibition to restrain its execution (see *Wheeler v. Leicester City Council* [1985] 2 ALL.ER 1106). Mandatory injunctions on the other hand are granted for the purpose of maintenance of the *status quo* which prevailed at the date of the suit or immediately preceding thereto, when a person is dispossessed of property or an office by another person taking the law in his or her own hands, in circumstances where judicial delays would not prevent such dispossession. When it is found that the person has been dispossessed without due course of law, a mandatory injunction will be granted for the purpose of restoring the *status quo*. Mandatory injunctions are granted to prevent the breach of a legal or contractual obligation and also for the purpose of compelling specific performance of certain acts which the court is capable of enforcing. They are generally granted requiring the respondent to do some positive act for the purpose of putting an end to a wrongful state of things created by such respondent.

The decisions challenged by the applicant were taken by the respondent in exercise of its administrative functions. The limits within which courts may review the exercise of administrative discretion were stated in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1947] 2 ALL ER 680: [1948] 1 KB 223, which are;- (i) illegality: which means the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationality: which means particularly extreme behaviour, such as acting in bad faith, or a decision which is “perverse” or “absurd” that implies the decision-maker has taken leave of his senses. Taking a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it and (iii) Procedural impropriety: which encompasses four basic concepts; (1) the need to comply with the adopted (and usually statutory) rules for the decision making process; (2) The common law requirement of fair hearing; (3) the common law requirement that the decision is made without an appearance of bias; (4) the

requirement to comply with any procedural legitimate expectations created by the decision maker.

The judicial attitude when reviewing an exercise of discretion must be one of restraint, only intervening when the decision is shown to have been illegal, unfair or irrational. The principle in matters of judicial review of administrative action is that to invalidate or nullify any act or order, would only be justified if there is a charge of bad faith or abuse or misuse by the authority of its power. The challenge ought to be over the decision making process and not the decision itself. The jurisdiction to decide the substantive issues is that of the authority and the Court does not sit as a Court of Appeal, since it has no expertise to correct the administrative decision, but merely reviews the manner in which the decision is made. It is elsewhere said that, if a review of administrative decision is permitted, the court will be substituting its own decision without the necessary expertise, which itself may not be infallible.

A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness). Failure to observe natural justice includes: denial of the right to be heard, the rule against actual and apprehended bias; and the probative evidence rule (a decision may be held to be invalid on this ground on the basis that there is no evidence to support the decision or that no reasonable person could have reached the decision on the available facts i.e. there is insufficient evidence to justify the decision taken).

Decisions made without the legal power (*ultra vires* which may be narrow or extended. The first form is that a public authority may not act beyond its statutory power: the second covers abuse of power and defects in its exercise) include; decisions which are not authorised, decisions taken with no substantive power or where there has been a failure to comply with procedure; decisions taken in abuse of power including, bad faith (where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which the power was

conferred), where power not exercised for purpose given (the purpose of the discretion may be determined from the terms and subject matter of the legislation or the scope of the instrument conferring it), where the decision is tainted with unreasonableness including duty to inquire (no reasonable person could ever have arrived at it) and taking into account irrelevant considerations in the exercise of a discretion or failing to take account of relevant considerations. It may also be as a result of failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision).

Applications for Judicial review under rule 3 of *The Judicature (Judicial Review) Rules, 2009*, S.I. 11 of 2009, made under section 38 (2) of *The Judicature Act*, for orders of mandamus, prohibition, certiorari or an injunction are directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by public decision makers. They are designed to enforce the rule of law and adherence to the Constitution. The focus of judicial review is to quash invalid decisions by public bodies, or require public bodies to act or prohibit them from acting, by a speedy process. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under statute, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief. An application for judicial review combines an allegation that a public authority has acted contrary to the substantive principles of public law, along with a claim for one of the kinds of relief listed. The discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals. It is essentially a claim for unlawful or unfair termination of employment with only a thin pretence to preventing the abuse of power.

1. Whether the impugned decisions involved any illegality.

By reconsideration of the impugned decisions for illegality, the court seeks to determine whether the respondent understood correctly the law that regulates its decision making power and gave effect to it. The powers include those expressly provided for in the statute as well as those that

arise by necessary implication (see Lord Selborne LC and Lord Blackburn, in *Attorney General v. Great Eastern Railway Co.*, (1880) 5 AC 473). Whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction, to be *ultra vires*. In the same sense, what those sources do not expressly or impliedly authorize is to be taken to be prohibited but those things which are incidental to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited. To the extent that a corporation acts beyond its powers, its actions will be *ultra vires* and invalid.

An action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers. If an act is within the powers granted, it is valid. If it is outside them, it is void. In *Regina v. Hull University Visitor, Ex parte Page; Regina v. Lord President of the Privy Council ex Parte Page*, [1993] 3 WLR 1112, [1993] AC 682, the House of Lords considered the nature and purpose of the system of judicial review from this perspective and stated:

The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases.....this intervention.....is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense.....reasonably. If the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting *ultra vires* his powers and therefore unlawfully.

There are four impugned decisions in the instant case, that is to say;-

- i. The decision to remove the applicant from the position of Acting Town Clerk.
- ii. The decision declaring the office of Acting Town Clerk vacant.
- iii. The decision to fill the post so declared vacant, with another office holder.
- iv. The decision ordering the applicant to recover shs. 38,360,000/=.

The first three of those decisions are entwined since they relate to the extent of the respondent's supervisory power and disciplinary control over the applicant. Supervisory and disciplinary

control over public servants is governed by law. A power to appoint any person to fill any public office or execute any public function when conferred by statute, then unless it is otherwise expressly provided, or unless a different intention appears, the authority having for the time being the power to make the appointment, also ordinarily has power to supervise, suspend, or otherwise discipline or dismiss any person so appointed. According to section 24 of *The Interpretation Act*, where, by any Act, a power to make any appointment is conferred, the authority having power to make the appointment also has power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power.

According to Article 172 (b) of *The Constitution of the Republic of Uganda*, The Public Service Commission is responsible for the appointment of public servants of ranks lower than that of head of department or above, other than those appointed by District Service Commissions by virtue of Article 200, and is responsible for confirmation of their appointments, the exercise of disciplinary control over them and their removal from office. On the other hand, under Article 200 of *The Constitution of the Republic of Uganda*, District Service Commissions have the power to appoint persons to hold or act in any office in the service of a district, including the power to confirm appointments, to exercise disciplinary control over persons holding or acting in any such office and to remove those persons from office. However, article 200 (2) of *The Constitution of the Republic of Uganda*, requires that the terms and conditions of service of local government staff must conform with those prescribed by the Public Service Commission for the public service generally.

According to Article 200 (4) of *The Constitution of the Republic of Uganda, 1995* (as amended in September, 2005), the power to appoint persons to hold or act in the office of Town Clerk in the service of a municipality, including the power to confirm appointments, to exercise disciplinary control over persons holding or acting in any such office and to remove those persons from office is vested in the Public Service Commission. Whereas a Municipal Town Clerk is a public servant appointed by the Public Service Commission, he or she serves, holds or acts in an office in the service of a district. Despite the fact that appointment to the office and disciplinary control over the office holder lies outside the mandate of the District Service

Commissions, the District Council exercises a level of supervision and oversight over the office as conferred by section 13 of *The Local governments (Amendment) Act, 2010* which specifically amended section 68 of *The Local governments Act, Cap 243* by providing as follows;

68. Removal of chief administrative officer and town clerks from office

- (1) The chief administrative officer, deputy chief administrative officer, town clerk of a city and town clerk of a municipality shall be removed from office in accordance with articles 188 (2) and 200 (4) of the Constitution respectively.
- (2) The town council may recommend the removal of a town clerk by a resolution supported by two-thirds of the council members on any of the following grounds—
 - (a) Abuse of office;
 - (b) Incompetence;
 - (c) Misconduct or misbehaviour; or
 - (d) Such physical or mental incapacity as would render the town clerk incapable of performing the duties of the town clerk, as the case may be.
- (3) Before passing a resolution under subsection (2), the council shall in writing, put its allegations to the town clerk who shall have the right to defend himself or herself before the council.
- (4) Following the resolution of the council, to remove the town clerk, the clerk to the council shall forward the council’s decision together with supporting documents to the chief administrative officer who shall immediately interdict the town clerk and require the town clerk to submit his or her written defence to the district service commission within fourteen days after receipt of the letter of interdiction.
- (5) The district service commission shall conduct investigations into the allegations against the town clerk and take further appropriate action.
- (6) The town clerk shall, during investigations under subsection (5), have a right to appear and defend himself or herself before the district service commission.
- (7) On receipt of the letter of interdiction, the town clerk shall hand over to an officer designated by the chief administrative officer.
- (8) Where the town clerk is dissatisfied with the decision of the district service commission he or she may appeal to the Public Service Commission.”

It follows from the above provision that a Municipal Council has no authority to suspend, direct to step aside or otherwise remove a town clerk from office. It's supervisory and oversight role over that office is limited to "recommending the removal" of a Town Clerk on account of any of the grounds specified by the Act. The power to suspend or interdict vests in the Chief Administrative Officer while the power of imposing other disciplinary measures, other than removal from office, lies in the District Service Commission, whose decision may be appealed to the Public Service Commission.

On the other hand, under section 11 (2) (g) of *The Public Finance and Management Act, 2015*, the power to appoint Accounting Officers is vested in the Secretary to the Treasury. Section 11 (3), grants the Secretary to the Treasury wide-sweeping oversight powers over persons appointed as Accounting Officers of Local Governments. Furthermore, according to section 45 (5), an Accounting Officer is also responsible and personally accountable to Parliament for the activities of a vote. Then according to section 79 (1) (e) of the Act, an Accounting officer, who without lawful authority and reasonable excuse fails to comply with any requirement of the Act or fails to execute duties and functions imposed on him or her under the Act, commits an offence and on conviction is liable to a fine not exceeding five hundred currency points, or a term of imprisonment not exceeding four years, or both. The Act though is silent as regards disciplinary control over Accounting Officers. It then follows that by virtue of section 24 of *The Interpretation Act*, the Secretary to the Treasury / Permanent Secretary of the Ministry of Finance, to whom the power to make appointments of Accounting Officers is conferred, also has the authority and power to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power.

In the instant case, the respondent characterised its decision as one that only required the applicant "to remain out of office until he recovers" the specified sum of money. Counsel for the respondent argued that this did not amount to a removal from office but rather the resolution merely required the applicant to step aside. However, taken together with the declaration made by the Speaker in his closing remarks that the office of Town Clerk was vacant as a result of that resolution, it was intended to and indeed had the effect of removing the applicant from office.

Not only did the respondent not have the authority to do so, but it also did not do so for any of the reasons specified by the Act for which a Town Clerk may be removed from office

When the office of Town Clerk falls vacant as a result of disciplinary proceedings having been initiated against the incumbent, the incumbent Town Clerk is required by section 68 of *The Local governments Act* (as amended), to hand over to an officer designated by the Chief Administrative Officer. In the instant case, the deponent to the affidavit in reply described himself as the Acting Deputy Town Clerk. I have not been furnished with evidence to the effect that the office of Acting Town Clerk has been handed over to any other person following the declaration at the close of the meeting of 22nd December 2016 that it had fallen vacant. Although the minutes indicate that the Speaker at the close of that meeting declared that the office of Acting Town Clerk would be occupied by one of the Divisional Town Clerks to care-take, there is no evidence before court that the respondent has acted on this declaration.

In directing the applicant to remain out of office until he recovers the shs. 38,360,000/=, the respondent cited the provisions of section 80 (1) of *The Public Finance and Management Act, 2015*. Under that provision, where a loss of or deficiency in public money occurs that was either advanced to or was under the control of a public officer or while it was in the care of a public officer, and the Minister is satisfied after due inquiry, that the negligence or misconduct of the public officer caused or contributed to the loss or deficiency, the amount of the loss or deficiency as the case may be, becomes a debt due to the Government, and may be recovered from the public officer either administratively or through a court of competent jurisdiction. Invoking this provision not only requires a prior inquiry into the circumstances by the Minister of Finance but also requires proof of such loss or deficiency and that it was caused by or contributed to by the negligence or misconduct of the public officer. In the instant case, there is no evidence that any inquiry was conducted by the Minister and that he was satisfied of existence of the stated prerequisites.

In conclusion, I find that the respondent exceeded the limits of its authority of “recommending the removal” of the applicant on grounds of abuse of office, incompetence, misconduct, misbehaviour, or physical or mental incapacity as would render him incapable of performing the

duties of the town clerk, as the case may be. The resolution directing the applicant “to remain out of office until he recovers the shs. 38,360,000/=,” the consequential declaration by the Speaker that the office of the Town Clerk was vacant and that it would be occupied by one of the Divisional Town Clerks to care-take, in short, the decision removing the applicant from office of Acting Town Clerk of Nebbi Municipal Council and consequently as Accounting Officer, was illegal, null and void for being *ultra vires* the respondent’s statutory powers and authority.

2. Whether the proceedings leading to the resolution directing the applicant to remain out of office until he recovers the shs. 38,360,000/= involved any Procedural Irregularity.

Although there is no general duty at common law to conduct a hearing before an administrative decision is taken, in circumstances where important interests are at stake such as one’s livelihood a hearing has been required (see *R v. Commissioner for Racial Equality exp. Helling don LBC [1982] AC 779*). The classic situations in which the principles of natural justice become applicable include situations where some legal rights, liberty or interest is affected. In the instant case, this having been a resolution with the potential of ultimate dismissal, thereby impacting on the livelihood of the applicant, and also to the extent that it denied the applicant active employment until his recovery of the stipulated shs. 38,360,000/=, it was a quasi-judicial process to which the principles of natural justice applied. The rules of natural justice are not immutable though but context-dependent and should be interpreted within the specific context, the basic or fundamental principle being that of a procedurally fair hearing before an impartial decision-maker.

In this regard, it is contended by counsel for the applicant that the procedure leading directing the applicant to remain out of office until he recovers the shs. 38,360,000/= involved procedural irregularities that violated the rules of natural justice for which reason the decision should be quashed. P.G. Osborn’s *The Concise Law Dictionary*, 5th Edition at p.217 defines the concept of natural justice as follows:

The rules and procedure to be followed by any person or body charged with the duty of adjudicating upon disputes between, or the rights of others; e.g. a government department. The chief rules are to act fairly, in good faith, without bias, and in a judicial temper; to give each party the opportunity of adequately

stating his case, and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of the other. A man must not be judge in his own cause, so that a judge must declare any interest he has in the subject matter of the dispute before him. A man must have notice of what he is accused. Relevant documents which are looked at by the tribunal should be disclosed to the parties interested.

Unless there are statutorily prescribed procedures, and subject to the overall requirements of fairness, the decision-maker will usually have a broad discretion as to how a disciplinary proceeding should be carried out. The decision-maker is free to determine its procedure provided such procedure is compliant with its general duty to act fairly, in good faith, without bias and in a judicial temper, giving the applicant the opportunity to adequately state his or her case, to correct or contradict any relevant statement prejudicial to his case, and not to hear the other party behind his back.

The essence of the *audi alteram partem* rule was explained by Lord Denning in *Kanda v. Government of the Federation of Malaya* [1962] AC 322, [1962] 2 WLR 1153 as follows;

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence is given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.....it follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing.

A quasi judicial body need not meet the standards of a trial in court but fairness must prevail. A duty resting upon a committee "to hear and decide" is an exercise of the auditory faculty which means to hear both sides and imports, at the very least, a duty to afford the parties an opportunity to be heard. To hear must mean "to listen judicially to" or "to give audience to." The respondent had the duty give the applicant the opportunity of adequately presenting his case. The applicant was entitled to know what he was being accused of and he was entitled to respond to and correct any statements prejudicial to his position. The principle is that a person in proceedings of this

character should, to use the words of Lord Greene, M. R. in *R. v. The Archbishop of Canterbury* [1944] 1 K. B. 282; [1944] 1 All E. R. 179 at p. 181, be given "... a real and effective opportunity of meeting any relevant allegations made against him." It follows that;

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L. C. in *Board of Education v. Rice* [1911] A.C. at p. 182 down to the decision of their Lordships' Board in *Ceylon University v. Fernando* [1960] 1 WLR 223. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice, sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. Instances which were cited to their Lordships were *Re Gregson* (1894) 70 L.T. 106, *Rex v. Bodmin Justices* 1947 K.B. 321 and *Goold v. Evans* (1951) 1 T.L.R. 1189, to which might be added *Rex v. Architects Registration Tribunal* (1945) 61 T.L.R. 445, and many others. Applying these principles their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby, J. in these words: "In my view, the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal." The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the Report of the Board of Inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice." (See *B. Surinder Singh Kanda v. The Government of The Federation of Malaya* [1962] A.C. 322 (P.C.).

By reason of those principles, the respondent was required to have before it the whole of the evidence presented, although not required to proceed as if the question before it were a trial, but

always giving a fair opportunity to the applicant for correcting or contradicting any relevant statement prejudicial to his view (see *Board of Education v. Rice* [1911] AC 179 at p. 182). The respondent had the right to regulate its procedures as it thought fit for example by hearing the applicant orally or by receiving written statements from him, or by appointing a person to hear and receive evidence or submissions from him for its own information (see *James Edward Jeffs and others v. New Zealand Dairy Production and Marketing Board and others* [1967] AC 551). Although the rules of natural justice need not involve an oral hearing, the respondent had an obligation to give the applicant a fair opportunity to correct or contradict any relevant prejudicial statement. Whichever procedure was adopted, it should be one capable of letting the applicant know the materials that were collected, what evidence was given and what statements or reports were made affecting his rights. He must have been given a fair opportunity for correcting or contradicting any relevant statement prejudicial to his view.

In the end, how nearly an inquiry by a statutory body which has to make decisions must approach to the full-blown procedure of a court of justice in order to comply with the rules of natural justice is not doubt a matter of degree. The essential requirements of natural justice are that; the person accused should know the nature of the accusation made; secondly, that he or she should be given an opportunity to state his or her case; and thirdly, the tribunal should act in good faith (see *Byrne v. Kinematograph Renters Society Ltd*, [1958]1 WLR 762).

Some of the rules of natural justice attendant to the removal of a Town Clerk from office are reflected in section 68 of *The Local governments Act* (as amended). Under that provision, the Town Clerk of a municipality is to be removed from office in accordance with 200 (4) of the Constitution which vests the power of removal in the Public Service Commission. Before making a recommendation for the removal of a Town Clerk by a resolution supported by two-thirds of the council members, section 68 (3) of *The Local governments Act* (as amended), requires the Council to put its allegations in writing to the town clerk who shall then have the right to defend himself or herself before the Council. Upon interdiction, section 68 (4) of the Act enjoins the Chief Administrative Officer to require the Town Clerk to submit his or her written defence to the District Service Commission within fourteen days after receipt of the letter of interdiction. During the ensuing investigations by the District Service Commission, section 68

(6) of the Act guarantees to the Town Clerk, the right to appear and defend himself or herself before the District Service Commission.

That aside, under *The Public Service Standing Orders, 2010* in part (F-S), interdiction means the temporary removal of a public officer from exercising the duties of his or her office while investigations over a particular misconduct are being carried out. By virtue of regulation 8 of Part (F-S) at page 129, the procedure (with modifications), to be followed is that;

- a. the charges against the applicant are investigated expeditiously and concluded;
- b. the Responsible Officer has to ensure that investigations are done expeditiously in any case within (three) 3 months for cases that do not involve the Police and Courts and 6 months for cases that involve the Police and Courts of Law;
- c. the applicant is informed of the reasons for the interdiction;
- d. the applicant receives such salary not being less than half of his basic salary, subject to a refund of the other half, in case the interdiction is lifted and the charges are dropped;
- e. the applicant was not to leave the country without permission from the Responsible Officer;
- f. the applicant's case is submitted to the District Service Commission
- g. After investigations, the Responsible Officer has to refer the case to the Public Service Commission with recommendations of the action to be taken and relevant documents to justify or support the recommendations had to be attached.

Where an administrative decision is a matter of discretion it will not be disturbed on judicial review except on a clear showing of abuse of discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Some of the general principles relevant to the exercise of discretion are: acting in good faith and for a proper purpose, complying with legislative procedures, considering only relevant considerations and ignoring irrelevant ones, acting reasonably and on reasonable grounds, making decisions based on supporting evidence, giving adequate weight to a matter of great importance but not giving excessive weight to a matter of no great importance, giving proper consideration to the merits of the case, providing the person affected by the decision with procedural fairness, and exercising the discretion independently and not under the dictation of a third person or body. What fairness requires will vary from case to case and manifestly the gravity and complexity of the charges and of the defence will impact on what fairness requires.

Natural justice in the instant case demanded that the respondent had to inform the applicant in good time of the nature of the accusations against him, that he must have adequate time and facilities to prepare his defence, and given a proper opportunity to give and call evidence and question any witnesses called against him. To the contrary, the facts show that before the meeting was convened, the applicant was never given notice of the reasons for his eventual temporary removal from office “until he recovers the shs. 38,360,000/=”. It was not a meeting called for taking disciplinary action against the applicant. On the face of the material before me, he must have been completely taken by surprise when at the meeting he was required to more or less defend himself against accusations of a perceived failure to recover that sum of money from Almutu Investments Limited. He was never given ample opportunity to defend himself against those accusations since they were practically sprung upon him at the meeting. The rules of natural justice were clearly violated.

Furthermore, although couched in words suggesting a temporary removal in office for recovery of the specified sum of money, the resolution of the respondent at its meeting of 22nd December 2016 was akin to an interdiction. *The Public Service Standing Orders, 2010* define interdiction a “temporary removal of a public officer from exercising the duties of his or her office while investigations over a particular misconduct are being carried out.” In this case, the removal was not for purposes of an investigation but for recovery of the specified sum of money. By accusing the applicant of failure to collect that money, the respondent made an indirect accusation of incompetence on the part of the applicant, which is a ground for interdiction. The respondent therefore should have followed the procedure laid down in part (F-S) of *The Public Service Standing Orders, 2010* and section 68 (3) of *The Local governments Act* (as amended) if it intended to remove the applicant from office for that purpose.

In the case of *Isodo Abdul v. Arua District Local Government, H. C. Misc Application No. 58 of 2004*, the applicant, who was then the Chief Administrative Officer of Arua District, challenged his removal from office on grounds of procedural impropriety, among others. The court held that in accordance with the law in force at the time, before interdicting a Chief Administrative Officer or Town Clerk, there ought to be a resolution supported by 2/3 of the members of the Council. The council must also have signed the notice of its intention to remove any of the two

officers. In that case, those procedural requirements had not been complied with and the court decided that in interdicting the applicant, the District Service Commission acted irregularly and *ultra vires*.

In the instant case, I find that neither the statutory procedure nor the rules of natural justice were complied with in the process leading to removal of the applicant from office “until he recovers shs. 38,360,000/=”. The decision was arrived at arbitrarily and capriciously. A decision reached in contravention of the Rules of Natural Justice is void *ab initio* (See *Matovu and two others v. Sseviiri and another* [1979] HCB 174; *Kamurasi Charles v. Accord Properties Limited*, S.C. Civil Appeal No. 3 of 1996).

3. Whether the decision requiring the applicant to remain out of office until he recovers the sum of shs. 38,360,000/= was irrational.

The court was invited to determine whether the respondent has failed to exercise its statutory discretion reasonably as to amount to irrationality in the decision requiring the applicant to remain out of office until he recovers the sum of shs. 38,360,000/=. Reasonableness was defined in *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223 where it was held:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v. Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Decision-makers remain free to take whatever decision they deemed right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal. “Reasonable” means here that the reasons do in fact or in principle support the conclusion reached.

When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum; the result is to be looked at in the context of the evidence, the parties’ submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference is the appointment of the tribunal and not the court as the front line adjudicator, the tribunal’s proximity to the dispute, its expertise, etc. the concept of “deference as respect” requires of the court’s respectful attention to the reasons offered or which could be offered in support of a decision and not submission. The fact that there may be an alternative decision to that reached by the tribunal does not inevitably lead to the conclusion that the tribunal’s decision should be set aside if the decision itself is in the realm of reasonable outcomes. On judicial review, a judge should pay “respectful attention” to the decision-maker’s reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

To justify interference by court without delving in the merits, the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. It is opined by De Smith, Woolf and Jowel in their *Judicial Review of Administrative Action*, Fifth Edition (pp.594-596) that it is

“a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues”. This principle, as reviewed by the Courts in cases such as *R (Daly) v. Secretary of State for Home Department [2001] 2 AC 532*, encompasses any or all of the following tests:

- i. The balancing test, which requires a balancing of the ends which an official decision attempts to achieve against the means applied to achieve them. This requires an identification of the ends or purposes sought by the official decisions. In addition it requires an identification of the means employed to achieve those ends, a task which frequently involves an assessment of the decision upon affected persons.
- ii. The necessity test which requires that where a particular objective can be achieved by more than one available means, the least harmful of these means should be adopted to achieve a particular objective. ...this aspect of proportionality requires public bodies to adopt those regulatory measures which cause minimum injury to an individual or community.
- iii. The suitability test requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful.

In the instant case, the facts disclose that the respondent invoked section 80 (1) of *The Public Finance and Management Act, 2015*, which as explained before required prior inquiry into the circumstances by the Minister of Finance, proof of such loss or deficiency as a fact and that it was caused by or contributed to by the negligence or misconduct of the applicant. A decision taken in absence of any of those pre-requisites fails the tests of reasonableness. Such a decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The decision is so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In the circumstances, the court has to intervene by declaring the respondent’s decision requiring the applicant to remain out of office until he recovers the sum of shs. 38,360,000/= as unreasonable.

4. Whether the applicant is entitled to the remedies sought.

Judicial review by way of the old prerogative writs has always been understood to be discretionary. This means that even if the applicant makes out a case for review on the merits,

the reviewing court has an overriding discretion to refuse relief. The orders sought by the applicant are of a discretionary nature and court is at liberty to refuse to grant any of them if it thinks fit to do so depending on the circumstances of the case, even where there is a clear violation of the principle of natural justice (see *John Jet Mwebaze v. Makerere University Council and two others*, H.C. Misc Application No. 353 of 2005; D. J. Mullan, “*The Discretionary Nature of Judicial Review*”, in R. J. Sharpe and K. Roach, eds., *Taking Remedies Seriously*: 2009 (2010), 420, at p. 421 and D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (6th ed. 2014), at pp. 686-87). Considering a similar issue in *Nichol v. Gateshead Metropolitan Borough Council (1988) 87 LGR 435 (CA)*, the court described how it was to exercise any discretion it had, to give relief on an application for judicial review, thus:

The court has an overall discretion as to whether to grant relief or not. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the following:

- (1) The nature and importance of the flaw in the challenged decision.
- (2) The conduct of the applicant.
- (3) The effect on administration of granting relief.

Guided by those considerations, the court is further mindful of the fact that an order of Certiorari lies to a body acting without or in excess of jurisdiction or as breach of the rules of natural justice or irregularly contrary to set procedural rules and it has been demonstrated when resolving the earlier issues that both the Council and the Chairperson acted contrary to the procedure laid down for suspension or removal of the applicant and that the Council acted contrary to the rules of natural justice and in violation of the principle of *audi alterem partem*, an order of Certiorari hereby issues quashing the Council proceedings leading to and the Resolution which purported to remove the applicant from the office of Acting Town Clerk and Accounting Officer of the Municipality.

Secondly, the applicant sought an order of prohibition stopping the respondent from appointing anyone to the position of Town Clerk. An order of prohibition is directed to a public authority forbidding that authority from acting in excess of its jurisdiction or contrary to law or generally from exercising its power in a manner unauthorised by law. It is a prospective, rather than a retrospective, remedy. It will not be granted unless there is something left to prohibit. At the close of the meeting, the Speaker of the respondent declared the office of the Town Clerk vacant

and informed members that the office would be occupied by one of the Divisional Town Clerks to care-take. If the respondent goes ahead to implement that decision it will be acting in excess of its jurisdiction or contrary to law, specifically section 68 (7) of *The Local governments Act* (as amended), or generally exercising its power in a manner unauthorised by law. For that reason an order of prohibition is hereby issued restraining the respondent from appointing anyone other than the applicant as holder of the office of Acting Town Clerk of the Municipality, until the procedure for declaring the office vacant is complied with.

Lastly, the applicant sought a mandatory injunction order requiring the respondent to refrain from enforcing the impugned decisions and from taking any action consequent thereupon. A mandatory injunction is ordinarily granted in situations requiring restoration of the *status quo* that existed prior to the institution of the suit. Having found that the decision removing the applicant from office of Acting Town Clerk of Nebbi Municipal Council and consequently as Accounting Officer, was illegal, null and void for being *ultra vires* the respondent's statutory powers and authority, in the circumstances, that it was arrived at arbitrarily and capriciously, and that it was unreasonable, the applicant is entitled to an order compelling the respondent to undo the breach, to the extent that it is capable of being enforced by the court. For that reason a mandatory injunction hereby issues requiring the respondent to restore the applicant or alternatively allow the applicant to resume his duties as Acting Town Clerk and Accounting Officer of the Municipality. In conclusion, the application is allowed with costs to the applicant.

Delivered at Arua this 20th day of July 2017.

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Stephen Mubiru
Judge
20th July 2017