

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS CAUSE NO.117 OF 2016

BIN-IT SERVICES LIMITED----- APPLICANT

VERSUS

- 1. KAMPALA CAPITAL CITY AUTHORITY**
- 2. KAMPALA SOLID WASTE MANAGEMENT CONSORTIUM LTD**
- 3. HOMEKLIN (U) LTD-----RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant filed an application for Judicial review seeking the following prerogative orders;

- a) An order of certiorari be issued to quash a public notice issued by the 1st respondent; entitled “Notice of New Garbage Waste Collection Measures” which it published in the New Vision of Tuesday 14th June 2016 whereby the 1st respondent purported to notify the general public that the 2nd respondent has exclusive rights to collect garbage in zones, 1, 2 and 6 Nakawa Division and also purporting to notify the said residents that the 3rd respondent has exclusive rights to collect garbage in Zones 3 &4.
- b) An order of prohibition against the 1st respondent to restrain absolutely from any further attempts to conscript the residents of Kampala City into the exclusive use of its garbage collection system.
- c) An order of Mandamus directing the 1st respondent to publish a retraction of the impugned public notice and issue another instead informing the residents of Kampala about their statutory right to opt out of the 1st respondent’s garbage collection system and of their further right to engage private garbage collection service providers of their preference.
- d) An order of mandamus directing the respondent to issue licences to all and any person(s) willing and able to meet generally applicable and rational licensing requirements for the business of collecting garbage regardless and independent of their status as authorised collection agents for the 1st respondents.
- e) Orders for damages against the 1st respondent.

The main ground upon which this application is premised is that;

The issuance of the impugned notice is ultra vires the provisions of the Kampala City Waste management Ordinance 2000.

This application was supported by the affidavit of Alvin Nzaro the Managing director of the applicant which sets out the grounds which briefly are;

1. That by issuing the said Notice, the 1st respondent was purporting to inform the residents of these areas the 2nd respondent had monopoly rights to conduct garbage collection business in those areas and further, that the residents had no option but to deal with the 2nd and 3rd respondents to the exclusion of all others including the applicant.
2. That the impugned notice purported to draw legal authority from Kampala City Council Solid Waste Management Ordinance 2000.
3. That Kampala Capital City Authority is under legal duty to licence any and all persons interested in collecting garbage regardless of whether or not it has set up its own garbage collection system or is in partnership with the 2nd and 3rd respondents.

The 1st respondent in reply or opposition to this application filed an affidavit by Dr David Serukka the Director Public Health and the Environment. The response of the 1st respondent is that; they have the mandate to regulate, control, license and generally manage waste in City of Kampala.

They advertised for private operators under a public private partnership under open domestic international bidding for the collection of solid waste in the City of Kampala.

The applicant was among bidders but the 2nd and 3rd respondents and M/s Nabugabo Up Deal JV were the successful bidders and the applicant and other companies were unsuccessful. The entire affidavit concentrated on the bidding process, the expiry of the licence of the applicant and the lack of merit of judicial review.

I wish to note that the 1st respondent's affidavit does not respond to the concerns raised in the notice of motion. Either the 1st respondent did not understand the applicant's complaint or he never had any meaningful answer to give and that is why he avoided giving the necessary response.

The 2nd respondent filed an affidavit in reply by Lwanga Jaffer and contended that the applicant does not possess a licence from National Environment Management Authority to transport waste.

The affidavit basically alluded to the powers of the 1st applicant to licence and regulate solid waste in Kampala and the applicant took part in the bidding process and was unsuccessful.

At the hearing of this application court directed the parties to file written submissions which the applicant and 2nd respondent filed save for the 1st Respondent who filed the submissions out of time and the 3rd respondent who neither filed its submissions at the time of writing this ruling nor apparently filed any affidavit in reply or appeared in court.

The applicant was represented by Ms Ninsiima Agatha and the 1st respondent was represented by Mr. Byaruhanga Dennis and Mr. Owen Murangira represented the 2nd respondent.

I have considered the respective submissions in the determination of this application. Both the 2nd and 1st respondent's counsel respectively raised preliminary objections which I shall address first before moving to the merits of this application. They follow thus;

Whether the application discloses a cause of action against the 2nd respondent?

The gist of the preliminary objection is that the application does not disclose any claim against the 2nd respondent. He submitted that when you look at the entire application and the affidavit in support, the orders sought and issues raised nothing is against the 2nd respondent.

This court agrees with the submission of counsel that Judicial review proceedings are a genre of proceedings in which it must be shown that there is an act or omission in the decision making process by the respondent in the process of which the applicant has been unfairly treated and the respondent had acted illegally, irrationally, unreasonably, with bias and without following the rules of natural justice. **Prime Media Networks and Alliance Media (U) Ltd vs Uganda National Roads Authority and Primedia Pty Ltd of Uganda Miscellaneous Cause No. 164 of 2014 & Miscellaneous Cause No. 172 of 2014**(consolidated).

However, on the submission that judicial review can only issue to control exercise of power in public offices, I do not agree since it is trite law that judicial review can issue against bodies deriving authority from the central government.

I agree with the submission of counsel for the 2nd respondent that the application does not state any wrong doing attributed to the 2nd respondent. They are only joined to the application because they are the best evaluated bidders but there is no claim against them. Indeed the application does not disclose any cause of action against them.

The 1st respondent's preliminary objection;

Whether this application for Judicial Review is time barred?

According to the 1st respondent the cause of action out of which this application for judicial review arose was in December 2013. They further contended that the applicant has filed this application out of stipulated time of three months.

As noted earlier, the 1st respondent does not seem to appreciate the applicant's case. The applicant contends that the 1st respondent published in the New Vision of Tuesday 14th June 2016 a decision that purports to exclude other persons entitled to collect garbage as private collectors for a solid waste collection service.

The applicant's claim is not about the bidding process of 5th December 2013. The preliminary objection that the application is time barred is therefore devoid of any merit.

Whether the 1st respondent acted legally, rationally and improperly in issuing a Notice of waste collection measures giving the 2nd and 3rd respondents exclusion waste collection rights.

The applicant contends that the decision to allow the 2nd and 3rd respondent as the sole garbage collectors affected the applicant's rights to carry out their business of garbage collection.

The notice as published in the Newspaper, indeed informed the public or residents in the different parts of Kampala that the 2nd and 3rd respondents were only companies that are entitled to conduct the garbage collection business in those areas. The notice read as follows;

“NOTICE OF NEW GARBAGE (SOLID WASTE) COLLECTION MEASURE

The Kampala City Council Solid Waste Management Ordinance 2000 provides that every owner or inhabitant of residential or commercial premises within Kampala City is responsible for waste generated at their premises until it is collected by the City administration or its authorised agents(s).

The prescribed fees are paid by the generator to the city administration or to the authorised agent(s) appointed to collect solid waste in the City.

*In line with the above Ordinance, KCCA through competitive process under a Public Private Partnership (PPP) framework contracted three companies namely; **M/s Kampala Solid Waste Management Consortium Ltd (KSWMS)** (allocated zones 1, 2, & 6) **M/s Nabugabo Updeal Joint Venture** (allocated zones 5 & 7) and **M/s Homeklin (U) Ltd** (allocated zones 3 & 4).....”*

The above advert or notice alludes to the law under which it was made as the **Kampala City Council Solid Waste Management Ordinance 2000**.

Clause 17 of the Ordinance provides;

The council shall, either by its agents, servants or licenced collectors, ensure that solid waste in the district is collected and conveyed to treatment installations or approved disposal sites to the extent required to satisfy both public health and environmental conservation requirements, and as provided in this ordinance.

This is the law under which the three companies were contracted to collect garbage on behalf of Kampala Capital City Authority.

However, **clause 23** of the Ordinance provides;

Residents who do not wish to use the Council's solid waste collection system shall be required to contract with authorised private collectors for solid waste collection services.

My simple appreciation of the above clause of the ordinance is that parties are free to opt out of the system of solid waste collection by the council and that they are at liberty to engage the private collectors authorised by the council.

The 1st respondent in its wisdom decided to first track its system of garbage collection and has since ignored the private collectors who would step in for those residents in Kampala who may not wish to use the licenced collectors of the 1st respondent.

The actions of the 1st respondent are indeed illegal. Illegality under judicial review looks at the law as it is in the legislation.

The basic idea behind the ground of review called illegality is that; a public authority must act within the four corners of its power or jurisdiction. Therefore acting outside the statute arises where there is total disregard of the law as it is in the law books. See ***Public Law in East Africa by Ssekaana Musa page 95-96***

The sum effect of refusing to authorise the private collectors is to conscript every resident of Kampala within the garbage collection system of the council which is contrary to the Ordinance and hence illegal.

The residents of Kampala have no option under the current arrangement of garbage collection system but to deal with the three named companies in the advert/notice to the public.

I agree with counsel for the applicant that this has created monopoly rights in favour of the 2nd and 3rd respondents in the garbage collection business in Kampala.

This application was filed on 21st June 2016 and it is now two years since it was filed and the 1st respondent has not filed any supplementary affidavit to show that they have indeed complied with clause 23 of the Ordinance i.e authorising private garbage collectors.

However, I do not agree with counsel's submission that the notice though creates a monopoly of garbage collection to the three companies, that it contravenes the economic rights of the applicant under Article 40(2) of the Constitution. This is because the applicant has not shown in his application that he has ever applied to be a private garbage collector to the 1st respondent. The right provided for under Article 40(2) is enjoyed in accordance with the law or as the law would prescribe.

Whether the applicant is entitled to the reliefs sought?

Judicial review remedies are discretionary. This means that the court has the discretion to withhold them from the applicant even if the public body is held to have acted unlawfully.

In **Amiran Enterprises Ltd vs Uganda Revenue Authority HCMA 06 of 2010** Justice *Kiryabwire* held that it must be born in mind that prerogative orders are discretionary in nature and the court must act judicially and according to well settled principles. Such principles may include common sense and justice; whether the application is meritorious; whether there is reasonableness; vigilance and not any waiver of rights by the applicant.

In that regard the applicant prayed for prerogative orders and it's here by ordered as follows;

Certiorari

An order of certiorari should issue to quash the decision of 1st respondent that has the effect of conscripting all the residents of Kampala into the Council's solid waste collection system without the option of residents contracting with authorised private collectors for a solid waste collection service.

Mandamus

The 1st respondent has to-date in accordance with its pleadings refused to authorise private collectors. This means that the 1st respondent is refusing to do what the ordinance directed it to do.

An order of Mandamus should issue directing the 1st respondent to authorise all or any person(s) willing and able to meet the generally applicable and rational licensing requirements for the business of collecting garbage without victimisation of the applicant.

An order of Mandamus should issue directing the 1st respondent to publish another public notice informing the residents of Kampala about their right to contract with authorised private collectors for a solid waste collection service and opt out of the 1st respondent's garbage collection system together with the list of authorised private collectors.

General Damages

The applicant has submitted that they lost several clients on the premise of not having a renewed trading licence. And that several retainer clients in compliance with the 1st respondent's notice have had to discontinue the services of the applicant in spite of their right to choose an authorized private collector for solid waste services.

I have not seen any evidence in support of this submission in the applicant's affidavit in support. The applicant has not adduced any evidence to prove that his company ever applied to be authorized as a Private Collector under Clause 23 of the Local Governments (Kampala City Council)(Solid Waste Management) Ordinance SI 243-21.

In the result, this application is allowed with costs against the 1st respondent. The 2nd respondent is denied costs because it is a beneficiary of 1st respondent's refusal to authorize the private garbage collectors.

I so order

SSEKAANA MUSA
JUDGE
20th /06/2018