THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO.206 OF 2018

DR KASOZI CHARLES---------- APPLICANT

VERSUS

1. **THE ATTORNEY GENERAL**
2. **HEALTH SERVICE COMMISSION---------- RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Section 36 & 38 of the Judicature Act as amended, Rule 3 of the Judicature (Judicial Review) Rules, 2009 seeking orders that;

a) An order of Certiorari to quash the purported decision of the 2nd respondent dated 6th August, 2018 refusing and/or declining to shortlist the applicant for the post of Medical Officer Special Grade (Family Medicine) Ref; ERS/2018/00390/014/Butabika NMRH EXTERNAL ADVERT NO.1 OF MAY 2018.

b) An Order of Certiorari to quash the purported decision of the respondents dated 10th April, 2018 under Board G purporting that the Applicant herein and all other candidates were not suitable for appointment to the post of Medical Officer Special Grade (Family Medicine).

c) An Order of Prohibition doth issue to prohibit the respondents from any further advertisement and conducting of interviews for the post of Medical Officer Special Grade (Family Medicine) as the Applicant is qualified.

d) An Order of Mandamus issues compelling the respondent to appoint the applicant to hold the post of Medical Officer Special Grade (Family Medicine as the applicant is the most qualified and suitable candidate to hold the said post and indeed is holding the same in acting capacity at Butabika Hospital.

e) An Order for costs of the application.

The grounds in support of this application were stated in the supporting affidavit of the applicant but generally and briefly state that;

a) That on the 11th day of December, 2017 the respondents advertised in the New Vision newspaper at page 31 inviting suitably qualified applicants to fill vacant posts among other , the post of Medical Officer Special Medicine (Family Grade) tenable at Butabika National Referral Mental Hospital.

b) That the applicant picked interest and applied for the said post but the same on the shortlist that was displayed out the post he applied for was missing or was not displayed.

c) That the shortlist for the post of Medical Officer Special Grade (Family Medicine) was delayed and or withheld until 9th day of March 2018 when the applicant raised a complaint to that effect.

d) That upon the applicant's complaint on the delayed release of the shortlist for the post that the applicant was the only candidate, the shortlist was released and they appointed a date of 10th April 2018 as the date of the interview for the post would be carried out.

e) That to the prejudice of the applicant, a panel/board of 3 persons was appointed but without any professional competence as regards the subject post i.e Specialist from the department of Family Medicine or atleast a representative from Butabika Hospital where the said post was tenable.

f) That the applicant reluctantly appeared for interviews before the board where incompetence among the board members was evident as the interviewers purely conducted the interviews completely outside the scope of the advertised post "Medical Officer Special Grade"(Family Medicine).

g) That to utter dismay and shock, the applicant awaited for the release of the results for the interviews he was subjected to, the 2nd respondent instead re-advertised for the same post in the New Vision newspaper of 3rd May. 2018 to the prejudice of the applicant and without prior notice to the applicant who had indeed taken part in the interviews conducted on 10th April, 2018.

h) That the applicant raised a complaint to the Permanent Secretary, Health Service Commission in his letter dated 4th May, 2018 concerning the irregularities of the process but was ignored and instead the applicant was advised to send in his application for the post just a day to the closure of receipt of applications in a letter dated 24th May, 2018 by the Secretary, Health Service Commission.

i) That the applicant complied with the advice and sent in his application re-applying for the post of Medical Officer Special Grade (Family Medicine) but to the applicant further dismay, he was informed that he had not attached his valid Annual Practising Licence but to the contrary the applicant had attached the APL as was required.

j) That the applicant further lodged an Appeal but the same was heard ex parte that occasioned an injustice to the applicant.

k) That the applicant only learnt of the decision of the application in a letter dated 6th August, 2018 without according him any prior hearing contrary to Article 42 of the Constitution.

The respondents in their its affidavit in reply of *Ddungu Stephen (Commissioner-Human Resource Management)* confirmed that the applicant indeed applied for the post of Medical Officer, Special Grade (Family Medicine) and following review of respective applications he was shortlisted.

The respondent confirmed that the applicant's version of events and contended that for the initial application he had failed to score at the set pass mark and that for the second application, the applicant and the other candidate where not shortlisted since they never attached the Annual Practising Licence.

That the applicant indeed appealed the decision of the 2nd respondent not to nominate him vide a letter dated 19th July 2018. The said letter was responded to in a letter dated 6th August 2018 confirming that he was not shortlisted for failure to attach a copy of valid practicing licence as required in the advertisement.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

The applicant raised 3 broad issues court's for resolution and the respondents also raised another issues as their preferred preliminary issue;

Applicants Issues

1. *Whether the Health Service Commission violated the principles of Natural Justice and the Right to a fair hearing in arriving at its decision of August, 2018?*

2. *Whether the Board G was properly constituted and had competence to interview the Applicant?*

3. *Whether the applicant is entitled to the remedies sought?*

Respondents issue

4. *Whether the application raises any matter for judicial review?*

I shall determine this application by resolving the 4th issue as raised by the respondent and later resolve the applicants' issues. The applicant was represented by *Ms Mwebaze Lydia* whereas the respondents were represented by *Mr Phillip Mwaka.*

Whether the application raises any matter for judicial review?

The respondent's counsel contended that the said application is frivolous, without merit and does not raise any matters for judicial review. He cited different authorities.

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case my fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***See; John Jet Tumwebaze vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd vs Attorney General Misc Cause No.125 of 2009, Balondemu David vs The Law Development Centre Misc Cause No.61 of 2016.***

For one to succeed under Judicial Review it trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The dominant consideration in administrative decision making is that public power should be exercised to benefit the public interest. In that process, the officials exercising such powers have a duty to accord citizens their rights, including the right to fair and equal treatment.

Judicial review is applicable to every public body that makes a decision and such decision can properly be challenged in court. Judicial review is only available against a public body in a public law matter. Public Body has been widely defined in the Judicature (Judicial Review) (Amendment) Rules, 2019 SI No. 32 of 2019.

The respondents are public bodies and any decision they make can be reviewed by this court. In the present case the applicant contends that he was not heard in the appeal against the refusal to be nominated.

The application clearly raises issues for judicial review as can be deduced from the facts presented. Lack of merit of the application should only be determined through interrogating the whole decision making process. Therefore it is baseless to raise such an issue when indeed there is a decision made by a public body.

This issue is resolved in the affirmative.

Whether the Health Service Commission violated the principles of Natural Justice and the Right to a fair hearing in arriving at its decision of August, 2018?

The applicant's counsel submitted that that the Applicant lodged an appeal before the 2nd Respondent and no attention was paid thereto, he was occasioned an injustice. Equally not in contention is the fact that the Respondents later unilaterally or at least without affording the Applicant hearing, did on 6th August, 2018 rule that the Applicant's application never had the Annual Practicing License was null and void and consequently made the Applicant herein to lose the opportunity to be appointed to the post he had applied for.

The applicant's counsel seems to be confusing the decision the applicant is challenging in this matter and this court according to the pleadings i.e Notice of motion the applicant is challenging the decision in the letter dated 6th August 2018.

The decision of 16th April, 2018 was never challenged by the applicant and it would be very erroneous to try and challenge the same the proceedings before court since the same would be out of time.

A decision made by a public body or any decision maker can only be challenged within 3 months. In case a party is caught by time or was unable to challenge the same within the prescribed time, then such a person must file an application for extension of time within which to challenge the decision.

The challenging of the decision of 16th April is out of time and therefore this court shall not consider the same.

The applicant dissatisfied by the decision of the 2nd respondent lodged an Appeal on the 19th July 2018 contending that;

" I'm told that my application lacked Annual Practicing Licence for the year 2018.

I got my APL in March, 2018 therefore if APL missed in the application form; it was either a technical error or a human error which can be corrected because APL is there and it is attached.

…….

I will be very grateful if my appeal is accepted and action taken accordingly"

The 2nd respondent responded in a letter dated 6th August, 2018;

"*Please refer to your letter dated July 19, 2018 regarding your appeal for not being shortlisted for the above mentioned post.*

The Advertisement referred to the above specifically required applicants to attach copies of their registration Certificates and valid Practising Licenses for health workers who are required by law to register with relevant Professional Councils.

I regret to inform you that you were not shortlisted because you did not attach a copy of a valid Practising Licence on your application as required.

…….
Benon Twineobusigye
For Secretary
Health Service Commission *"*

The applicant is aggrieved by the above decision taken without hearing him out before the said decision was made.

The respondent did not respond to this contention specifically and it is indeed true that there was never any such hearing conducted or that they never found it necessary to hear the applicant on his appeal.

The applicant contends that there was serious impropriety in procedure and there was non-observance of the rules of natural justice.

This position was restated in ***Council of Civil Service Union v. Minister for the Civil Service 1985 AC 374*** where court held that it's a fundamental principle of natural justice that a decision which affects the interests of any individual should not be taken until that individual has been given an opportunity to state his or her case and to rebut any allegations made against him or her.

In the case of ***Twinomuhangi vs Kabale District and others [2006] HCB130*** Court held that;

> "*Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the rules of natural justice or to act with procedural fairness towards one affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision*."

This court is satisfied that the applicant was not accorded a hearing and this violated his rights enshrined in the Constitution specifically Article 28 & 42.

In the case of ***Commissioner of Land v Kunste Hotel Ltd [1995-1998] 1 EA (CAK)*** ,Court noted that;

"Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he is being subjected."

There is no known procedure by the applicant through which the decision was taken and the same could have guided court whether it was indeed fair or the regulatory framework of handling the appeal process. Public bodies may have their own internal mechanisms of handling matters without necessarily following the fair hearing as envisaged in courts. In the case of ***Kenya Revenue Authority vs Menginya Salim Murgani Civil Appeal No. 108 of 2009***. The Court of Appeal delivered itself as follows;

> "*There is ample authority that the decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed*".

The respondents have not set out any special circumstances that would absolve them from treating the applicant fairly by according him a hearing on his appeal especially where it required proof of attachment of the Annual Practising License.

The applicant was not accorded a fair hearing or rules of natural justice where not followed when they made a decision.

Whether the Board G was properly constituted and had competence to interview the Applicant?

The applicant's counsel submitted that the Applicant herein was subjected to be interviewed by the purported Board G that was not properly constituted and therefore had no competence at all to interview the Applicant thereby constituting an illegality as well causing an injustice to the Applicant.

The said Board G did not have the required competence to interview the Applicant. For, it lacked the professional competence to conduct interviews for a candidate for

the post of Medical Officer Special Grade (Family Medicine) as is evidenced by annexure ''C''. Both Dr.Apollo Karugaba and Dr. Mukisa Robert have got no qualifications in Family Medicine. Dr. Mukisa Robert is a Consultant in'' Internal Medicine'' but not in **''Family Medicine''**. Therefore, there was no way they could conduct and produce acceptable results out of what they had no professional capability to do so.

This issue is baseless and devoid of any merit for the simple reason bodies established to perform a specific task cannot be questioned in the composition unless there is statutory guidance given in the composition of such a body.

At least the law does not state that the appointments committee or the interviewing committee must only have persons of the same field or qualifications of the jobs available for interview.

The argument advanced by the applicant that there should have been persons of the same qualifications like himself or somebody who has worked at Butabika is totally misplaced and very erroneous.

The 2nd respondent is competent enough to select a competent body to interview the candidates even if they may have lower qualifications than the applicant. The competency of the body cannot be subject to judicial review save for situations of bias/conflict of interest or taking of an irrational decision.

In the case of ***Kenya Revenue Authority vs Menginya Salim Murgani Civil Appeal No. 108 of 2009***. The Court of Appeal delivered itself as follows;

"*There is ample authority that the decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed*".

Therefore issues of composition, grading, order of appearance and types of questions during interviews are better managed by the decision making body.

This issue is resolved in the affirmative.

Whether the applicant is entitled to the remedies sought in the application.

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas *certiorari* was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558, R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652***

The primary purpose of *certiorari* is to quash an ultra-vires decision. By quashing the decision certiorari confirms that the decision is a nullity and is to be deprived of all effect. See ***Cocks vs Thanet District council [1983] 2 AC 286***

In in simple terms, *certiorari* is the means of controlling unlawful exercises of power by setting aside decisions reached in excess or abuse of power. See ***John Jet Tumwebaze vs Makerere University Council and Another HCMC No. 353 of 2005***

The effect of *certiorari* is to make it clear that the statutory or other public law powers have been exercised unlawfully, and consequently, to deprive the public body's act of any legal basis.

The further effect of granting an order of *certiorari* is to establish that a decision is ultra vires, and set the decision aside. The decision is retrospectively invalidated and deprived of legal effect since its inception.

The applicant has prayed for the quashing to the decision of the respondent dated 6th August 2018 since it was made in breach of rules of fairness.

The applicant has satisfied the court that the decision of the respondent was made without according the applicant a hearing. The said decision/order passed by the respondent made and contained in the letter dated the 6th August 2018 is hereby quashed.

The applicant is awarded costs of this application.

I so Order.

SSEKAANA MUSA
JUDGE
28th/06/2019