

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANEOUS CAUSE NO.02 OF 2019

1. WANZUSI ROBERT FULTON MATUKHU
2. NANDAWULA SHAMIM----- APPLICANTS

VERSUS

KAMPALA CAPITAL CITY AUTHORITY----- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application under Article 42, and Section 36 of the Judicature Act as amended, Rules 3(1)(a), 5 & 6 of the Judicature (Judicial Review) Rules, 2009 for the following reliefs;

1. Declaration that;
 - a. The applicants are validly elected as male and female Councillors representing Workers at Kampala capital City Authority for Kampala Electoral Area.
 - b. The Respondent's decision of refusing to swear the Applicants as Councillors representing Workers at Kampala Capital City Authority for Kampala Electoral Area is null and void for being *ultra vires* and void *ab initio*
 - c. The applicants are entitled to salaries, allowances and all benefits accrued as Councillors at Kampala Capital City Authority from the 17th Day of July, 2018 the date the applicants' ought to have been sworn in as Councillors.
2. Orders of certiorari quashing the respondent's decision or refusing to swear in the applicants as Male and Female Councillors representing the Workers at Kampala capital City Authority for Kampala Area for being null and void *ab initio*.
3. An Order of Mandamus compelling the respondent to swear in the applicants as Male and Female Councillors representing the Workers at Kampala Capital City Authority (KCCA) for Kampala Electoral Area forthwith.

4. An Order that the applicants be paid all their respective emoluments and all benefits accrued as Councillors at Kampala capital City Authority from the 17th day of July, 2018 the date the applicants ought to have been sworn in by the respondent.
5. An Order for general damages against the respondents.
6. Costs for the Application be granted to the Applicants.

The grounds in support of this application were stated very briefly in the Notice of Motion and in the affidavits in support of the applicant by *Wanzusi Robert Fulton Matukhu* and *Nandawula Shamim* but generally and briefly state that;

- 1) The applicants were validly elected as male and female councillors, representing Workers at Kampala Capital City Authority for Kampala Electoral Area under section 10 of the Local Governments Act.
- 2) The results of the elections of Councillors representing Workers at Kampala Capital City Authority were duly gazetted in the Uganda gazette by the Electoral Commission.
- 3) The Respondent made a decision of refusing to swear in the applicants as Councillors representing the Workers at Kampala Capital City Authority which is irrational and unreasonable, thus null and void.
- 4) The applicants have made several oral and written demands to sworn in as Councillors but the respondent's servants and agents have stubbornly refused to have then sworn in and or carry on this statutory duty.
- 5) That the workers right to representation in the Council meeting of Kampala capital City Authority have been violated and infringed upon.
- 6) That the applicants as new Councillors have not earned any salary or allowances that accrue to the said office due to the respondents refusal to be sworn in and they are seeking general damages for such inconvenience.

The respondent opposed this application and filed an affidavit in reply through Engineer Kitaka Andrew the Ag Executive Director Kampala Capital City Authority as follows;

1. The Electoral Commission conducted elections for Councillors representing Workers in the different district councils under the Local Government Act and the Electoral Commission accordingly notified the Clerk to Council and the Office of the Executive Director Kampala capital City Authority.

2. That the Executive Director Kampala Capital City Authority on the 21st day of September, 2018 requested the Lord Mayor Kampala Capital City Authority to include the Administration of Oath for the said applicants on the Order Paper of the Authority Meeting scheduled to take place on the 2nd October, 2018 to enable them perform their duties as Councillors.
3. That however, on the said 2nd day of October, 2018 the meeting did not take place as scheduled but on 10th October 2018, the meeting took place but still the Administration of Oath for the applicants was not included on the Order Paper for the Authority meeting.
4. That following the filing of the present suit by the Applicants, the Ag Executive Director Kampala Capital City Authority on the 14th of February, 2019 implored the Lord Mayor Kampala capital City Authority to have the swearing in of the said applicants on the Order Paper for the next Authority meeting.
5. That the Order paper for the Authority meeting of Wednesday, 20th and 21st March, 2019 did not have the swearing in of the applicants.
6. That there is no decision of the respondent refusing to swear the Applicants as Councillors representing workers for Kampala Electoral Area as all efforts to have them sworn in have been fruitless.

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.

Three issues were framed by the applicants for court's determination;

1. *Whether the respondent's decision and action can be challenged by way of judicial review?*
2. *Whether the respondent acted legally, rationally and properly in refusing to swear the Applicants in as Male and Female Councillors representing Workers at Kampala Capital City Authority?*
3. *What remedies are available to the applicants?*

The applicant was represented by *Mr Tumuhimbise Alex* whereas the respondent was represented by *Mr Byaruhanga Dennis*.

The main issue for consideration rotates around the 2nd issue raised and it is the only issue the court shall determine.

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 may 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 is trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The respondent as a public body is subject to judicial review to test the legality of its decisions if they affect the public. 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.”

Whether the respondent acted legally, rationally and properly in refusing to swear the Applicants in as Male and Female Councillors representing Workers at Kampala Capital City Authority?

The applicants' submissions are premised on the fact that there was a decision made by the respondent to refuse to swear in the applicants in their respective positions as Councillors for Workers.

The applicants' counsel contends that the Executive Director of the respondent has glaringly admitted that the respondent has refused to swear the applicants as councillors.

However in his affidavit in reply paragraph 7 states that there is no decision of the respondent refusing to swear in the applicants as councillors representing workers for Kampala Electoral Area as all its efforts to have them sworn in have been fruitless.

It is the submission of the applicants counsel that the respondent acted ultra vires and or illegally when it refused to swear in the applicants as councillors representing workers.

In addition, the respondent acted illegally when it made a decision not to swear in the applicants as councillors representing Workers at Kampala Capital City Authority for Kampala Electoral Area without according them the right to be heard.

The decision of the respondent in refusing to swear in the applicants as councillors representing Workers at Kampala Capital City Authority for Kampala Electoral Area is unreasonable in the *Wednesbury's* sense.

The applicants counsel contends that when the electoral commission communicated to the Respondent that the respondents had been duly elected as councillors they were duty bound to have them sworn in and let them assume office.

The applicants were elected as Councillors representing workers under the Local Governments Act and the Labour Union (Election of Worker' Representatives to District Councils) Regulations, 2006 and their results were duly published in the Uganda Gazette.

The Electoral Commission accordingly notified the Clerk to Council and the Office of the Executive Director, KCCA. The applicants requested to be sworn in on several occasions but nothing was done.

The applicants have never received any explanation from the respondents why they have not been sworn in just like all other Districts in Uganda.

The respondent's counsel submitted that the application was brought out of time and therefore it is incompetent since no leave was granted by court.

In addition, they have also argued that there is no such decision made by the respondent to the effect that the applicants should not be sworn in.

They further contend that the respondent has always expressed willingness to have the applicants sworn in as Councillors representing workers for the Kampala Electoral Area but that the Kampala Capital City Authority Council chaired by the lord Mayor has todate not included the administration of oath for the applicants despite the respondent's Executive Director imploring the Lord Mayor to include the administration of Oath on the Order Paper for the Authority.

Determination

It can be deduced from the facts and pleadings that the respondent is at pains to defend a matter where they have made every effort to ensure that the applicants are sworn in as Councillors for Kampala Electoral Area but the Lord Mayor who chairs the Authority and in charge of issuing the Order Paper has refused to include the Administration of Oath to the applicants since July 2018.

The applicants counsel argued that the respondent made a decision to refuse to swear in the applicants as councillors for Workers in Kampala area but I do not agree with his submission that there is a decision of that nature.

What the case is as can be deduced from the facts is that the office of the Lord Mayor or the Lord Mayor has refused to carry out a statutory duty of swearing in the applicants and has not advanced any such reasons to the Executive Director for his refusal.

Judicial review may be used to compel the performance of public duties by public authorities or decision makers. The KCCA Act imposed a duty to perform such an act of swearing in councillors. Failure to act is automatically unlawful and can be remedied by judicial review, by grant of an order of mandamus.

It can be seen from the different communications from the office of the Executive Director indeed imploring the Lord Mayor to include the administration of oath of the applicants but the same have deliberately been ignored.

The FIRST Letter is reproduced as hereunder;

OFFICE OF EXECUTIVE DIRECTOR

REF:ED/KCCA/007/01

21st September, 2018

The Lord Mayor,
Kampala capital City Authority
KAMPALA

ADMINISTRATION OF OATH FOR COUNCILORS REPRESENTING WORKERS OF KCCA UNDER THE KAMPALA ELECTORAL AREA

Reference is made to the above subject and a letter dated 27th June 2018, Ref; EC/KLA/FOD/18 regarding the elected Councillors representing workers of KCCA for Kampala Electoral Area.

The Electoral Commission conducted elections for Councillors representing workers of the different District Councils under the Local Government Act CAP 243 as amended, The Labour Unions Act No. 7 of 2006 and the Labour Unions (Election of Worker' Representatives to District Councils) Regulations 2016.

Accordingly, *Mr Wanzusi Robert Fulton Makuthu* and *Ms Nandawula Shamim* were elected as the Councillors representing workers of KCCA.

This is to request you to include the Administration of Oath for the said Councilors on the Order Paper for the Authority meeting scheduled to take place on 2nd October 2018, to enable them perform their duties.

Attached hereto is a copy of the letter from the District Registrar

Samuel Sserunkuuma

AG. EXECUTIVE DIRECTOR

The second letter is reproduced in summary.

OFFICE OF THE EXECUTIVE DIRECTOR

REF:ED/KCCA/007/01

14th February, 2019

The Lord Mayor
Kampala Capital City Authority
KAMPALA

**RE: REPRESENTATION OF OLDER PERSONS IN THE AUTHORITY AND THE
SWEARING-IN OF COUNCILLORS REPRESENTING WORKERS IN THE
AUTHORITY; WANZUSI ROBERT FULTON MATUKHU & ANOTHER V
KCCA MISC CAUSE 02 OF 2019**

Reference is made to the above subject.

Following the election of representatives of the older Persons and the Workers to the Authority, there has been some concerns raised by the said representatives with regard to matters pertaining to their status and they are as follows;

- a) For the representatives of the Older Persons, they have been denied opportunity to speak during Authority proceedings ever since they were sworn in; and
- b) For the Workers' representatives, since they were elected in June 2018, they have been denied opportunity to take oaths and assume duties.

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On the question of the Workers' representatives, they were elected in June 2018 and their results were published on the 17th July 2018 in the Uganda Gazette. The Electoral Commission notified the clerk to Council and my Office. The Lawyers representing the said representatives also wrote to our offices including yours, requesting that the said representatives be sworn in. Unfortunately, this has not been done.

The said Workers' representatives filed a suit in the High Court vide Miscellaneous Cause 02 of 2019 seeking the following;

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.....

A copy of the said application is attached and marked "B"

We are of the considered opinion that the Local Governments (Amendment), 2015 applies to KCCA and so the Workers' representatives ought to be sworn in. Failure to do so would be a contravention of Article 38(1) of the Constitution already highlighted above. Such omission would be discriminatory and inconsistent with Article 21 of the Constitution which provides for equality and freedom from discrimination and this would expose the institution to unnecessary litigation and costs. This is a matter the parties can settle out of court and avert nugatory expenditure.

We do implore you to have the swearing in of the said Workers' representatives on the Order Paper for the next Authority Meeting.

Eng Andrew M. Kitaka
AG EXECUTIVE DIRECTOR

The Executive Director has done whatever is within his mandate to ensure that the applicants are sworn in as councillors for workers in Kampala Electoral area.

Section 19 of the Kampala Capital City Authority provides for the functions of the Executive Director to include;

g) advise the Authority on technical, administrative and legal matters pertaining to the management of the Authority.

It is clear that upon rendering the advice on the different occasions, it was then the duty of the Lord Mayor to ensure that the workers councillors are sworn in.

The functions of the Lord Mayor as set under the Kampala capital City Authority under Section 11 of the Act. These include the swearing in of the representatives of the Workers under section 11(b and c) of the Kampala Capital City Authority Act.

The refusal to swear in the applicants is an act of illegality that is compounded by abuse of authority vested by the Kampala Capital City Authority Act.

In the area of administrative exercise of power, the courts have tried to fly high the flag of Rule of Law which aims at the progressive diminution of arbitrariness in the exercise of public power.

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely—that is to say, it can validly be used only in the right and proper way which Parliament conferring it is presumed to have intended.

The law requires that statutory power is exercised reasonably, in good faith and on correct grounds. The courts assume that Parliament cannot have intended to authorise unreasonable action, which is therefore ultra-vires and void.

There is expanding scrutiny by the courts through judicial review that political victimisation by persons in authority is wrongful conduct for which a remedy must be given by the court.

Parliament or the authority granting power cannot be supposed to have intended that powers granted by it be open to any kind of abuse. It is to be presumed that the body upon which power is bestowed will act judiciously in effecting the intent and scheme of the enabling law.

This court is alive to the fact that the KCCA Act does not set out any specific timeline within which the applicants were to be sworn in as councillors but failure to act within a reasonable time is equally an abuse of authority and the courts ought to compel such a person to take immediate action.

In the present case, the applicants were elected in June 2018 and their names were put in the gazette on 17th July 2018, it is now coming to 12 months/one year. The continued refusal to swear in the applicants without any reason advanced to them or Executive Director of KCCA by the Lord Mayor is an act that is illegal and an abuse of authority which is contrary to the Kampala Capital City Authority Act.

In the case of ***R v Commission for Racial Equality ex p Hillingdon LBC [1982] QB 276*** Griffiths LJ has said;

“Now it goes without saying that Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or a power to abuse its powers. When the court says it will intervene if the particular body acted in bad faith it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament. Of course it is often a difficult matter to determine the precise extent of the power given by the statute particularly where it is a discretionary power and it is with this consideration that the courts have been much occupied in the many decisions that have developed our administrative law since the last war.”

It can therefore be deduced from the above decision that where Parliament confers power upon some public official or other authority to be used in discretion, it is obvious that the discretion ought to be that of the designated authority and not the court. Whether the discretion is exercised prudently or imprudently, the authority’s word is to be law and the remedy is to be political only.

On the other hand, Parliament cannot be supposed to have intended that the power should be open to serious abuse. It must have assumed that the designated authority would act properly and responsibly, with a view to doing what was best in the public interest and most consistent with the policy of the statute. It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion or power.

In the case of ***Sharp v Wakefield [1891] AC 173*** court observed that;

“ ‘discretion’ means when it is said that something is to be done within the discretion of the authorities that something is to be done according the rules of reason and justice, not according to private opinion: Rookes case; according to the law and humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.”

The refusal to swear in the applicants as councillors cannot be a proper exercise of power or authority vested under the KCCA Act but rather an improper exercise of power for improper motives or bad faith and or is not provided for under the law and is indeed *ultra vires* and an exercise in excess of his jurisdiction.

The refusal or failure to swear in the applicants by the Authority through the concerned public officials-Lord Mayor is illegal, unlawful and contrary to the Kampala Capital City Authority Act.

What remedies are available to the applicants?

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***

Mandamus

The applicants have satisfied the court that the refusal or failure to have them sworn in is *ultra vires* and illegal.

The applicant has also sought an order of mandamus to compel the respondent to have them sworn in as Councillors for Workers for Kampala Electoral Area.

In the case of ***Philadelphia Trade & Industry Limited vs Kampala Capital City Authority***- It was held that Mandamus is issued to compel performance of a statutory duty. It is used to compel public officers having responsibilities in public offices and public duties imposed upon them by the Act of Parliament.

An applicant for an Order of Mandamus is required to establish the following:

- a) A clear legal right and corresponding duty on the Respondent
- b) That some specific act or thing, which the law requires that particular officer to do, has been omitted to be done by him;
- c) Lack of an alternative, or
- d) Whether an alternative exists but is inconvenient, less beneficial or totally ineffective.

See Hon Justice Geoffrey Kiryabwire & Others vs Attorney General High Court Miscellaneous Application No. 783 of 2016

The applicant has satisfied the requirements for the issuance of an order of Mandamus. The respondent through the Office or public official concerned is directed to swear in the applicants as Councillors representing the Workers in Kampala Electoral Area.

The respondent is ordered to ensure that the applicants are sworn in within 30 days from the date of this ruling. Any further delay in the swearing the applicant shall attract a punitive fine of 150,000/= per day to each applicant until is sworn in.

The fine must be paid by the public official/servant who fails to execute their statutory duty.

The applicants have suffered since July 2018 and as such they are entitled to their full emoluments; salaries, allowances and other monetary benefits that all councillors got during the period they were supposed to have been

sworn in.

The applicants are each awarded a sum of 10,000,000/= as damages.

The applicants are awarded costs of this application.

I so Order.

SSEKAANA MUSA
JUDGE
14th/06/2019