

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 207 OF 2017**

RONALD SEKAGYA ::::::::::::::::::::::::::::::: APPLICANT

VERSUS

ATTORNEY GENERAL ::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

a) Introduction

1. This is the ruling in the judicial review application brought under sections 33 and 36 of the Judicature Act and Rules 3 and 6 of the Judicature (Judicial Review) Rules, 2009 seeking:
 - i. An order of certiorari quashing the decision of the Public Service Commission recommending a reprimand of the Applicant by the President of Uganda.
 - ii. An order of certiorari quashing the reprimand issued to the Applicant on 19th April 2017.
 - iii. An order of certiorari quashing the decision and actions of the Secretary to the Judicial Service Commission to refer the Applicant to the disciplinary process and procedures of the Public Service Commission.
 - iv. Costs of this application.

2. Mr. Frederick Sempebwa of M/s. Katende, Ssempebwa & Co. Advocates represented the Applicant and the Respondent was represented by Ms. Jackline Amusugut from the Attorney General's Chambers.
3. The application was supported by the affidavit of the Applicant. The grounds of the application briefly were that on 19th April 2017, in disregard of the law and various statutory instruments regulating the procedure for disciplining public officers, the Secretary to the Judicial Service Commission illegally and unjustly reprimanded the Applicant. Further that without according the Applicant a fair hearing, an administrative decision that was prejudicial to him and wholly unreasonable was made. The actions of the Public Service Commission recommending that the Applicant's reprimand at the recommendation of the Secretary to the Judiciary were unreasonable as the Applicant had been cleared of causing loss and/or any wrongdoing by both the Auditor General and the Director of Public Prosecutions. The Applicant also averred that the reprimand issued was in total disregard of principles of natural justice.
4. The application was opposed by the Respondent through the affidavit in reply of Mr. Kagole E. Kivumbi the former Secretary and Accounting Officer at the Judicial Service Commission at the material time (hereinafter referred to as accounting officer). He averred that the Applicant deposited Ug. Shs. 3,317,900/= (Uganda Shillings Three Million Three Hundred Seventeen Thousand Nine Hundred only) to M/s. Vivo Energy (U) Ltd without his authorization as accounting officer and caused the company to credit a fuel card No. 6005. That in June 2014, he advised M/s. Vivo about the irregularity of having received such money. He also deponed that on 7th July 2014, the Applicant submitted all pending accountabilities for the financial year 2013/2014 including a receipt of Ug. Shs. 3,317,900/= paid to M/s. Vivo Energy (U) Ltd. That on 9th July 2014, he advised the Applicant to refund the money he had paid to M/s. Vivo and as is the practice at Judicial Service Commission, the Applicant had up to 30th September to have all the money unaccounted for refunded.

5. The accounting officer also deponed that on 1st October 2015, he asked the Applicant to show cause why among other things disciplinary proceedings should not be commenced against him. That he received a response from the Applicant on 2nd October 2015 delivered by Mr. Isa Goloba a courier clerk of M/s. Monitor Publications Ltd. That on 5th October 2015, he availed the Applicant with more facts and details to enable him focus on the matter of depositing or utilizing Ug. Shs. 3,317,900/= without authority of the Accounting Officer to which the Applicant responded on 7th October 2015. Further that on 12th October 2015 he informed the Applicant of the intention to present the matter to Public Service Commission for appropriate action and the Applicant responded on 16th October 2015. On 19th October 2015, the accounting officer offered the Applicant an opportunity to acknowledge the anomaly, irregularity and impropriety of his action to which the Applicant responded on 20th October 2015. He also deponed that the matter was tabled before Public Service Commission on 25th November 2016 and it was decided that the officer be reprimanded. Further that this application be dismissed as the Applicant was at all material times given an opportunity to be heard and he submitted responses on all issues raised.

b) The Law

6. In **HCMC No. 48 of 2014 Fuelex (U) Ltd v. Attorney General & 2 Ors**, it was held that in order to succeed in an application for judicial review the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.
7. In **Stream Aviation Ltd v. The Civil Aviation Authority Misc. Application No. 377 of 2008 (Arising from Misc. Cause No. 175 of 2008)** Justice V. F. Musoke Kibuuka held that the prerogative order of *certiorari* is designed to prevent the excess of or the outright abuse of power by public authorities. The primary object of this prerogative order is to make the machinery of Government operate properly, according to law and in the public interest.

c) Analysis

8. I have read all the pleadings and submissions on file. I also note that for awhile, Ms. Amusugut presented that an amicable settlement was possible, we adjourned severally for the same until she didn't report back. From the record, issues arose out of a reimbursement of Ug. Shs. 3,317,900 (Uganda Shillings Three Million Three Hundred Seventeen Thousand Nine Hundred only) by the Applicant after expenditures in the course of his work. As a result, the accounting officer eventually recommended to the Secretary to the Public Service Commission that the Applicant be severely reprimanded for undermining proper financial management, making false statements/accountability of public funds, contravention of the code of conduct of public officers and insubordination. To understand this case well, the chronology of events is important. I will recast the same below.
9. On 13 February 2014 the Applicant wrote to the accounting officer asking him to authorize the cashier to receive the money from him or otherwise advise him on what do with the money. On 21 February 2014, on his own volition, the Applicant deposited the disputed amount into the account of Vivo Energy. For clarity, Vivo Energy was the service provider that provided fuel to the Judicial Service Commission. It appears the Applicant deposited this money on this account because he allotted it to fuel, which he had not utilized.
10. The accounting officer never responded to the Applicant or in any way advised him on what to do with the money. Instead the accounting officer wrote to Vivo Energy on 6 June 2014 asking it to urgently deposit the said funds on the JSC non tax revenue account as soon as possible, not later than 30 June 2014.
11. Then on 1 October 2015 the accounting officer wrote to the Applicant asking him to show cause why disciplinary proceedings against him shouldn't be commenced for failure to refund the same money into the consolidated fund of Government by 30 September. Although the accounting officer referred to a prior memo dated 9 July 2014, he did not attach it for this Court to have a look. The accounting officer however explained that in it he

advised and guided the Applicant on the issue of expenditure of public funds without prior written authority of the accounting officer. In all events, the 2014 memo could not have directed the Applicant on where to deposit the disputed money since this monuey arose in 2015.

12. On 2 October 2015, the Applicant responded to the accounting officer's 1 October 2015 letter. The Applicant refers to the accounting officer's failure to respond to his letter of 13 February 2014 in which he requested him to authorize the cashier to receive the suit money; the Applicant explained that he gave full accountability of the monies in issue and that the matter was fully closed; he suggests that accounting officer was bringing this issue up to defeat the Applicant's chances of joining the higher bench as a judge of the High Court or Court of Appeal- positions he'd applied for. The Applicant also explained that writing to the accounting officer to authorize the cashier to receive such monies had been the practice and he attached several receipts on which the cashier received such money on previous occasions; the Applicant also took issue with the accounting officer's conduct in bringing the case up from nowhere saying whenever he spoke about evils at the Commission, he was threatened with disciplinary proceedings. He referred in particular to issues of accountability of funds he raised in the senior management meeting of 28 September 2015 and that this disciplinary action was meant to silence him.

13. The accounting officer then wrote to the Applicant again on 5 October 2015 acknowledging receipt of the Applicant's letter of 2 October 2015 and said he was writing for the second time for the applicant to show cause why the accounting officer should not among other actions commence disciplinary proceedings against him over the matter of the expenditure of the suit money without the authority of the accounting officer. The accounting officer gave a detailed recap and concluded asking the Applicant why he should not 1) refer his matter to the Public Service Commission for appropriate disciplinary action for a) insubordination b) undermining proper financial management in JSC, c) contravening the code of conduct for public officers d) making false statements/accountability of public funds and 2) report to the

relevant Government agencies the loss of the suit money which money in alleged collusion with individuals in M/s. Vivo Energy U Ltd, was spent without authority of the Accounting officer Vote 184 Judicial Service Commission.

14. The Applicant responded on 7 October explaining he had already explained in his earlier responses that the internal memo of 13 February 2014 provided accountability for the money and he sought the accounting officer to allow the cashier receive the same. The Applicant explained that when the accounting officer rejected the request to return the money to the cashier he also rejected the accountability. The Applicant again explained that such practice of the cashier being authorized to receive the money was normal practice. He wondered why the accounting officer refused to authorize the cashier to receive the money this time. The Applicant also explained that he was not guided on this matter.
15. Following through on his letter of 5 October 2015, the accounting officer vide a letter dated 8 October 2015 wrote to the Directorate of Criminal Investigations - Police Headquarters, seeking technical assistance in regard to expenditure of the suit money without his authority. In this letter, he simply referred the Applicant's case to police for police to take it up and cause appropriate action if it emerged that offences were committed.
16. On 12 October 2015, the accounting officer wrote to the Applicant again informing him that he intends to initiate disciplinary proceedings against him for misconduct and requested the Applicant for the third time to give reasons why this course of action should not be taken by 26 October 2015.
17. The Applicant responded on 16 October 2015 again giving accountability and reasons why disciplinary action should not be taken against him. On 19 October 2015, the accounting officer wrote to the Applicant again referring to the 16 October reply insisting his actions were under the law. He concluded saying that had the Applicant deposited the suit money in the JSCNTR account, he would not among other actions at this point be seeking the recovery

of taxpayer's money, the suit money. The Applicant replied on 20 October 2015 saying he had already explained in his earlier responses to all the matters the accounting officer raised in this last letter and referred him to the earlier explanations.

18. On 26 October 2015, the accounting officer wrote to the Secretary Public Service Commission reporting the Applicant regarding his misconduct arising from the expenditure of the suit money without his authority. He attached a report with details of the case. At the end, the accounting officer recommends that the Applicant be severely reprimanded for the grounds he lists in his letters of 5 October 2015 and 12 October 2015.
19. On 15 December 2015, the Auditor General wrote to the accounting officer regarding his 26 October 2015 letter to the secretary Public Service Commission and the Applicant's 12 November 2015 request that the Auditor General gives an opinion on the matter of the suit money. In this letter, the Auditor General attaches a final verification report on alleged misconduct of the Applicant in respect of use of fuel funds, the suit money. I have looked at the report.
20. In the report, the Auditor General found that during the course of the financial year 2013/2014, a sum of Ug. Shs. 6,631,200 (Uganda shillings six million six hundred thirty one thousand two hundred only) was advanced to the Applicant's personal account in respect of fuel to undertake official activities. Out of this amount the Applicant utilized Ug. Shs. 3,392,400 (Uganda shillings: three million three hundred ninety two thousand four hundred only) leaving unspent cash balance of Ug. Shs. 3,317,900. A review of available correspondences revealed that on 13th February 2014, the Applicant communicated to the accounting officer about the unspent cash balance and requested for guidance as to where the funds should be deposited since the funds had remained unutilized. This communication was not responded to by the accounting officer. With no response, the Applicant deposited the unutilized funds to the JSC fuel account with Vivo Energy (U) Ltd on 20 February 2014 and accordingly a receipt was issued on 21 February 2014. The audit confirmed that the funds

were reflected on JSC-EPA (DEPUTY REG) fuel consumption statement on 25 February 2014. The accounting officer was subsequently informed about the deposit on 4th March 2014. The funds were later utilized and the following were further observed; (a) depositing of unutilized funds on the JSC-EPA (DEPUTY REG) fuel JSC account with M/s. Vivo Energy and later spending the fuel appeared irregular since the subsequent spending was not on activities for which the funds had earlier on been released; (b) the accounting officer did not provide guidance to the Applicant on how to handle the unspent balance despite the Applicant seeking this guidance in writing; (c) a review of the documentation by this office relating to the utilization of funds revealed that the funds were accounted for. Funds were spent on activities of the Judicial Service Commission and activity reports availed.

21. The Auditor General then concludes that (a) the Applicant spent the unutilized funds on Commission activities; (b) the deposit of the funds on the fuel account was not authorized by the accounting officer prior to utilization; (c) the accounting officer did not give adequate guidance to the Applicant on the appropriate action with regard to unspent balance as the letter requesting for guidance was not responded to and (d) the Auditor General's office concludes that there was no loss in this transaction relating to the unspent balance.
22. On 1 April 2016, the Director Criminal Investigations replied the accounting officer explaining that the case was investigated, file submitted to the DPP for perusal and advice. The file was returned from the DPP with instructions to close and put away the case file on grounds of insufficient evidence based on the Auditor General's findings that there was no loss in this transaction. Police accordingly closed the file and put it away.
23. On 14 September 2016 the Secretary Public Service Commission asked the accounting officer to address his mind to the Auditor General's verification report of November 2015 and sent to him on 15 December 2015 and the response from Directorate of Criminal Investigations dated 1 April 2016. On 27 September 2016 the accounting officer responded

insisting on his recommendations of a severe reprimand and disregarding the two communications from the Auditor General and the Directorate of Criminal Investigations.

24. Finally, the accounting officer (who by this time was changed to Rose Nassali) wrote to the Applicant on 19 April 2017 informing him that the president on advice of Public Service Commission directed that the Applicant be reprimanded because of the expenditure of the suit money without following the right procedures of accountability or seeking authorization of the accounting officer for the payment of the said amounts to Vivo Energy Uganda Ltd.
25. Although we do not have the directive from the president or communication from the Secretary of Public Service Commission, the accounting officer on 19 April 2017 wrote to the Applicant informing him that the President on the advice of Public Service Commission under PSC Advice 3/2017 directed that the Applicant be reprimanded for the expenditure of the suit amount without following the right procedures of accountability or seeking authorization of the accounting officer for payment of the said amount to Vivo Energy Uganda Ltd. It would have been helpful for the Court to see the communications in PSC Advice 3/2017 from the President and the Public Service Commission to understand the exact terms of this reprimand.
26. On administrative authority, Peter Kaluma has opined that a fundamental tenet of administrative law is the requirement that power should be exercised in accordance with the rules of natural justice. The rules of natural justice have gained so much prominence in application and scope that they are today presumed to apply to every decision and every case where the rights of an individual stand to be affected.¹ The right to be heard is embodied in the Latin phrase '*audi alteram partem*' which literally means 'hear the other side.' The right to be heard imposes a peremptory duty to every person, body or tribunal vested with power to resolve a dispute to fairly hear both parties and consider both sides of the case before making a decision on the matter; no man should be condemned unheard. The body or tribunal

¹ Peter Kaluma "Judicial Review Law Procedure and Practice" 2nd Edition, p. 175

making a decision should not base its decision only on hearing one side; it must hear both sides and not hear one side in the absence of the other. In so doing, it should grant equal opportunity to both parties to present their cases or divergent viewpoints and should hold the scales fairly and evenly between them.²

27. The rule against bias is embodied in the Latin phrase *nemo iudex in re causa sua* which literally means ‘no man shall be a judge in his own cause.’ The rule imposes the requirement of impartiality in decision making. It is not only a principle of good governance but also an immutable rule of law ideal which cannot be curtailed even by legislation. It is a matter of prime importance that judges, tribunals and all decision making bodies should be free from bias while discharging their duties.³ Where there is reason to suspect bias, it is no defence to argue that even a totally disinterested tribunal could have come to the same decision. This is because the rule against bias is a requirement of procedural protection as opposed to matters of substance or merit.⁴ Decided cases draw a distinction between actual bias and apparent bias as tests ordinarily applied to express the culpability of decision making bodies against the requirement of impartiality. The phrase ‘actual bias’ is applied to situations where it is proved that a judge or decision-making body had been influenced by partiality or prejudice in reaching a decision or where it is demonstrated that a judge is definitely prejudiced in favour of or against a party. ‘Apparent bias’ on the other hand describes the situation where circumstances exist which give rise to reasonable apprehension or suspicion that the judge may have been biased.⁵

28. From the above background, it was irregular for the accounting officer to disregard the Applicant’s accountability for the suit money as part of his accountability for money he had received for official work, in the communication of 13 February 2014. If I consider the Applicant’s receipts tendered as annexures B1, B2, B3, B4, B5 and B6 as proof that the

² Ibid at p. 176-177

³ Ibid at p. 201

⁴ Ibid at p. 202

⁵ Ibid at p. 211

practice in cases of unspent money was for the accounting officer to authorize the cashier to receive the same from employees like the Applicant, then it is not satisfactorily explained why in this case the accounting officer refused to allow the cashier to receive the suit money which was unspent from the Applicant. It was equally irregular for the accounting officer once informed of the unspent suit money by the Applicant, not to give him clear and timely direction on where to deposit the same especially if he did not want him to return it to the cashier which the Applicant says was the normal practice.

29. By not timely guiding him on where to return the suit money, the accounting officer acted irregularly and set in motion other irregular actions. So if one applies the “but for” test, it is clear that if the accounting officer had clearly guided the Applicant on where to deposit the suit money, then the Applicant would not have deposited the same on the fuel account the JSC held with Vivo Energy.
30. According to the Auditor General’s report the Applicant deposited the money on the JSC fuel account held at Vivo Energy on 20 February 2014. The Applicant said he informed the accounting officer of this deposit. It was therefore disingenuous, irregular and unfair of the accounting officer to keep insisting on accountability for the suit money from the Applicant when he was well aware and had advised Vivo Energy to urgently deposit the same to the JSC non-tax revenue account as soon as possible, not later than 30 June 2014 and this was already done. By advising this transfer by Vivo Energy, the accounting officer was fully aware the Applicant had deposited the suit money with Vivo Energy as early as 6 June 2014 when he wrote to them. So I wonder why then did he keep demanding the same from the Applicant even in 2015 and 2016.
31. To the extent, the accounting officer did not consider the accountability given by the Applicant, he irregularly recommended his serious reprimand to the Public Service. In turn even the Public Service acted irregularly and illegally by not conducting its own independent

investigations of the matter before adopting the accounting officer's serious reprimand for presentation to the President.

32. The accounting officer was the complainant to Public Service Commission. By making the recommendation for a serious reprimand which was then just adopted, he sat in his own cause, to the prejudice of the Applicant. He acted with bias and blatant malice to the detriment of the Applicant. This was irregular and unfair thus procedurally improper.
33. Moreover, since the decision concerned the Applicant as the officer complained about, the Public Service Commission should have summoned the Applicant to hear his side of the story before adopting the accounting officer's recommendation. By this failure, the Public Service Commission condemned the Applicant unheard in contravention of a cardinal principle of natural justice.
34. Public Service Commission also acted unfairly and with bias when it simply adopted the accounting officer's recommendation of a serious reprimand for recommendation to the President. Had the Public Service Commission heard from the Applicant, it would have had opportunity to correct the procedural irregularity and unfairness of the accounting officer. By so not listening to the Applicant, Public Service Commission unfairly and illegally further entrenched the accounting officer's procedural wrong doing.
35. The accounting officer also irregularly disregarded any advice from the Auditor General and Directorate of Criminal Investigations that vindicated the Applicant once he received it, or even after the Public Service Commission drew his attention to it. He appears to have irrationally had a mindset to get the Applicant reprimanded at all costs. This was unfair and irregular.
36. Based on all the above, the Public Service Commission recommendation to seriously reprimand the Applicant which was adopted by the President was a result of a procedurally

improper and unfair process which was prejudicial to the Applicant. This rendered it illegal, procedurally improper and irrational *ab initio*. As a result, the judicial review application is allowed in the following terms:

- i. The accounting officer's action/decision initiating disciplinary action against the Applicant and at the same time recommending a serious reprimand of the Applicant is quashed for being irregular, unfair and illegal.
- ii. The Public Service Commission recommendation for a serious reprimand of the Applicant is quashed for being based on an unfair and irregular recommendation of the accounting officer.
- iii. The reprimand of the Applicant allegedly issued on 19 April 2017 is quashed for being based on unfair, illegal and irregular recommendations from Public Service Commission and the accounting officer.

37. Costs follow suit. The Applicant is awarded costs to be paid by the Public Service Commission..

I so order

LYDIA MUGAMBE
JUDGE
18 JANUARY 2019.

