

The term of engagement could be renewed upon consent of both parties. On the 19th April 2017, the applicant applied to the 2nd respondent to have her contract renewed. The 3rd respondent after several follow ups by the applicant on the 28th of July 2017 wrote to the then Ag Executive Director directing him to write to the applicant and communicate his decision not to renew her contract.

The 3rd respondent at the time was on leave. The applicant made an appeal concerning the procedural irregularities in reaching the decision not renew her contract. The 2nd respondent after several reminders from the applicant responded to the appeal after a year in which it upheld the decision of the 3rd defendant.

The 1st and 2nd respondents in their reply to the application stated that the reasons for their decision were premised on the special audit report of the Auditor General which raises issues of poor performance of the applicant as the Head of Procurement and Disposal Unit and prayed the application be dismissed.

The 3rd respondent raised two preliminary objections to the suit stating that the suit is barred by law to be brought against the 3rd respondent in his personal capacity and that the application is incompetent as the applicant's cause against the 3rd respondent does not fall within the ambit of Judicial review and should be dismissed with costs.

The applicant was represented by *Mr. Isaac Kugonza and Mr. Kayanja Smith* whereas the 1st and 2nd respondents were represented by *Mr. Richard Adrole and Mr. Allan Tumwesigye* for the 3rd respondent.

The parties proposed the following issues for determination by this court.

- 1. Whether the application is properly before this court.*
- 2. Whether the decision of the respondents not to renew the applicant's contract was marred by procedural irregularities.*
- 3. What remedies are available to the parties?*

The parties were ordered to file written submissions; all parties accordingly filed the same. All parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the application is properly before this court.

Counsel for the 3rd respondent submitted that the *Electricity Establishment and Management of the Rural Electrification Fund) Instrument S.I No. 75 of 2001*, Regulation 15 (1) provides that a member of the Board is not personally liable for an act done by him or her in good faith and without negligence for purposes of carrying out into effect the provisions of those regulations. The said Regulations protect an employee of the agency or any other person acting on behalf of the Board from personal liability.

It was submitted that the Judicial (Judicial Review) (Amendment) Rules S.I 32 of 2019 widened the definition of a public body under Rule 3 not to include a natural person. In the instant case, the application was brought against the 3rd respondent in his personal capacity and also in his capacity as an employee of the 1st respondent who doubles as a secretary of the 2nd respondent and is thus barred under the Regulations as the 3rd respondent's actions were done in good faith.

The 3rd respondent further submitted that the application does not fall within the ambit of judicial review under Rule 3 of the Judicature (Judicial Reviews) as it is available for purposes of looking at the merits of an expired contract on whether it can be extended or not. It was prayed that the application be dismissed with costs since it was a contractual matter arising out of employment law where the applicant is alleging breach of contract but disguising it as a complaint about not being heard during the performance review or annual appraisals.

The applicant in submissions in rejoinder relied on Article 42 of 1995 Constitution that provides for a right to just and fair treatment in

administrative decisions. The said provision gives an opportunity to a person who has been unfairly treated by an administrative officer taking an administrative decision to challenge the public officer's decision.

Judicial review can be properly brought against a public official or body that took a decision which is complained of as having been improperly reached procedurally. It was noted that the rule of law does not treat with exclusion individuals or public entities as long as the matter concerns rule of law (see: **Dunsmuir v New Brunswick [2008] 1 SCR 190**). That it is lawful and proper to sue the decision making body or official/person as it is the only way the court can exercise its supervisory powers to check such an individual (see: **Misc. Cause No. 001 of 2019, Grace Namulondo & 3 Ors v Jone Johns Serwanga Salongo & 2 Ors**).

It was therefore submitted that the 3rd respondent was sued as an official that took the decision which the applicant contends was illegal.

On whether the application was properly before this court, the applicant in rejoinder submitted that it was as it raises procedural irregularities in the manner in which the decision of the 3rd respondent was arrived at as well as the decision of the 2nd respondent.

Determination

The principles governing Judicial Review in Uganda 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 trite law that he/she 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.

In the instant case, the applicant brought an application for judicial review against the 1st and 2nd respondents as the public bodies and the 3rd respondent as the official who was acting in capacity for the 1st and 2nd respondents and thus made the said decision on behalf of the same.

The applicant is aggrieved by the said decision and thus sought for court's indulgence against the 3rd respondent in his acting capacity for the 1st and 2nd respondents. As submitted by the applicant, judicial review is concerned with the court's supervisory jurisdiction to check and control the exercise of power by those in public offices or person/ bodies exercising quasi-judicial functions by granting prerogative orders as the case may fall (see: **Grace Namulondo & 3 Ors v Jone Johns Serwanga Salongo & 2 Ors (supra)**).

In the circumstances therefore, I find that the application is rightly before this court and as against the 3rd respondent in his capacity as the secretary for the 1st and 2nd respondent as well as the person who communicated the decision. Sometimes public official is added in order to account for his/her actions if challenged for acting in bad faith or malafide.

Whenever such allegations are made against a public official it is only fair that such a person is added in order not to be condemned without a hearing. Modern conventional legal practice dictates that where any court action is likely to affect any other person's rights or title, such other person ought to be joined in the action and afforded the right to be heard before a decision in

the matter is arrived at. To do otherwise would certainly qualify as condemning a party unheard and therefore unconstitutional.

The applicant makes serious allegations of abuse of office by the 3rd respondent and acting without authority, when he acted while on forced leave. He had to defend himself against such allegations and he was rightly added to the application.

Issue 1 is resolved in the affirmative.

Issue 2

Whether the decision of the respondents not to renew the applicant's contract was marred by procedural irregularities.

Counsel for the applicant stated that the basis on which it is claimed that the decision of the respondents was procedurally flawed in respect of the 3rd respondent under para 9 of the affidavit in support are that he was on forced leave during this period and was under investigation, had refused and failed to appraise the applicant for the entire period of the employment contract in issue.

The 3rd respondent did not have the power to take the decision to renew or not to renew the applicant's contract and therefore took a decision that was arbitrary and did not follow any of the established procedures under the law and regulations that required considering the applicant's continued appraisals during the contract period.

In respect of the 2nd respondent which administers the 1st respondent, the applicant was not granted an opportunity to be heard. It failed and refused to exercise its powers under Regulations 7(1) of the Electricity Establishment and Management of the rural electrification fund. The respondents were never guided by the applicants performance appraisals in considering whether to renew her contract or not but acted on a sham appraisal based on the performance of 6 months instead of 4 years of the contract. The 2nd and 3rd respondents' decision did not follow the requisite procedure and as such, the decisions were irregular, ultra vires, unfair and unreasonable.

It was stated that under Reg. 7 of the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, 2001, the functions of the 2nd respondent among others are to recruit and discipline the staff of the Agency and determine their terms and conditions of employment, monitor the management and performance of the agency.

The 3rd respondent purports to have had the powers to take the decision to renew or not to renew the applicant's contract which is not true as the general powers concerning staff of the 1st respondent is vested with the 2nd respondent in line with Reg. 7 (1)(i) and (n). It was contended that the 3rd respondent had no business in the renewal of contract of employment of the applicant but only powers to recruit as delegated to him by the 2nd respondent.

It was further stated that that the 3rd respondent whether as Executive Director could not be a judge in his own case. He could not purport to be the applicant's supervisor, appraiser and then the one to take a decision on whether or not to renew the applicant's contract. This was at odds with principles of natural justice which required to be applied in all administrative decisions under Article 42 of the Constitution. Therefore, the 3rd respondent did not have the powers to act the way he acted and in so doing acted ultra vires.

Further, the 3rd respondent exercised powers while he was on leave to refuse to renew the applicant's contract and appraise the applicant. Counsel relied on the Public Standing Orders under para. 17 where it is stated that a public officer before proceeding on any leave shall be required to hand over his or her office and any government property under his or her care in accordance with subsection f-d. he stated that the wording of the Human Resource Manual implies a fully-fledged handover of office by an officer that is going on leave and would mean that the officer going on leave has no further business to run the agency during the period they are on leave and it is surprising that the 3rd respondent, a senior officer in the 1st respondent and

in public service being in knowledge could persist on continuing to exercise the duties of the office of Executive Director which was occupied by another person. The 3rd respondent had been compelled to take leave in order for a special audit to take place.

Counsel submitted that the 2nd respondent simply upheld the irregular decision of the 3rd respondent and in upholding the said decision also acted with a lot of irregularities where it also failed and/ or refused to consider the applicant's appeal until a year later.

It was submitted for the 1st and 2nd respondent that the applicant's request for contract renewal was declined basing on performance appraisals by her supervisor who is the 2nd respondent as her performance was wanting. it was stated that the applicant did not either submit the appraisal forms or submitted them late.

The 1st and 2nd respondent also argued that powers were delegated to the 3rd respondent to recruit employees and this power included the power to renew and not to renew contracts. The 1st and 2nd respondent therefore submitted that the 3rd respondent acted intravires the Human Resource Manual of the 1st respondent in deciding not to renew the applicant's contract because contract renewal is premised on performance of the applicant.

Counsel stated that the applicant exercised her right to challenge the decision of the 3rd respondent before the 2nd respondent but the latter did not find that the 3rd respondent had acted unfairly or in breach of the natural challenge. The 1st and 2nd respondent came to the decision after hearing the appeal and this was a fair hearing.

The 3rd respondent submitted that what was required for the applicant's contract of employment was mutual consent and this was not given by the employer before the applicant's term expired.

Determination

The purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. In this particular case, the applicant stated that at the time the decision was made terminating her contract, the 3rd respondent was on forced leave at the time and even if he had not been on leave did not have the mandate to terminate the contract as he was the applicant's supervisor who had failed to properly appraise her work. Doing so made the 3rd respondent a judge in his own case yet this power was vested with the 2nd respondent acting on behalf of the 2nd respondent.

If a court finds that powers have been used for unauthorised purposes, or purposes 'not contemplated at the time when the powers were conferred', it will hold that the decision or action is unlawful.

Power or discretion conferred upon a public authority must be exercised reasonably and in accordance with law. An abuse of discretion is wrongful exercise of discretion conferred because it is the exercise of discretion for a power not intended. Accordingly, the courts may control it by use of the *ultra vires doctrine*. The courts task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances. See *Minister of Environment Affairs and Tourism v Bato Star Fishing (Pty) Limited* 2004 (7) BCLR 687 (CC); 2004 (4) SA 490 (CC) para 49.

The 3rd respondent was on forced leave during this period and only returned to effect a decision which was vested with the 2nd respondent. Since the applicant had been on forced leave it was illegal and unlawful to return to the same office and exercise powers of the Executive Director unless it was intended for ulterior and sinister motive of ensuring that the applicant's contract is not renewed notwithstanding that he was out of office.

Similarly, the applicant was supposed to be subject to appraisal in order to determine whether at the end of her contract the appointing authority would be able exercise the discretion to renew the contract of employment.

The 3rd respondent refused or failed appraise the applicant for the entire period of her contract of employment. The absence any appraisal exposed the applicant to unfairness and arbitrariness in determining whether to renew her contract or not. The purported appraisal carried out within four days to the end of her contract was irregular and contrary to the Human Resource Manual.

This was a clear abuse of power that this court would not allow to stand. This was a sham appraisal made to achieve an intended purpose of not renewing the applicant's contract. The applicant was supposed to be reappraised every 6 months to ascertain her fitness for the job. This would have been done for about 8 appraisals but it was only done once.

The 2nd respondent was vested with power or discretionary power to renew the applicant's contract and the said power had to be exercised by its own mind and after taking into account and consideration of all relevant factors keeping in view the object of conferring such discretion. It should not be influenced by improper motive or purpose.

Another aspect of the matter is that the decision makers must not allow their personal interest and beliefs to influence them in the exercise of their statutory powers, but must exercise those powers impartially and should not pre-judge the case.

The powers conferred by statute must be exercised reasonably and in good faith and for proper and authorized purpose only and that, too in accordance with the spirit as well as letter of the empowering Act.

The primary rule is that discretion should be used to promote the policies and objects of the governing Act. A discretionary power should not be used to achieve a purpose not contemplated by the Act that confers the power. All decision makers are expected to act in good faith. Powers must not be abused and should not be exercised arbitrarily or dishonestly.

The actions of the 3rd respondent were malafide since it involved improper exercise of power or abuse of discretion. The impugned action of the 3rd respondent was taken with a specific object of refusing to renew the applicant's contract of employment in order to affect her livelihood.

It can equally be said that fettering of one's discretion is to abuse that discretion. The law expects that public functionaries would approach the decision making process with an open mind. Reason and justice and not arbitrariness must inform every exercise of discretion and power conferred by statute. See *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132*

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 sham appraisals conducted once in the entire four year period was clearly intended for "satisfying a private or personal grudge of the respondents". The decision not to renew the applicant's contract was done within the powers conferred, it was vitiated because it was malafide or bad motives or improper purposes.

The 2nd respondent also acted irrationally when it upheld the decision of the 3rd respondent upon the applicant's appeal a year after the decision had been made by the 3rd respondent. This was a violation of the principles of natural justice in respect of a fair hearing that is a right while taking administrative decisions.

Essentially, procedural fairness involves elementary principles that ensure that, before a right or privilege is taken away from a person, or any sanction is otherwise applied to him or her, the process takes place in an open and transparent manner. It is also called fair play in action and embraces the means by which a public authority, in dealing with members of the public, should ensure that procedural rules are put in place so that the persons affected will not be disadvantaged.

The 2nd respondent merely endorsed an illegal decision taken by the 3rd respondent without authority. The purported delegation of powers by the board to the 3rd respondent was equally illegal and contrary to the law.

The 3rd respondent had exercised his powers illegally for improper purposes and motives. The person was on forced leave to pave way for investigations, it was improper for the 2nd respondent to rely on the actions taken while the 3rd respondent was on leave.

There is no indication to show that the applicant was given a hearing before the 2nd respondent considered her appeal. Secondly, there is no known criteria that was used to take a decision not to renew when the applicant had not been appraised for the entire contract of employment. The sham appraisal could not be used to determine whether to renew the contract or not.

The 3rd respondent's decision not to renew could not be validated with the appeal since it was wrongful exercise of power.

Government agencies are obliged to observe principles of natural justice or rules of fairness before taking decisions that may affect the livelihood of citizenry like contracts of employment.

The employees legitimately expected to be treated fairly before any decision is taken not to renew their contracts of employment. Legitimate expectation envisages that if the administration by a representation has created an expectation in some person, then it will be unfair on the part of the administration to whittle down or take away such legitimate expectation. It is mainly confined mostly to right to a fair hearing before a decision which results in negative promise or withdrawing an undertaking is taken.

Legitimate expectation extends to an expectation of a benefit. This may arise from what a person has been permitted to enjoy and which he can

legitimately expect to be permitted to continue to enjoy. But the same can be changed on rational grounds after giving an opportunity to comment to the affected person. It may also extend to a benefit in future which has not yet been enjoyed but has been promised.

The applicant expected to have the contract extended or renewed since it was clearly promised in the original contract. Any intended frustration of the legitimate expectation had to be explained through a hearing.

This court is therefore satisfied and convinced that the decision of the respondents not to renew the applicant's contract was marred by procedural irregularities since the performance appraisals which were the basis of the renewal were improperly done by the 3rd respondent who did not also have the powers to terminate the applicant's contract. The applicant was not accorded a fair hearing or rules of natural justice were not followed when they made a decision.

ISSUE 3

What remedies are available to the parties?

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 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 HCCM 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 of the decision of the respondents since it was made in breach of rules of fairness.

This court issues a declaratory order that the decision of the respondents in dismissing the applicant's contract without a fair hearing was unjustified, unreasonable, against the principles of natural justice and characterized by procedural irregularity.

This court issues an order of Certiorari quashing the decision of the respondents not to renew the applicant's contract and makes an order of mandamus compelling the respondents to appraise the applicant and consider the reinstatement of the applicant or renewal of the applicant's contract of employment basing on the alternative appraisals.

As far as damages are concerned, it is trite law that damages are awarded in the discretion of court to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant.

The applicant is awarded **UGX 50,000,000** as damages due to the circumstances of this case that has occasioned her suffering due to wrongful exercise of power.

This application is allowed with costs.
I so order.

SSEKAANA MUSA

JUDGE

13th March 2020