

5 **Ministry of Public Service from effecting and/or
implementing the impugned instrument of appointment.**

3. **An order of certiorari to quash the decision of Minister of
MOJCA made on 16th June 2016 directing the Solicitor
General (SG) to assign Mwambutsya a Senior State Attorney
10 the duties of Commissioner for Civil Litigation.**

4. **An order of certiorari to quash the decision of the SG made
on 17th June 2016 assigning Martin Mwambutsya a Senior
State Attorney the duties of a Commissioner for Civil
Litigation;**

15 5. **An order of mandamus to direct the PSC to conduct the
recruitment process for the post of Commissioner for Civil
Litigation (Line Ministries) in accordance with the Public
Service Act and Public Service Standing Orders in force**

6. Costs of this application be provided.

20 The application is supported by the affidavit sworn by the Applicant,
but the salient averments as contained therein are that on 21st
September 2015, the Applicant received an internal circular issued
by the then Assistant Commissioner, Human Resources
Management (AC/HRM) at the MOJCA, advertising vacant positions

5 for Commissioner Civil Litigation (Line Ministries) and Principal
State Attorney in the Directorate of Civil Litigation and calling for
personal qualifications from qualified staff in the Ministry. The
circular also stipulated that in order to qualify for promotion one
must have served in his/her immediate position for a minimum of
10 three years. At the time of this advertisement the Applicant had
been a Principal State Attorney for five years and therefore qualified
for promotion to the position of Commissioner. That she applied for
the position of Commissioner for Line Ministries and submitted her
application form and all accompanying documents to the HRM
15 Department on 2nd October 2015.

In December 2015, the Applicant inquired from Mr. Emitu Francis,
a senior staff in HRM Department, about the progress of the
recruitment process and that he informed her that three Principal
State Attorneys namely; Ben Turyasingura, Henry Oluka and the
20 Applicant herself, had applied for the vacant position of
Commissioner and that the Ministry had submitted what is known
as a formal submission to fill a vacancy to the PSC in respect of the
two advertised positions. That whereas the PSC subsequently
conducted interviews of the applicants for the other advertised

5 position of Principal State Attorney and later two successful
candidates were appointed, applicants for the position of
Commissioner had never been called for any interviews to date.

That sometime in December 2015, unconfirmed rumor circulated at
the Ministry that one Martin Mwambutsya, a Senior State Attorney,
10 had been appointed to the said position of Commissioner Civil
Litigation. The Applicant immediately set to confirm this
information from the HRM Department and she was informed by Mr.
Emitu that the Ministry had not been notified of such an
appointment by the PSC or the Ministry of Public service. It is the
15 Applicant's case that that Martin Mwambutsya had never applied
for any of the advertised vacancies and the SG had never made any
recommendation to PSC for his promotion to the position of
Commissioner.

That in March 2016 during the Presidential Election Petition at the
20 Supreme Court, the Applicant was surprised when the Deputy
Attorney General introduced Mr. Mwambutsya as a Commissioner
for Civil Litigation. Soon thereafter, the Applicant inquired from Mr.
Jagenu the Assistant Commissioner HRM about Mwambutsya's

5 reported appointment and he informed her that the Ministry had not been notified of the said appointment as required.

That on 1st June 2016, the Applicant and one Oluka wrote a Minute to Mr. Francis Atoke the SG, requesting him to direct the Assistant Commissioner HRM to clarify in writing to the management and the
10 applicants on the status of the position of Commissioner Line Ministries and also that the SG informs them of the decision made by PSC or any other office in respect of filling the vacancy.

That on 13th June 2016, the Applicants received a copy of the Minute from Mr. Jagenu, the AC/HRM in which he informed staff
15 that on 18th May 2016, the Ministry had received a copy of a letter from H.E the President of Uganda addressed to the Chairman PSC advising the PSC to regularize the appointment of Martin Mwambutsya as Commissioner Civil Litigation (Line Ministries).

That the minute was also informing staff vaguely that the Ministry
20 was awaiting formal communication from the PSC. That despite the requests, Mr. Jagenu did not avail to the Applicant documents relating to the said appointment.

That around 20th June 2016, Mr. Oluka informed the Applicant that he had received a copy of the minute dated 17th June 2016 written

5 by the SG to Mr. Mwambutsya stating that pursuant to directives of
H.E the President and MOJCA, the SG was assigning him the duties
of a Commissioner for Line Ministries. That she noted that the letter
addressed Mr. Mwambutsya as a Senior State Attorney, but stated
that his assignment as Commissioner would take immediate effect
10 as MOJCA awaited regularization of his appointment by the PSC.

The Applicant contends that she is aware that appointments
including promotions in the Public Service are made by directives
from designated appointing authorities in accordance with the
Public Service Standing Orders, and that the appointing authority
15 for the rank of Commissioner and other superior positions is the
President who is required to issue an instrument upon the advice of
the PSC. Further, that PSC is the custodian of such instruments
and upon proper issuance of the same, it is required to notify the
relevant Ministries and relevant officials through the PS/ MPS.

20 That on 7th September 2016, the Applicant wrote to PSC requesting
to be availed a copy of the instrument appointing Mr. Mwambutsya
as Commissioner with a view to seeking legal redress. That on the
same day, the Applicant visited the office of the Ag. Secretary to
PSC Mr. Musingwire, in order to follow up on her request, who

5 acknowledged that the PSC had received Mr. Mwambutsya's
instrument which had been issued without a recommendation from
PSC. That he, however, declined to avail the Applicant with a copy
of the said document in the absence of a court order. That she has
made numerous inquiries within the Ministries of Justice and
10 Public Service and established that PSC has not notified the said
Ministries of the said instrument to date, and that based on various
information that the Applicant has regarding the instrument as
enumerated above, there is a decision by the appointing authority
to issue an instrument appointing Martin Mwambutsya as
15 Commissioner and she believes the same has not been implemented
by the PSC.

That the decision of the appointing authority to issue an instrument
appointing Mr. Mwambutsya as Commissioner contravened the
Public Service Standing Orders which provide that an officer shall
20 not be recommended for promotion unless he or she has held the
substantive position for a minimum period of three years. Further,
she was aware that Martin Mwambutsya was promoted to the rank
of Senior State Attorney around 2015 and that he lacked the
necessary minimum three years' experience at that rank to qualify

5 for promotion to Principal State Attorney and has no experience as
principal State Attorney to qualify for promotion to a Commissioner.
Further, that the Public Service Standing Orders prohibit the
promotion of an officer to more than one step up the ladder or
before they complete three years in their substantive grade except
10 in the case of accelerated promotion. That they also provide that an
officer may only be recommended for accelerated promotion where
there is no qualified officer for the position and that there were no
circumstances warranting Mr. Mwambutsya accelerated promotion
as there were six Principal State Attorneys who qualified for the
15 promotion and that the circular clearly called for applications from
Principal State Attorneys and three had applied for the position.
That PSC has a constitutional and statutory duty to advise the
appointing authority in respect of appointments of public servants
and may determine procedures to test suitability for promotion.
20 That in implementing this duty, PSC calls for applicants in order to
determine their competence and suitability for appointment and
after conducting the interviews advises or recommends qualified
and suitable candidates to the appointing authority for appointment.
That Mr. Mwambusya was issued appointment without the PSC

5 conducting any interviews of qualified applicants or recommended
as a successful candidate for appointment. That also as one of the
qualified applicants for the position of Commissioner, the Applicant
had a legitimate expectation to be interviewed by the PSC with other
applicants in order to determine their suitability for the position
10 which would allow PSC to properly exercise its discretion to
recommend the most qualified applicant to the appointing authority.
The procedure adopted leading to the issuance of the instrument
appointing Mr. Martin Mwambutsya as Commissioner contravened
the rules of natural justice and was manifestly unfair to the
15 qualified applicants for the said position. In addition, that issuing of
the instrument has adversely affected the recruitment process and
the rights of the Applicant for the said position. That the decision by
the Minister and the SG to assign Martin Mwambutsya, a Senior
State Attorney, duties of the Commissioner for Line Ministries
20 pending the regularization of his appointment, were made contrary
to the Public Standing Orders which require that an officer should
not be assigned duties of a higher office when there are more senior
officers at a higher level than him/her in the same hierarchy. That
the decision of the SG contained in letter dated 17th June 2016 to

5 assign Martin Mwambutsya a Senior State Attorney, the duties of
Commissioner for Civil litigation was made in contravention of the
provisions of the Public Service Act and Standing Orders.

That it is in the interest of justice that the impugned decisions of
irregularly issuing the instrument appointing Mr. Martin
10 Mwambutsya and assigning him the duties of Commissioner be
quashed, an order of prohibition be issued prohibiting PSC and the
PS/MPS from effecting the impugned instrument, and an order for
mandamus be issued directing PSC to conduct the recruitment for
the said position in accordance with the Standing Orders.

15 The Respondent opposed the application and in the affidavit in
reply, states that by letter dated 9th November 2016, the PS/MPS
wrote to and notified Mr. Martin Mwambutsya that H.E the
President of Uganda had, in exercise of the powers vested in him
under Article 172(1)(a) of the Constitution and on advise of the PSC
20 directed that Mr. Martin Mwambutsya be offered appointment as
Commissioner Civil Litigation (Line Ministries) with effect from the
date of assumption of duty. The Respondent attached a copy of
regularization by Public Service marked "A". Further, that Mr.
Martin Mwambutsya wrote accepting the appointment on 11th

5 November 2016 and that the appointment as Commissioner in respect of which he is duly qualified has already been lawfully concluded and implemented in accordance with Article 172(1)(a) of the Constitution. The Respondent thus contends that this application is overtaken by events.

10 Mr. Kabiito Karamagi represented the Applicant and Mr. Geoffrey Mandette, State Attorney, represented the Respondent. Both filed written submissions to argue the application. It is important to first address the preliminary objections raised by counsel for the Respondent, of which the Respondent gave notice in their reply to
15 the application that they would raise.

The first one relates to whether the court should rely on the supplementary affidavit in support of the application filed on 4th August 2018. Counsel for the Respondent submitted that pleadings in H.C.M.C. No. 241 of 2016 were closed on 27/01/2017, and on
20 4th August 2018 the Applicant filed a further supplementary affidavit seeking to introduce a new cause of action different from the one in the application after so many futile attempts to amend the same. Counsel drew the attention to H.C.M.A. No. 912 of 2016 and H.C.M.A. No 504 of 2017, and submitted that it is an abuse of

5 court process to seek to introduce a supplementary affidavit in support of an application despite there being decisions of this very court on the same. For that proposition, counsel relied on the cases of ***Samuel Mayanja vs. Uganda Revenue Authority HCT-0017-2015*** and ***Elias Waziri & 2 Others vs. Opportunity Bank (U) Ltd***
10 ***HCT-00-CC-MA-599 of 2013***. Further, that the supplementary affidavit was filed more than two years out of time after a reply had been filed and without leave of court and that the same be disregarded.

In reply the counsel for the Applicant submitted that during the
15 course of pleadings, the Applicant's counsel had unsuccessfully sought for the court to allow him apply for leave to validate the supplementary affidavit which was filed after close of pleadings, and that on 25th June 2019, the court ruled that the Applicant could not apply for leave to validate the filing of the supplementary
20 affidavit because the Respondent had proposed the issue in the scheduling notes and hence the Applicant would instead address the issue in submissions.

Court notes that it is not in dispute that the impugned affidavit was filed way after the close of pleadings and without the leave of court

5 to do so. The Applicant concedes so albeit with attempts to justify
the failure. In ***Mutembuli Yusuf vs Nagwomu Moses Musamba &
Electoral Commission CAEPA No. 43 of 2016***, which was an
appeal upholding the decision of this of this court, which same
decision was relied on in the case of ***Walugembe Daniel vs.
10 Attorney General HCMC 231 of 2018***, it was held, inter alia, that
no affidavit in reply or supplementary affidavit can be validly and
properly filed in a matter where an affidavit in rejoinder has been
filed by the opposite party and served.

The Applicant having conceded that the impugned affidavit was not
15 validated and no leave of court was sought and also that they do
not intend to rely on it, this court finds that the impugned affidavit
was filed out of time without leave of court and on that account the
affidavit is incompetent and shall not be relied upon.

The second objection relates to whether the application is
20 competent and properly before court on account of being is moot.
Counsel for the Respondent submitted that the entire application is
in a state of legal limbo of mootness and is misconceived and
untenable for that reason. This fact is also sworn to by the SG in
the affidavit in reply. Counsel for the Respondent submitted that

5 the Applicant has conceded to this in her submissions at page 8,
and that orders 2,3 and 4 sought in the application are now
overtaken by events and court ought not to exercise its discretion in
vain. Further, that according to the Applicant, what remains in
contention are orders 1, 5 and 6 sought in the application.

10 That in addition, prayer No. 1 which seeks an order to quash the
decision to issue an instrument appointing Mr. Martin
Mwambustsya a Senior State Attorney as a Commissioner for Civil
Litigation (Line Ministries) in the MOJCA is not backed as court has
not been favored with the said decision to issue an instrument.

15 That as such the Applicant has not discharged the burden of
providing the decision to issue an instrument. Counsel relied on
Sections 101, 202 and 103 of the Evidence Act Cap 6, and argued
that there is no way court can inquire into a decision not brought
before it and that the Applicant actually concedes that there is no
20 decision before this court on the same. That besides, court already
pronounced itself on the issue that the information or documents
that the Applicant sought to discover from the PSC is privileged
information.

5 In reply counsel for the Applicant submitted that a party who asserts a fact must prove it unless it is admitted. That under Section 57 of the Evidence Act (supra) facts which are admitted or deemed to be admitted need not be proved otherwise than by such admissions. That the Applicant challenges the decision to appoint
10 Mr. Mwambutsya as Commissioner on various grounds, and that at the time of filing the suit there was available evidence of the decision which was contained in letters from the MOJCA notifying staff of the President's decision to appoint Mr. Mwambutsya as Commissioner (*Annexure PM5 and PM6*). That thereafter, the
15 Respondent filed an affidavit in reply in which the SG stated that the impugned decision to appoint Mr. Mwambutsya had been implemented and lawfully concluded by in the said relevant letters which formalized the appointment. That the reply and its annexed letters in effect admitted to the fact of the President's decision to
20 appoint Mr. Mwambutsya as Commissioner, and the SG also did not rebut the averments that the decision to appoint a Commissioner is made by the President issuing directives which are contained in an instrument of appointment. That where facts are sworn in an affidavit and they are not denied by the opposite party,

5 the presumption is that such facts are accepted. That since the
affidavit in reply acknowledged existence of the President's decision
to appoint Mr. Mwambutsya and the fact that such appointments
are effected by the instrument of appointment, the Applicant
needed not to prove the fact of the said admitted decision by way of
10 providing the instrument of appointment.

Further, that since the affidavit in reply only averred that the
appointment was lawfully concluded, the only issue in dispute
between the parties is whether the said appointment was lawful or
not. That the Applicant did not need to adduce evidence of decision
15 whose existence was not in dispute between the parties. Further,
that the instrument of appointment is in the possession and
custody of the PSC which is represented by the Respondent in this
suit. That there is unrebutted evidence on record that PSC admitted
having possession of the said instrument and refused to avail the
20 Applicant with the said instrument.

Regarding the issue of departure from pleadings, the Applicant's
denied there being any departure. She stated that the application
and supporting affidavit clearly show that she challenged both the
President's decision to appoint Mr. Mwambutsya and the SG's

5 decision to assign him duties of the said office pending
regularization of his appointment, and she sought separate judicial
review orders in respect of both decisions. That whereas the
implementation of the President's decision to appoint Mr.
Mwambutsya rendered the assignment of duties as overtaken by
10 events, it did not affect the other issue in dispute between the
parties as to the legality and propriety of the President's decision to
appoint Mr. Mwambutsya.

Court has carefully evaluated the evidence and the respective
submissions. On the issue on departure from pleadings, the general
15 rule is that no person shall depart from their pleadings. Order 6
rule 19 of the Civil Procedure Rules, provides for amendment of
pleading as the only way for a party to depart from pleadings. It was
held in ***Jani Properties Ltd vs. Dar es Salaam City Council***
[1966] EA 281 and in ***Struggle (U) Ltd vs. Pan African Insurance***
20 ***Company Ltd (1990) KAL 46 – 47***, that parties are bound by their
pleadings which have the potential of forming part of the record and
moreover, the court itself is also bound by what the parties have
stated in their pleadings as to form facts relied upon by them.

5 Looking at the prayers in the pleadings that the Applicant is seeking as of now, prayer No. 1 seeks for an order to quash the decision to issue an instrument appointing Martin Mwambustsya a Senior State Attorney as a Commissioner for Civil Litigation (Line ministries) in the MOJCA. Prayers No. 2, 3 and 4 were in regard to
10 assignment of duties were abandoned by the Applicant having been overtaken by events. Therefore, the decision that the Applicant is seeking to quash, specifically in her paragraph 10 of the affidavit, is that **consequently** on 13th June 2016 the Applicant received a copy of the minute from Mr. Jagenu, the AC/HRM in which he informed
15 staff that on 18th May 2016, that the Ministry had received a copy of a letter of H.E. the President addressed to the Chairman PSC advising to regularize the appointment of Martin Mwambutsya as Commissioner Civil Litigation (Line Ministries). The minute also informed staff, vaguely though, that the Ministry was awaiting
20 formal communication from the PSC. Despite the requests, the Applicant states that Mr. Jagenu did not avail her the documents relating to the said appointment. That around 20th June 2016 Mr. Oluka informed the Applicant that he had received a copy of the minute dated 17th June 2016 written by the SG to Mr. Mwambutsya

5 stating that pursuant to directives from H.E the President and the
Minister of Justice, he was assigning him the duties of a
Commissioner for Line Ministries. Mr. Oluka availed a copy of the
minute and the Applicant noted that the letter addressed Mr.
Mwambutsya as “Senior State Attorney”, but stated that his
10 assignment as Commissioner would take immediate effect as the
Ministry awaited regularization of his appointment by the PSC.
Minute Annexure PM5 - a communication informing all staff that
on 18th May 2016 is a letter was received from State House *Ref.*
PO/23 dated 11th may 2016, signed by the H.E the President
15 addressed to the Chairperson PSC, Kampala with a copy to SG,
advising the Chairperson of the PSC to regularize the appointment
of Mr. Mwambutsya as Commissioner Civil Litigation so as not to
create a vacuum in that office. *Annexure PM6* is a letter from the
SG assigning Mr. Mwambutsya duties pursuant to H.E’s directive
20 and the Minister of Justice directive on the same subject. All these
communications referred to by the by the Applicant were before the
regularization which she intended to be quashed and prohibited
and it is what was referred to in her pleadings and nothing else. To
my understanding, the instrument that the Applicant seeks to

5 quash is the one from which the other duties that were assigned to
Mr. Mwambutsya accrued. The Applicant also contests the
appointment. However, looking on the record, the letter or
instrument referred to in prayer No.1 is not an instrument of
appointment. It is an instrument advising the Chairperson PSC
10 Kampala, to regularize the appointment of Mr. Martin Mwambutsya
as Commissioner Civil Litigation. A proper interpretation of what
the Applicant refers to as an appointment, shows that it is actually
an instrument advising and *Annexures PM5 and PM6* respectively,
are in reference to the same.

15 Attached to the affidavit in reply of the Respondent, is *Annexure A*”
the regularization of Mr. Mwambutsya on the post of Commissioner
Civil Litigation (Line Ministries) dated 9th November 2016. The
acceptance by Mr. Mwambutsya was put in and received on
11th November 2016. This could only mean that the instrument
20 referred to in the pleadings that were filed on 13th June 2016 which
the Applicant sought to be quashed; from which the other assigned
duties accrue, is the instrument dated 11th May 2016 that had
come to her notice, which is invariably overtaken by events having

5 been acted upon already. To that extent the application is moot having been overtaken by events.

Black's Law Dictionary 9th Edition page 1090 defines a "moot case" to mean a matter in which a controversy no longer exists; a case that only presents an abstract question that does not arise from
10 existing facts or rights. See also: ***Justice Okumu Wengi vs. Attorney General of Uganda (2007) 600 KaLR*** where it was held that for an application and reliefs sought to be moot, it means that the remedies sought cannot be realized. Also in ***Human Rights Network for Journalists and Another vs. Uganda Communications Commission Others HCMC No. 219 of 2013***
15 court held that courts of law do not decide cases where no live dispute between parties in existence. Courts do not decide cases or issue orders for academic purposes only. Court orders must have practical effects. They cannot issue orders where the issues in
20 dispute have been removed or no longer exist. The instant application is thus an exercise in futility.

As already noted above, the letter sought to be quashed was already acted upon. It was not an appointment at the time but an instrument from the appointing authority advising the Chairman

5 PSC. Prayer No.1 was thus over taken by events and granting the
same would in the be acting in vain. Prayers 2, 3 and 4 were
abandoned by the Applicant on account of being overtaken by
events. Prayer 5 and 6 were premised on prayer No.1 and hence
also cannot stand. All prayers thus collapse. There is already a
10 substantive holder of the office as the regularization was done.

The determination of the preliminary objections disposes of the
entire application. The Respondent's objections are upheld, and the
application is hereby dismissed. Given the nature of the currently
existing employer - employee relationship between the Applicant
15 and the Respondent, it is ordered that each party bears its own
costs.

BASHAIJA K. ANDREW
JUDGE
07/02/2020

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