

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

MISC. CAUSE NO.439 OF 2017

**UGANDA CLEARING INDUSTRY &
FORWARDING ASSOCIATION ::: APPLICANT**

VERSUS

- 1. KAMPALA CAPITAL CITY AUTHORITY (KCCA)**
- 2. ATTORNEY GENERAL ::: RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant filed this application against the respondents under Article 191 of the Constitution of the Republic of Uganda, section 33 of the Judicature Act, section 98 of the CPA and Rule 3 (1) (a), 6 (1) and (2) of the Judicature (Judicial Review) Rules seeking orders that;

1. Time be extended in relation to the filing of this judicial review application.
2. An order for certiorari do issue to quash items 14 (in Part C) of the Trade (Licensing) (Amendment of Schedule) Instrument No. 2 of 2017 which purport to require clearing and forwarding firms who are already “licensed” annually to carry on their trade by the East African Customs Management Act, 2004 (EACMA) and payment of dues in respect of both to now also seek a further “license to trade” from the Town Clerk of a Municipal Council and if granted, pay further “licensing dues” in respect of thereof;
3. An order of prohibition do issue restraining and preventing items 14 of the Trade (Licensing) (Amendment of Schedule) Instrument No. 2 of 2017 from taking effect and prohibiting the respondents or their agents, from enforcing the said Trade License provisions against clearing firms;

4. Costs of this Application be provided for;

The grounds upon which the application was based were set out in the affidavit of *Alhaji Jaffer Abdallah Businge Farjallah* the acting national chairman of the applicant.

The 1st respondent opposed the applicant's application relying on the affidavit in reply deposed by Mr. Ezra Ssebuwufu, the Ag. Deputy Director Business Support and Compliance Management Revenue Collections of the 1st respondent.

The 1st respondent further contended that the applicant's application is frivolous, misconceived and brought in bad faith and should be dismissed with costs to the 1st respondent for being out of time. It was also contended that the applicant has no locus standi and unfairly sued the 1st respondent who is not the promulgator of the law/ legislation in respect of which the applicant is aggrieved and should not be held to account for adhering to set law.

The applicant was represented by *Mr. Godfrey Rwalinda* whereas the 1st respondent represented by *Ms. Rita Mutuwa* and *Ms. Dorothy Namutebi* and *Mr. Brian Musota* for the 2nd respondent.

The following issues were proposed for determination by this court.

1. ***Whether the time should be extended in relation to the filing of this application by the applicant.***
2. ***Whether the application raises any grounds for judicial review.***
3. ***Whether the applicant is entitled to the remedies sought in this application.***

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

DETERMINATION OF ISSUES

Whether time should be extended in relation to the filing of this application by the respondent.

Counsel for the applicant noted that the application was filed on the 29th December 2019 after the amendment to the schedule that is sought to be reviewed was passed on the 13th January 2017 by the Minister of Trade, Industry and Cooperatives.

Counsel relied on *Rule 5 the Judicature (Judicial Review) Rules* that provided that application like the instant should be made promptly or within 3 months from the date when the grounds of the application first arose unless court considers that there is good reason to extend (*see; Mugumya IP v Attorney General Misc. Cause No. 116 of 2015*). He stated that the essence of this is that the applicant should ideally have brought this application by the 13th April 2017.

He submitted that it is upon this background that the applicant sought for court to extend the time which the applicant should bring this application.

Counsel submitted that this court is given inherent powers to grant remedies that are not specifically provided by law but ensure ends of justice to be met under section 33 of the Judicature Act and section 98 of the Civil Procedure Act, Cap 71.

He stated that this application aims at stopping the illegality including clearing and forwarding firms among the businesses required to pay trading licenses to town clerks or municipalities yet they are already catered for under the East African Customs Management Act which in essence would be a double payment by the firms.

Counsel thus submitted that extending the time within which this application should be filed does not prejudice the respondents but in case not granted, the applicant would suffer losses that could be cured by the extension.

Counsel for the 1st respondent submitted that the applicant having been made aware that on the 13th of January 2017, the Minister of Trade, Industry and Cooperatives issued Statutory Instrument No. 2 of 2017 (Trade Licensing (Amendment of Schedule) Instrument of 2017 and having admitted that it should have brought the application by the 13th April 2017 is estopped from seeking such extension of time having knowingly sat on its rights and unjustifiably brought its application for judicial review on the 29th December 2017 close to a year later.

Counsel stated that statutes of limitation are statutes of strict interpretation and where the law provides a time frame within which to bring actions or suits; the same cannot be twisted by court or ignored as this would lead to a mischief that the legislature avoided. Such would be to defat justice and breed confusion, disorder and set off a chain reaction of bad precedents.

Counsel thus submitted that this application is time barred and an abuse of court process and the same should be dismissed and or struck off with costs.

Counsel for the 2nd respondent submitted that the 3 months period within which to the application for judicial review are mandatory in nature as per Rule 5 (1) of the Judicature (Judicial Review) Rules, 2009 and require the applicant and their counsel to be vigilant while seeking redress from a competent court with jurisdiction (*see Hilton v Sutton Steam Laundry [1946] 1KB 61 at 81*)

Counsel further submitted that counsel for the applicant did not give a sufficient good reason to justify the extension of the period within which the application for judicial review should be filed neither did he adduce any evidence to show that upon time lapsing, attempts were made to immediately file an application for extension of time (*see Okoth Umaru and 3 Ors v Busia Municipal Council and 3 Ors HC Misc. Cause No. 0012 of 2016*).

Counsel therefore submitted that the application was brought as an afterthought and is time barred. He stated that the applicant will not suffer any loss nor will their interest in the application be prejudiced if court in exercising its discretion does not grant extension of time to the applicant to file an application for judicial review.

Determination

The respondents contend that the grounds out of which this application for judicial review arose was on the 13th of January 2017 and that this application was therefore out of stipulated time of three months with no good reason as to why the time should be extended.

This court has the discretion to extend the period within which to bring an application for judicial review for good reason (*see; Rule 5 (1) of the Judicial*

Review) Rules, No. 11 of 2019, Kulo Joseph Andrew (supra), Nampogo Robert & Anor v Attorney General HCMC No. 0120 of 2008).

In these circumstances, this application is brought by an association representing clearing firms that is not to benefit as an entity but all members under the association. Further, the applicant submitted that this application aims at stopping the illegality that seeks to include clearing and forwarding firms among the businesses required to pay trading licenses to town clerks or municipalities yet they are already catered for under the East African Customs Management Act which in essence would be a double payment by the firms which is good and sufficient reason before this court for extension of time.

Therefore, in the interest of justice and without undue regard to technicalities; this court finds that there is a good reason for extending the period within which the application should be made and therefore having it heard on its merits since it is one made in the interest of several individuals and not just the applicant.

This issue is therefore resolved in affirmative.

Whether the application raises any grounds for judicial review.

Counsel for the applicant submitted that judicial review is concerned with prerogative orders which are remedies for the control of the exercise of power by those in public offices and the said orders are discretionary in nature. Counsel further stated that the discretion alluded must however be exercised judicially and according to settled principles (*see Moses Ssemakula Kazibwe v James Ssenyondo Misc. Appln No. 108 of 2008.*

Counsel submitted that this application raises grounds of judicial review as it seeks to challenge the legality of S.I No. 2 of 2017 which was made by a Minister and there a public official as was stated in *NC Bank of Uganda Ltd and 24 Ors v KCCA & A. G H.C Misc. Cause No. 2 of 2018.*

Counsel stated that court has to give consideration to all relevant matters of the cause before arriving at a decision in exercise of its discretion. He stated that judicial review is not concerned with the decision in issue per se but with the decision making process.

Counsel also stated that in order for an application of judicial review to succeed, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety.

Counsel submitted that as stated in paragraph 5 of the affidavit in support of the application, the impugned amendment sections are pursuant to an issue of a Statutory Instrument No. 2 of 2017 by the then Minister of Trade, Industry and Cooperatives amending the schedule to the Trade (Licensing) Act to include the clearing and forwarding firms/ entities that require a license to trade from the Town Clerk of a Municipal Council pursuant to the Act. He stated that this is a clear and glaring illegality on behalf of the Minister since the clearing and forwarding firms are already licensed under the East African Customs Management Act and taxing and requiring them to obtain licenses from municipal council is not only illegal but also irrational as the firms would in essence be taxed and or licensed twice for the same service and within the same year of operation.

He stated that the amendment as expounded in paragraph 6 of the affidavit in support amends the definition of trade and trading to include selling services and again sought to repeal section 8 of the Trade Licensing Act which exempted the obtaining of a trading license in respect of any trade or business for which a separate license is required by any written law. He stated that clearing and forwarding firms neither trade nor sell services and this creates a lacuna in the law in respect to including the applicant's firms under the Amendment schedule. It thus makes the license sought to be paid by them illegal and irrational as they are being required to pay for a service they do not offer.

Counsel further submitted that the exemption of section 8 (f) of the Trade (Licensing) Act is not only in bad faith but also illegal as it encourages double taxation which is illegal in law.

He stated that the meaning of "services" is not defined in the parent Act and any attempt to interpret the work of clearing and forwarding firms falls under services as envisaged under the Statutory Instrument No. 2 of 2017 would be an attempt to stretch the meaning of "services". Counsel stated that neither the Act nor the Amendment Schedule attempts to outline the services of the clearing and forwarding firms which leaves a lacuna in the law.

He submitted that clearing and forwarding firms do not offer for sale and or expose for sale anything and neither do they carry out their profession in trading premises as stipulated under section 1 (g) to (i) of the Trade Licensing Act. He therefore stated that it is illegal and irrational to include the same in the amendment schedule to the Act.

Counsel further argued that it was not the intention of the legislature that a firm that has been licensed to practice under the East African Customs Management Act 2004 be prevented from practicing by a Town Clerk of a municipality. He stated that this law in essence defeats the spirit of the East African Community and in return curtails the trade within the East African member states (*see Amrit Goyal v Hari Chand Goyal Commercial Court Civil Suit No. 432 of 2001* where court stated that by rule of statutory interpretation, a specific interpretation over a specific subject takes precedence over general legislation and since in the circumstances the East African Customs Management Act 2004 is a specific legislation on the subject matter containing clearing and forwarding services, it takes precedence over any other subsidiary legislation of the Minister.

Counsel therefore submitted that the Minister acted ultra vires the Trade Licensing Act as amended which does not defined clearing and forwarding firms as a service and as such, is null and void and should be quashed with costs to the applicant.

Counsel for the 1st respondent submitted that the gist of the applicant's case concerns the merits of the decision made rather than the decision making process. He stated that the application and supporting evidence does not raise any issues or grounds of judicial review. Counsel made reference to paragraph 5, 6, 7, 8 and 10 of the affidavit in support that show that the applicant is solely aggrieved by the legislation itself and its parent laws and not the process leading to the said legislation.

Counsel stated that the applicant alludes to the requirement to pay trade license fees by clearing and forwarding firms as bringing about double taxation which would set in motion a dual and parallel licensing scheme which to the applicants is illegal and thus irrational and unfair. He submits that this overwhelming points to the fact that the applicant's dissatisfaction is with regard to the decision itself

and not the procedure taken or decision making process as required by the law on judicial review.

In regards to the applicant's argument as to illegality, counsel submitted that there is a deliberate attempt to use this court to challenge the provisions of a law or legislation rather than the process of making that legislation. He relies on the applicant's definition of an illegality being one where the decision making authority commits an error of law in the process of taking or making the Act, the subject of the complaint.

Counsel cited the case of ***Ignatius Loyola Malungu v Inspector General of Government Miscellaneous Cause No. 59 of 2016*** where court held that just because the result was not what the applicant expected does not in itself make the decision irrational or erroneous.

Counsel also submitted that the numerous claims raised by the applicant regarding double taxation and licensing require substantial evidence to be adduced. With the judicial review procedure adopted by the applicant, court is unable to make a determination on these claims given the fact that judicial review cannot cover the merits of the decision itself.

He therefore submitted that this court is not clothed with the power to hear the said evidence due to the limits of judicial review procedure taken by the applicant (***Refer; Kampala Private Medical Professionals Association v Attorney General & 2 Ors Misc. App. No. 552 of 2017***). Counsel submitted that the appropriate procedure should have been a constitutional petition under Article 137 of Constitution of Uganda and thus prayed that this application be dismissed by court.

Counsel also submitted that the 1st respondent did not make any decision that would be subject to judicial review. He stated that there's no illegality on the part of the 1st respondent as its duty is to implement the provisions of the legislation passed by the minister with regards to trade license fees and the applicant in its affidavit in support of the application and submissions have failed to attribute illegality on the part of the 1st respondent. He further stated that with regard to irrationality, there is no outrageous decision made by the 1st respondent with regards to the case before court.

Counsel submitted that the Minister of Trade, Industry and Cooperatives did not in any way act ultra vires by amending the schedule to include clearing and forwarding firms in contravention of Article 191 as alluded to by the applicant as the minister derives the said power and legal mandate to issue the said amendment under sections 29, 30 and 31 of the Trade (Licensing) Act, Cap. 101. Counsel therefore prayed that this issue should be answered in the negative.

Counsel for the 2nd respondent submitted that judicial review is defined by ***Micheal J. Allen, Brian Thompson and Bernadette Walsh in Cases and Materials on Constitutional and Administrative Law 3rd Edition pg 456*** as the jurisdiction of the superior court to review the acts, decisions and omissions of public authorities in order to establish whether they have exceeded or abused their powers.

He stated that section 30 (3) of the Trade (Licensing) Act Cap. 101 provide that the minister may by statutory instrument amend the schedule to the Act. It was submitted that the Minister acted within the stipulated powers and issued the Trade (Licensing) (Amendment of Schedule) Act Statutory Instrument No. 2 of 2017 which includes clearing and forwarding firms under Part C item 14 of the schedule as one of the businesses required to pay trade licensing fees in line with section 8 (1) of the Trade (Licensing) Act. Cap 101 on the 13th January 2017.

Counsel further submitted that section 145 (1) of the East African Community Customs Management Act, 2004 provides for licenses issued to agents in clearing and forwarding business with an aim to determine the quality or standards of services to be provided.

He submitted that the rationale for amending section 8 of Cap. 101 was to recognize that trade is both in goods and services according to the rules of International Trade and to clarify the inconsistency created by this section which exempted persons who are licensed by their regulatory bodies from obtaining trading licenses.

He therefore submitted that the licenses under Statutory Instrument No. 2 of 2017 and the East African Community Customs Management Act, 2004 are imposed on clearing and forwarding firms for different purposes and not double payment for the same services as submitted by counsel for the applicant.

He thus submitted that the clearing and forwarding firms are properly and legally included under Part C item 14 of the schedule to No. 2 of 2017 for the sole reason that clearing and forwarding is a trade in services covered under No. 2 of 2017. He also stated that the said imposed licensing fees form part of the revenue sources and applies to a general business area such as a city, municipality or town.

Counsel therefore submitted that the actions of the Minister of Trade, Industry and Cooperatives were not ultra vires neither did they constitute a decision tainted with illegality, irrationality or procedural impropriety therefore an order of certiorari to quash item 14 in Part C of Statutory Instrument No. 2 of 2011 is misconceived and the application should be dismissed with costs to the respondents.

Determination

The power of judicial review may be defined as the jurisdiction of superior courts to review laws, decisions and omissions of public authorities in order to ensure that they act within their given powers.

Judicial review per the Judicature (Judicial Review) (Amendment) Rules, 2019 means the process by which the High Court exercises its supervisory jurisdiction over proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties;

Broadly speaking, it is the power of courts to keep public authorities within proper bounds and legality. The Court has power in a judicial review application, to declare as unconstitutional, law or governmental action which is inconsistent with the Constitution. This involves reviewing governmental action in form of laws or acts of executive for consistency with constitution.

Judicial review also establishes a clear nexus with the supremacy of the constitution, in addition to placing a grave duty and responsibility on the judiciary. Therefore, judicial review is both a power and duty given to the courts to ensure supremacy of the Constitution. Judicial review is an incident of supremacy, and the supremacy is affirmed by judicial review.

It may be appreciated that to promote rule of law in the country, it is of utmost importance that there should function an effective control and redressal mechanism over the Administration. This is the only way to instil responsibility and accountability in the administration and make it law abiding. Judicial review as an arm of Administrative Law ensures that there is a control mechanism over, and the remedies and reliefs which a person can secure against, the administration when a person's legal right or interest is infringed by any of its actions.

When a person feels aggrieved at the hands of the Administration because of the infringement of any of his rights, or deprivation of any of his interests, he wants a remedy against the Administration for vindication of his rights and redressal of his grievances. The most significant, fascinating, but complex segment in judicial review is that pertaining to judicial control of administrative action and the remedies and reliefs which a person can get from the courts to redress the injury caused to him or her by an undue or unwarranted administrative action in exercise of its powers.

In the circumstances of this case, the decision to include items 14 (in part C) of the Trade (Licensing) (Amendment of the Schedule) Instrument No. 2 of 2011 was an illegality as it was in total disregard of the existing laws under the East African Customs Management Act, 2004 and the Trade Licensing Act, Cap 110 (as amended) as it amounted to double taxation and was unfair to the individuals as represented by the applicant.

In as far as the argument that this matter is not a grievance to be addressed by the High court as argued by the 1st respondent, this court begs to defer. Judicial review is 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.

For one to succeed under Judicial Review it is trite law that he must prove that the act, omission or commission (decision) made was tainted either by; illegality, irrationality or procedural impropriety. In this case, the applicant has proved to this court that the said decision by the minister was tainted by illegality against the existing laws governing the profession of Clearing and forwarding that were passed by Parliament under the East African Customs Management Act, 2004.

A delegated legislation can be questioned on ground that it is inconsistent with provisions of the parent Act or that it is contrary to some other statute applicable on the same subject matter. It can also be questioned on ground that it is manifestly arbitrary and unjust or irrational.

In the case of ***Stanbic Bank of Uganda Ltd, Barclays Bank of Uganda Ltd, Centenary Rural Development bank Ltd and Standard Chartered Bank Ltd vs Attorney General HCT-00-CC-MA 0645-2011*** court held that;

“It is also my view that the issuance of two licenses for the same business, one by the Central government and another by the local government cannot be a rational manner of improving the collection of revenue. Given the financial linkages between the central government and the local governments it appears to be double collection that would be unfair to the licensee....”

This Court concurs with the reasoning by the learned Judge in the above matter since it is similar in principle with the present case. The conferment of rule-making power by an Act does not enable the rule making authority to make a rule that travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto or affects other existing legislations. See ***Uganda Law Society vs Kampala Capital City Authority & Attorney General Misc. Cause No. 243 of 2017***

Thus, while adjudging the *vires* of delegated legislation, the courts do not concern themselves with the merits, demerits, wisdom of the underlying policy. A court never quashes a rule because, in its opinion, the policy underlying it is not wise or prudent. The Court’s only concern is to see whether the impugned delegated legislation falls within the scope of the rule making power conferred on the concerned authority by the parent Act and does not conflict with other legislations.

In the case of *I.R.C v National Federation of Self-Employed and Small Businesses [1981] 2 All ER 93 at 107* court noted thus;

“They [Ministers] are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.”

The inclusion of the clearing and forwarding firms/ entities among the business/trade/services that require issuance of trading licenses is illegal and contrary to the East African Customs and Management Act ,2004 and it conflicts with specific legislation. Where two legislations conflict i.e between general legislation and specific legislation, the specific legislation overrides the general legislation on the subject matter. *Generalibus specialia derogant* or *Generalia specialibus non derogant*. No latter general Act can prevail over an earlier special Act. Meaning general things do not derogate from special things. See ***Eaton Towers Uganda Limited v Attorney General & Jinja Municipal Council Misc. Cause No. 84 of 2019***

This court is therefore convinced that the decision of the Minister was ultra vires the existing laws (East African Customs Management Act) in respect of licensing of clearing and forwarding firms in Uganda as it was unfair and amounts to double taxation.

This issue is therefore answered in affirmative.

Remedies

- This court issues an order of Certiorari quashing items 14 (in Part C) of the Trade Licensing (Amendment of Schedule) Instrument No. 2 of 2011 which purport to require clearing and forwarding firms who are already licensed annually to carry on their trade by the East African Customs Management Act, 2004 and payment of dues in respect of both to now seek a further license to trade from the town clerk of a municipal council and if granted, pay further licensing dues in respect thereof.
- This court issues an order of prohibition restraining and preventing items 14 of the Trade (Licensing) (Amendment of Schedule) Instrument No. 2 of 2011 from taking effect and prohibiting the respondents or their agents from enforcing the said Trade License provisions against clearing and forwarding firms.
- This application is allowed with no order as to costs.

I so order.

Dated, signed and delivered be email at Kampala this 8th day of May 2020

SSEKAANA MUSA
JUDGE