The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Civil Misc. Cause No. 21 of 2020

In the matter of an Application for Leave to file an Application for Judicial Review out of time

Epwonu James Frank ..... Applicant

Versus

Kaberamaido District Local Government

The CAO Kaberamaido District Local Government ..... Respondents

Before: The Hon. Justice Dr Henry Peter Adonyo

Ruling

Background:

The applicant in 2012 was sponsored by Baylor Uganda to attain a degree in medical laboratory technology from Mbarara University of science and technology and was bonded to work with the respondents for three years and upon completion and attaining the degree, the applicant was to be promoted by the respondents in Tandem with the applicant's qualifications.

The bond required Baylor Uganda to hold the applicant's degree and only release them upon the completion of three years and access to the academic documents during the bonding period was to be determined on case basis. Upon the written

advice of the 2nd respondent, the applicant was kept bonded at the old pre-degree designation.

This application was brought by way of notice of motion under the provisions of sections 36, 37, 38 of the Judicature Act Cap 13 as amended, Rules 3 (1 & 2), 5,6,7 and 8 of the Judicature (Judicial Review) Rules S.I 11 of 2009 and O.51 r 1,2.3 of the Civil Procedure Rules SI 71-1 and the application was supported with an affidavit deponed by Epwonu James Frank.

The respondents filed an affidavit in reply deponed by Akera John Bosco the CAO of Kaberamaido District Local Government.

Representations:

The applicant was represented by Makmot-Kibwanga and Co. Advocates. The respondents were represented by The Attorney General's Chambers Mbale regional Office.

Grounds of the application:

The grounds of the application lodged by the applicant are set out in the notice of motion and expounded in the supporting affidavit. The Applicant sought for the following orders,

a. An order permitting the applicant to file an application for judicial review against the respondents out of time seeking for the following orders,

b. An order of certiorari to issue against the respondent to bring into this court and quash the decision of the respondents' which denied the applicant promotion within public service.

c. An order of mandamus to issue against the respondent to compel the respondents to re-designate and promote the applicant as per the central government guidelines in the circular standing instruction no.9 of 2018, Scheme of service for medical laboratory cadre in the Uganda public service.

d. An order of prohibition to issue against the respondents from recruiting any person to the office of the senior Laboratory Technologist of Kaberamaido district which the applicant, according to the guidelines, should be occupying.

e. Costs of the application.

Issues:

Issues raised for determination were as follows:

a. Whether the applicant has a good ground for the extension of time?

b. What are the available remedies?

Applicant's submissions:

Counsel for the applicant submitted that the applicant has disclosed a good reason for extension of time for application of judicial review and quoted ***Rule 5 (1) of the Judicature (Judicial Review Rules) 2009*** which provides that;

> *"... an application for judicial review shall be made promptly and in any event with in three months from the date when the grounds of the application arose, unless the court considers that there is good reason for extending the period with in which the application shall be made."*

Counsel further submitted that applications of such nature should be made within three months from the date when the ground of the application arose. The ground for judicial review in this case occurred in January 2019 when the respondents failed to act on the policy guidelines. The applicant is outside the three months' deadline hence this application for extension of time.

counsel for the applicant stood firm on the ground that justice is a fundamental right as enshrined in 1995 constitution coupled with the right to a fair hearing related with the right to challenge unfair decisions by way of judicial review.

Counsel further submitted that judicial review looks at natural justice, fairness, equity and good conscience and therefore an applicant barred by limitation ought to be looked at kindly in order to allow him reach court with his grievances.

Counsel cited the case of ***Paul Millls Ekwang Vs Lira District Local Government MA 036/2007*** where court held that the burden is on the applicant to avail to court facts that on their own face would entitle him to be granted leave.

Counsel for the applicant also indicated that a decision had been reached against the applicant and the desire to explore the existing internal mechanisms of solving the dispute triggered the delay in application for judicial review.

Counsel also submitted on the third ground that the Covid-19 disoriented access to court and hence access to justice delayed. Counsel further pointed out that this application touches the applicant's professional life and livelihood.

Counsel for the applicant in addition submitted that this application does not prejudice the Respondents in any way except that it shall streamline how matters are handled by the 1st respondent which is a public body. He further defined judicial review and quoted a case where the Cardinal principles are enunciated. The case of ***Okoth Umaru & 3 others VS Busia Municipal & 3 others HCMC 0012 2016*** where Court held that it is fair and just to give the applicant an opportunity to appear in court and explain his grievances through judicial review and indicates that these are contained in the affidavit of Epwonu James Frank in paragraphs 3-11.

The applicant sought the remedies of an order granting leave to file for judicial Review out of time and costs.

Respondents' Submissions:

Counsel for the respondents' vehemently opposed the application submitting on a point of law in regards to the incompetence of the application. That the application is time barred and it was filed out of time. Counsel quoted ***Rule 5 (1) of the Judicial Review Rules 2009*** which provides as…

"an application for Judicial Review shall be made promptly and in any event within 3 months from the date when the grounds of the application first arose, unless court considers that there is good reason for extending the period with in which the application shall be made."

The above principle was illustrated in the case of ***Muwanguzi Mugalu V Uganda Railways Corporation & Attorney General High Court Miscellaneous Cause No 3 of 2012*** and ***Basima James V Kabale District Local Government H.C Misc. Application No.20 of 2011.***

Further counsel submitted that the applicant has not adduced any valid reasons why he was prevented from coming to court. It is counsel's submissions that the allegation that he was exhausting internal remedies is false. The applicant does not show which remedies he was undertaking.

Counsel for the respondents also submitted that prerogative remedies under judicial review are not available where there are alternative statutory remedies and that they are final remedies in nature and a party ought to utilize all available remedies.

He further submitted that if there was any decision made against the applicant, there are statutory remedies by way of appeal available provided for under section 59(2) & (3) of the local government act which provides that *" a person aggrieved by a decision of the district service commission may appeal to the public service commission, but the ruling of the district service commission shall remain valid until the public service commission on appeal shall be final"* hence the remedy of judicial review being premature and not available to the applicant as up held in the case of ***Micro Care Insurance limited V Uganda Insurance Commission Misc. Application No. 0218 of 2009***

Counsel also submitted that a remedy by way of judicial review is not available where an alternative remedy exists. Judicial review is a collateral challenge where parliament has provided appeal procedures, as in the taxing state, it will only be very rarely that the court will allow collateral process of judicial review to use to attack an appealable decision …

Counsel also submitted on the test to be applied in deciding whether or not to grant leave to an applicant seeking leave to file an application for judicial review was set out by the court of appeal in ***Kikonda Butema Farms Ltd Vs The Inspector General of Government Civil Appeal No. 35 of 2002 (unreported)*** where court stated that the applicant has provided to the court that in the opinion of the court entitles the applicant to be granted leave to file an application for judicial review.

Counsel for the applicant concluded this issue by stating that the current application does not pass the above test because the applicant has never applied for a promotion because the applicant never had the requisite qualifications at the time there were vacancies in the district. The respondents also aver that the position of the senior laboratory technologist does not exist in the structure of Kaberamaido District Service commission.

Counsel for the applicant while rejoining reiterated his earlier position stating that the applicant has disclosed a good reason for extension of time for an application of judicial review.

Counsel for the applicant cited Article 42 of the Constitution that gives one who is aggrieved by the decision of any of the administrative official or body a right to apply to a court of law, section 36 of the judicature act which gives high court powers to grant prerogative orders.

However, on the issue of non-exhaustion of the available remedies cited the case of ***Pauline Nakabuye vs. Uganda Revenue Authority High Court Misc. Application No. 372 of 2019*** where Hon Justice Ssekaana Musa stated the rule of exhaustion of remedies is not an inflexible rule and the court may relax it if there are special circumstances present in the case such as breach of rules of fairness / natural justice, jurisdictional errors, blatant abuse of power or arbitrariness in exercise of its power. This rule does not oust the jurisdiction of this court to exercise or grant judicial review reliefs or to have supervisory powers over the exercise of powers by the executive.

Resolution:

In the case of ***Kolou Joseph Andres & 2 Others vs. Attorney General Misc. Cause No. 106 of 2010*** it was held that:

"... it is trite law that judicial review is not concerned with the decision in issue per se but with the decision making process. Essentially judicial review involves the assessment of the manner in which the decision is made. It is not an appeal and the jurisdiction is exercised in supervisory manner, not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality."

The purpose of judicial review as stated in ***Chief Constable of North Wales Police V Heavens [1982] Vol.3 All ER*** is to ensure the individual receives fair treatment not to ensure that the authority after according a fair treatment reaches on a matter it is authorized or enjoined by law to decide from itself a conclusion which is correct in the eyes of the court.

Thus the court, shall, in considering an application for judicial review satisfy itself that the following conditions do exist as are were laid out in Rule 7A of the Judicial Review Rules

a) That the application is amenable for judicial review

b) That the aggrieved person has exhausted the existing remedies available with in the public body or under the law

c) That the matter involves an administrative public body or official.

In order to succeed in an application for judicial review, the applicant has to show that the decision complained of is tainted with an illegality, irrationality or procedural impropriety…'' illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. it may also involve failure to adhere to and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision as was stated in the case ***Amuron Dorothy vs. Law Development Centre Misc. Cause 042 2016*** that reiterated the position in the case of ***Pastoli vs. Kabale District Local Government Council [2008] 2 EA 300*** where it was held while citing ***Council of Civil Unions V Minister for the Civil Service [1985] AC 374.***

On whether the applicant has a good ground for the extension of time, this is my finding. The applicant in this matter seeks for extension of time with in which to

file an application for judicial review. Rule 5 (1) is to the effect that an application for judicial review shall be made promptly and in any event with in three months from the date when the grounds of the application first arose. In the instant case, the ground for judicial review occurred in January 2019 when the respondents' failed to act on the policy guideline. This only indicates that three months elapsed in the month of march 2020. The applicant is outside the three months' time frame provided for by Rule 5.

Rule 5 further reads '*...unless the court considers that there is a good reason for extending the period within which the application shall be made*'.

I note that the applicant in his submissions stated that he wanted to exhaust the existing internal mechanisms of solving disputes. However, the applicant has / did not adduce any valid reasons as to why he was prevented from coming to court and does not show which or what remedies he undertook leaving court in speculation. In this case it is not the duty of this court to speculate that the applicant was or might have been prevented by good reasons from filing his application in time set by the law and then on the basis of such speculation extend time. such would be for court descending into the area which is inherently dangerous. It has the effect of court turning itself into a litigant, witness and judge at the same time. That would grossly contravene the principles of natural justice.it is always incumbent upon the party seeking for extension of time to properly demonstrate good reasons for such extension in an application because court would not know

them before they are shown on evidence as stated in ***Dawson Kadope V URA Misc. Cause No. 40 2019***.

I thus find that the applicant did not demonstrate any good reason for the delay in filing an application for judicial review.

I have also noted that the agreement between the applicant and the respondents is *void ab initio* as this was a common mistake in law as to the existence of the subject matter of the contract which rendered it void and un enforceable.

The respondent's in an affidavit in reply while responding to paragraph 9 of the applicant, aver that the position of senior laboratory technologist does not exist in the structure of Kaberamaido District Local Government and attached a copy of the district structure marked as Annexture 'B' only indicating that subject matter in which the agreement was entered was nonexistent.

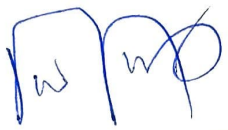
The applicant also submitted that a decision was taken but did not attach any evidence to that effect. The evidence act cap 6 is very clear in section 101 that he who asserts must prove. The applicant has not adduced any documentation to his assertions hence leaving the court in suspense.

On the issue of what remedies are available to parties, I would from the findings above, award costs to the respondents for having been put to undue expenses of defending the application. Section 27 of the civil procedure act is to the effect that the award of costs of all suits shall be in the discretion of the court which

shall have full power to determine by whom and out of what property and to what extent those costs are to be paid.

In light of the above, I find that the applicant in seeking leave within which to apply for judicial review has not demonstrate any good reason for this application to be granted thus it dismissed with costs to the respondents.

I so Order.



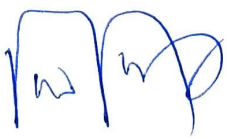
Henry Peter Adonyo

Judge

2nd July 2021

Order: This ruling is forwarded to the Registrar of this court to have it delivered online to parties in line with the Hon Chief Justice's directions on COVID-19 SOP's.

I so order



Judge

2nd July 2021

23/7/2021

Court: Ruling delivered via Email to the parties/ Advocates.

23/7/2021

Mr. Peter Masaka and Ms. Nalwanabo Barbra of Attorney General's Chambers - Mbale

Email: nalwanababarbra@yahoo.co.uk
Petermasaka@gmail.com.
info@justice.go.ug.

Mr. Macknot Kibwanga Counsel for the Applicant.

Email: ~~macknotkibwanga~~
- info@maknot.com.
- adams.kibwanga@yahoo.com

23/7/2021 AR.