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

MISC. APPLICATION NO. 454 OF 2021

CLARE S. KAWEESA :: APPLICANT
VERSUS
1.UGANDA FREE ZONES AUTHORITY
2. FREDERICK KIWANUKA :: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Applicant brought this application by Notice of Motion under *Sections 14(1) & (2)(c) and 33 of the Judicature Act, Section 98 of the Civil Procedure Act (CPA) Cap 71, Rule 5(1) of the Judicature (Judicial Review) Rules 2009* and *Order 52 Rules 1 and 3 of the Civil Procedure Rules (CPR) SI 71-1* seeking for orders that:

a) This Court be pleased to extend time for the Applicant to file an application for judicial review out of time.
b) Costs of the application be in the cause.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit in support of the application deponed to by the Applicant. Briefly, on 1st January 2016, the Applicant was appointed as the Manager Legal and Compliance of the 1st Respondent Authority on a 4-year contract. The above contract expired on the 31st December 2019 and was renewed by the Respondent's Board on 1st January 2020 for a period of one year. On 8th January 2021, the 1st Respondent's Board of Directors communicated an unfair and malicious decision to renew the Applicant's employment contract for a period of two years, subject to a six months Performance Improvement Plan, with Performance Targets that are impossible to perform.

[3] The Applicant averred that the decision to renew her contract for two years only and subject to a Performance Improvement Plan was in total disregard of her Performance Appraisal and the procedure prescribed by the 1st Respondent's Human Resource Policy and Procedures Manual. The Applicant requested the Respondents to follow the well laid down procedure but she was ignored and was given an ultimatum of three days to sign the renewal of the contract. The Applicant avers that the said conduct by the Respondents is illegal, unfair, unfounded, irrational, irregular and unconscionable.

[4] The Applicant further averred that she could not file the judicial review application in time because the Minutes of the 39th, 40th and 42nd Meetings of the 1st Respondent's Board that she seeks to rely on were only signed by the 2nd Respondent on 29th March 2021 and 12th April 2021 respectively. Another document that the Applicant needed to rely on, the Auditor General's Report, was received by the 1st Respondent on 17th March 2021. The Applicant averred that the two successive decisions that she seeks to challenge are part of an unfair, malicious, procedurally flawed and illegal ploy by the Respondents against her. She stated that there are serious questions of law to be decided in the intended application and she has brought the same expeditiously.

[5] The application was opposed by both Respondents through an affidavit in reply deponed to by **Hez Kimoomi Alinda**, the Executive Director of the 1st Respondent, who with express authority also deposed on behalf of the 2nd Respondent. The deponent stated that the Respondents intended to raise a preliminary objection with regard to the tenability of the application. He further stated that the intended application for judicial review bears no merit and the Applicant has demonstrated no good cause before this Court to support the grant of the relief sought in this application. He stated that the application is res judicata; and the Applicant did not need the signed Minutes of the Board

Meetings since Board Resolutions were extracted and signed in December 2020 and were a sufficient foundation for one to apply for judicial review within time. He further stated that the allegation of the requirement to rely on the Auditor General's Report was immaterial to the timely filing of the application. The deponent concluded that the allegations by the Applicant are without merit and the application should be dismissed with costs.

[6] The Applicant filed an affidavit in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

[7] At the hearing of the application, the Applicant was represented by Ms. Lydia Tamale from M/s Tamale & Co. Advocates while the Respondents were represented by Mr. Mwasame Nicholas holding brief for Ms. Bridget Kusiima from M/s Shonubi Musoke & Co. Advocates. It was agreed that the hearing proceeds by way of written submissions which were duly filed. I have reviewed and considered the submissions of both Counsel in the course of resolution of the issues that are before the Court for determination. In their submissions, both Counsel raised some preliminary objections which I will first deal with before considering the merits of the application. I have opted to frame the said objections into two separate issues and the gist of this application shall constitute the third issue.

Issues for determination by the Court

[8] The issues for determination by the Court, therefore, are;

1. **Whether the affidavit in reply filed by the Respondents is defective?**
2. **Whether this application is res judicata?**
3. **Whether the Applicant has demonstrated justifiable cause for extension of time within which to file an application for judicial review?**

Court Resolution and Determination of the Issues

<u>Issue 1:</u> Whether the affidavit in reply filed by the Respondents is defective?

[9] In paragraph 3 of the Applicant's affidavit in rejoinder, the Applicant averred that the affidavit in reply filed by the Respondent is argumentative, awash with falsehoods, prematurely delves into merits of the intended application for judicial review, was defectively commissioned by Counsel for the Respondents, is untenable in law and should be struck out. In their submissions however, the Applicant's Counsel never made any arguments on these points of objection.

[10] In the submissions in reply, Counsel for the Respondents picked up the objections from the affidavit in rejoinder and offered a response, particularly on the matter regarding commissioning of the affidavit. In their submissions in rejoinder, Counsel for the Applicant responded to the submissions made on the points of objections but also opened up some areas not canvassed by the Respondents' Counsel. For purpose of this Ruling, I will restrict myself to the area canvassed by the Respondents' Counsel since it was the fault on the part of the Applicant's Counsel that they did not raise whatever issues they had regarding the affidavit in reply in their initial arguments. Raising any such issues in the submissions in rejoinder would be prejudicial to the Respondent who had no chance to counter them. As such, I will only restrict my consideration to the objection regarding the commissioning of the affidavit in reply; since it is the only one that was substantiated and, secondly, it bears some material significance necessitating court's determination.

[11] In as far as I understand the point raised by the Applicant, it was contended that the affidavit in reply was commissioned by Counsel Nicholas Mwasame who happens not only to work in the same firm representing the

Respondents but also appeared in court for the Respondents. Counsel for the Applicant submitted that this conduct is prohibited by Section 4(1) of the Commissioner for Oaths (Advocates) Act. For the Respondent, it was submitted that the Counsel in personal conduct of the matter was Ms. Byarugaba Kusiima and the record was clear that when Counsel Mwasame Nicholas appeared in Court on 1st July 2021, he expressly informed the Court that he was merely holding brief for Counsel in personal conduct of the matter. Counsel Nicholas Mwasame only went on record upon the court's directive and insistence and solely for purpose of getting a schedule for filing submissions in the case. Counsel relied on the decision in ***Okidi & 4 Others vs Odok W, Election Petition No. 9 of 2011*** for the submission that where the lawyer who commissioned the affidavit is not the same lawyer in personal conduct of the matter, such does not offend the provisions of Section 4 of the Commissioner for Oaths (Advocates) Act.

[12] The facts and circumstances on this aspect have been correctly captured by Counsel for the Respondents. When this matter came up for hearing on 1st July 2021, it had a certificate of urgency already issued by my colleague Judge. Mr. Mwasame Nicholas, who appeared on brief for Ms. Bridget Kusiima (Counsel in personal conduct) informed the Court thus: *"Although I hold brief for Counsel in personal conduct, I am not able to proceed because of an issue of conflict of interest. Counsel in personal conduct lost her mother and was not able to appear. I pray for court's directions"*. Ms. Tamale Lydia for the Applicant stated thus: *"We are interested in the substance of this matter and its quick resolution. I have been informed that the Respondents filed an affidavit in reply but we have not been served with the same"*. The Court then directed thus: *"In that case, let us agree on short timelines which Counsel holding brief shall communicate to the Counsel in personal conduct …"* The schedule was then agreed upon and set running up to this Ruling.

[13] From the foregoing, a few things are clear to me. It is clear that Counsel Nicholas Mwasame expressly informed the Court that he was not able to proceed in the matter because of an issue of conflict of interest. Clearly if it was not for the circumstances of the case, the matter would have been adjourned awaiting presence of Counsel in personal conduct. But given the expressed urgency of the matter and the plea by the very Counsel for the Applicant that they were more interested in the substance of and the quick resolution of the matter, the Court prevailed over the said Counsel to take and communicate the agreed schedule to Counsel in personal conduct. For Counsel for the Applicant to turn around and seek to use this against the Respondents is, in my view, not honest of her. By indicating their interest as substance and quick disposal, I understand it to mean that they were prepared to ignore any unnecessary and immaterial technicalities along the way. For the reason I am to state in the following paragraph, this appears to me to be one of those unnecessary and immaterial technicalities being raised by the Applicant's Counsel.

[14] I hold the view expressed above because it is clear to me that Counsel Nicholas Mwasame was never in personal conduct of this matter. It is also clear that the provision under Section 4(1) of the Commissioner for Oaths (Advocates) Act Cap 5 only prohibits a commissioner for oaths to *"exercise any powers given by this section in any proceeding or matter in which he or she is the advocate for any of the parties to the proceedings or concerned in the matter … or in which he or she is interested"*. I do not read into that provision a requirement that a member of the same law firm cannot commission affidavits in a matter in which another Counsel from the same firm is in personal conduct. The authority to commission oaths is personal to holder and is not issued to an advocate as a member of a particular firm. I am fortified in this view by the statement of **Ruby Aweri Opio J.** (as he then was) in ***Okidi & 4 Others vs Odok W, Election Petition No. 9 of 2011*** thus:

"Commissioning of Oaths is the confidence the law grants to advocates among other officers. The authority to commission oaths is personal to holder and is not issued to a firm member. There was no evidence to show that Akena was an advocate of the Petitioners or concerned with the proceedings. ... an advocate takes his own instructions even if he is a partner in the same firm. In the premises, it is my conclusion that Akena was not interested in the matter and it was, therefore, proper for him to commission the said affidavits."

[15] I entirely agree with the above reasoning by the Learned Judge. The circumstances are also similar to what the Court is faced with in the instant case. Herein, although Counsel Nicholas Mwasame works in the same firm, he was not in personal conduct of the matter, and there is no evidence that he was personally concerned with or interested in the proceedings in the matter. Additionally, there is some indication from the statements on record that by the time Counsel Mwasame appeared on brief for counsel in personal conduct, he had already commissioned the affidavit. Mr. Mwasame declared that he was conflicted. Although Counsel did not express on record the particulars of the conflict, the Court and both parties proceeded under the understanding that he would not take any steps or decisions that would make his participation to appear as though he was in personal conduct of the matter. His role was simply to communicate the schedule to counsel in personal conduct. Such cannot be offensive to the provision under Section 4 of the Commissioner for Oaths (Advocates) Act. I have therefore found no merit in this point of objection and the same is overruled. Issue 1 is therefore answered in the negative.

<u>Issue 2:</u> Whether this application is res judicata?

[16] It was submitted by Counsel for the Respondents that this application is res judicata. Counsel argued that dismissal of a suit on account of a failure to

fulfil a statutory requirement such as happened in ***M.C No. 131 of 2021: Clare Kaweesa vs Uganda Free Zones Authority*** determines the suit in its entirety. Counsel relied for this submission on the provision under *Section 7 of the CPA* and the decisions in ***Masukhal Ramji Karia & Anor V AG, SC Civil Appeal No. 20 of 2000; Tukamuebwa George & Others V AG & Anor, Constitutional Petition No. 59 of 2011;*** and ***Sam Akankwatsa V United Bank of Africa (U) Ltd, HC M.A No. 40 of 2019 (Arising from C.S No. 843 of 2018)***. Counsel prayed that the application be dismissed on this ground.

[17] In response, Counsel for the Applicant submitted that the position of the law is that when a prior suit has been dismissed on some technical ground without going into merits of the questions raised, there can be no decision on such questions and therefore no res judicata. Counsel submitted that according to explanatory note one under Section 7 of the CPA, the former suit should have been **"heard and finally decided"**. Counsel relied on the text in **M. Ssekaana & S.N. Ssekaana, 2007; "Civil Procedure and Practice in Uganda", at pp. 88 – 89** and on the decisions in ***Masukhal Ramji Karia & Anor V AG, (SC) [2005] 1 EA 83; Boutique Shazim Ltd v Norattam Bhatia & Anor, Court of Appeal Civil Appeal No. 36 of 2007;*** and ***Onzia Elizabeth v Shaban Fadul (as Legal Representative of Khemisa Juma), HC Civil Appeal No. 0019 of 2013***.

[18] The doctrine of *res judicata* arises from the provision under *Section 7 of the Civil Procedure Act* which provides as follows:

> *"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has*

been subsequently raised, and has to be heard and finally decided by that Court."

[19] The law on res judicata was also succinctly put by the Court of Appeal in ***Ponsiano Semakula Vs Susane Magala & Others, 1993 KALR 213*** which was cited with approval in the latter case of ***Maniraguha Gashumba Vs Sam Nkundiye, CA Civil Appeal No. 23 of 2005***. The Court had this to say:

> ***"The doctrine of res judicata, embodied in S.7 of the Civil Procedure Act, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine (is) succinctly expressed in the well-known maxim: 'nemo debet bis vexari pro una et eada causa' (no one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by res judicata appears to be that the plaintiff in the second suit is trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".***

[20] The essential elements of the doctrine of res judicata therefore are:

a) There was a former suit between the same parties or their privies;
b) The matter was heard and finally determined by the court on its merits;

c) The matter was heard and determined by a court of competent jurisdiction; and
d) The fresh suit concerns the same subject matter and same parties or their privies.

(See: *Bithum Charles Vs Adoge Sally, HCCS No. 20 of 2015* which relied on ***Ganatra v. Ganatra [2007] 1 EA 76; Karia & Another v. Attorney General & Others [2005] 1 EA 83 at 93 -994;*** and ***Attorney General & Anor vs. Charles Mark Kamoga MA 1018 of 2015*****).**

[21] On the case before me, the Applicant filed ***M.C No. 131 of 2021: Clare S. Kaweesa vs Uganda Free Zones Authority & Another*** for judicial review together with M.A No. 320 of 2021 seeking an order for a temporary injunction. When M.A 320 of 2021 came up for hearing, Counsel for the Respondents raised an objection to the effect that the application for a temporary injunction could not be sustained since it was based on a suit that was incompetent on account of being time barred. The objection was upheld and the application together with the suit (M.C 131 of 2021) were accordingly struck out. The Applicant was advised to follow the law and seek appropriate remedies. It is that proceeding that Counsel for the Respondents is basing on to make a plea of res judicata.

[22] I must say, with due respect, that Counsel for the Respondents have totally misconceived the application of the doctrine of res judicata. The main body of the law, starting from the explanatory note to Section 7 of the CPA and from several court decisions, clearly point out that for a matter to be res judicata, the matter in issue must have been heard and finally determined. In ***Onzia Elizabeth v Shaban Fadul (as Legal Representative of Khemisa Juma), HC Civil Appeal No. 0019 of 2013*****, Mubiru J.** went ahead to interpret the phrase "heard and finally determined" to mean "heard and determined on merits". At page 4 of the judgment, after reviewing a plethora of

available authorities on the subject, the Learned Judge concluded that for the doctrine of res judicata to apply, ***"there must have been a decision on the merits of the case. Therefore, where the decision was not made on the merits of the suit, the matter cannot be res judicata"***. The same view was expressed in ***Bithum Charles Vs Adoge Sally, HCCS No. 20 of 2015*** which relied on ***Ganatra v. Ganatra [2007] 1 EA 76***.

[23] I am in total agreement with the above construction of the law. That, in my view, is the plain and natural construction of the main thrust of the body of authorities on the subject. I have looked at the authorities relied upon by the Respondents' Counsel to propound the argument that a dismissal on a point of law of a previous suit makes the subsequent suit res judicata. I find that the decision in ***Tukamuhebwa George & Others Vs AG & Another (supra)*** is distinguishable from the circumstances before this Court and was cited by the Respondents' out of context. The decision in ***Sam Akankwasa Vs. United Bank of Africa (supra)*** is not binding on this Court and, with due respect, I am unable to be persuaded by the same. I am not in agreement with its contextualization of the decision of the Constitutional Court in ***Tukamuhebwa George & Others Vs AG & Another (supra).***

[24] In my considered view, when the Constitutional Court in ***Tukamuhebwa George & Others Vs AG & Another (supra)*** held that "a dismissal on a point of law is fundamental and in the eyes of the law resolves the dispute unless there is an appeal and the dismissal is set aside", it did not mean or intend to hold that such applies to all kinds of points of law. That decision was reached in light of the facts that were before the Court. In that case, the High Court matter had been dismissed on account of limitation. The law is that a dismissal of a suit on account of a statute of limitation extinguishes the cause of action except where a party is able to rely on an available exception. That is the reason the Constitutional Court held that dismissal on the point of law was

fundamental and had resolved the dispute. That cannot be said of many or of all points of law. Where a point of law does not extinguish a cause of action or does not finally determine the matter, dismissal of a suit on account of such a point of law cannot make the subsequent suit res judicata.

[25] The facts in the instant case are different. Under *Rule 5(1) of the Judicature (Judicial Review) Rules, 2009*, *"an application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the court considers that there is good reason for extending the period within which the application shall be made"*. [Emphasis added]. This rule sets the time within which the application shall be brought but also grants discretion to the Court to extend such time. In my view, when the court is to exercise this discretion and on what grounds, is entirely within the court's powers. Where such a time limit is allowed to be extended, a party cannot be precluded from taking benefit of the power of the court to extend such time on account of the plea of res judicata. It does not matter, in my view, that the party invokes the court's discretion after their first suit is dismissed under the provision setting the limitation.

[26] In the circumstances therefore, I do not agree with the submission by the Respondents' Counsel that the doctrine of res judicata is applicable to the present case. The law clearly envisaged that where a party was unable to bring the application for judicial review within the set timeline, they can invoke the discretion of the court upon showing good cause and secure an extension of the time. This applies even where the party realizes or is alerted that they are out of time after they have already filed the application. Where such earlier filed application is dismissed on account of the time limitation, such does not extinguish the cause of action; which is the requirement for a suit to be defeated for being res judicata on account of a time bar. The Respondents have

therefore not satisfied the Court that this application is res judicata. The second issue is therefore answered in the negative.

<u>Issue 3</u>: Whether the Applicant has demonstrated justifiable cause for extension of time within which to file an application for judicial review?

[27] *Rule 5(1) of the Judicature (Judicial Review) Rules, 2009* sets the time limit within which an application for judicial review may be brought by an applicant. The provision also leaves room for an applicant who has failed to bring the application within time, to bring such application outside the stated period, upon satisfying the court that there is good reason for extending the stated period of time. Under the law, good or sufficient reason must relate to the inability or failure to take the particular step in time. See: ***William Odoi Nyandusi vs Jackson Oyuko Kasendi, CA Civil Application No. 32 of 2018*** and ***Rosette Kizito vs Administrator General & Others, SC Civil Application No. 9 of 1986.***

[28] The question, therefore, is whether in the instant case the Applicant has established good reason for failure to bring the application for judicial review within the set time period.

[29] It was averred by the Applicant that she could not file the judicial review application in time because the Minutes of the 39th, 40th and 42nd Meetings of the 1st Respondent's Board that she seeks to rely on were only signed by the 2nd Respondent on 29th March 2021 and 12th April 2021 respectively. The Applicant also needed to rely on the Auditor General's Report which was received by the 1st Respondent on 17th March 2021. The Applicant averred that the two successive decisions that she seeks to challenge were part of an unfair, malicious, procedurally flawed and illegal ploy by the Respondents against her.

She stated that her application discloses serious questions of law to be decided by the Court and she has brought the application expeditiously.

[30] For the Respondents, it was stated that the intended application for judicial review bears no merit and the Applicant has not demonstrated any good cause to support the grant of the relief sought in this application. It was further stated that the Applicant did not need the signed Minutes of the Board Meetings since Board Resolutions were extracted and signed in December 2020 and were a sufficient foundation for one to apply for judicial review within time. The Respondents further stated that the Applicant's claim that she needed to rely on the Auditor General's Report was immaterial to the timely filing of the application.

[31] The Applicant disputed the dates on which the Board Resolutions are said to have been extracted and signed. She claimed they were dishonestly backdated to justify the Respondents' untenable arguments and to frustrate the Applicant's case. The Applicant claimed she is the Custodian of the 1st Respondent's Board documents and she can confirm that no Board Resolutions were signed before signing of the Minutes of the Board Meetings. On the other hand, it was submitted by the Respondents' Counsel that since the Executive Director is the Secretary to the Board according to the Uganda Free Zones Act, he was the Custodian of the Board documents and not the Applicant as claimed.

[32] I note that although Section 12 of the Free Zones Act 2014 makes the Executive Director the Secretary to the Board, it does not state that the function of keeping Board documents is specifically performed by the Secretary to the Board. Section 15 of the same Act provides that the Secretariat shall be headed by the Executive Director but shall have such other officers and staff as the Board may determine. It therefore cannot be assumed that merely because

the Executive Director is the Secretary to the Board, he must be the Custodian of the Board documents. It is possible that another officer or staff below the Executive Director maintains custody of such documents. As such, there is no factual evidence before the Court to dispute the Applicant's claim that she is the Custodian of the Board documents. That being the case, the questions raised regarding the authenticity of the Board Resolutions and when they were extracted and signed cannot be sufficiently answered in these proceedings, in absence of further evidence. Since the dates on which the Minutes of the Board Meetings were signed are not in dispute, I will take those dates as the basis of the Applicant's knowledge of the decisions of the 1st Respondent's Board.

[33] To that end, I have therefore believed the Applicant's evidence to the effect that she was unable to bring the judicial review application in absence of signed minutes of the Board Meetings as it was the only official way she came to learn of the decisions of the 1st Respondent's Board. I have also believed her claim that she needed to rely on the Auditor General's report and the same was only available by 17th March 2021. The Minutes of the said Board Meetings were signed on 29th March and 12th April 2021 respectively. The decision of the 1st Respondent subjecting the Respondent to a Warning was communicated on 19th April 2021. The Applicant had on the 26th April 2021 filed an application for judicial review which was, however, found to have been filed out of time going by when the grounds for judicial review first arose in accordance with Rule 5(1) of the Judicature (Judicial Review) Rules, 2009.

[34] Taking all the above circumstances into consideration I find that the Applicant has shown good cause, sufficient enough, to invoke the discretion of the Court to extend the time within which the Applicant can bring the application for judicial review. Accordingly, this application succeeds and the same is allowed with the following orders:

1. Time is extended for the Applicant to file the application for judicial review against the Respondents' actions.
2. The Applicant shall file the application within 15 days from the date of delivery of this Ruling.
3. The costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered by email this 6th day of August, 2021

Boniface Wamala
JUDGE