

3. In breach of Articles 28(1), 42 and 173 of the Constitution and the Respondent's own internal regulations, the respondent on 10th September 2021, purported to remove the applicant from public office as its Senior Engineer-Investment verification unceremoniously, unjustly, unfairly, irregularly, improperly, high handedly and without due process.
4. The respondent's internal appeal procedures were not available to the applicant whose removal from office did not arise from a disciplinary hearing but rather from a purported expiry of contract. The applicant through his lawyers sought to be reinstated which the respondent unjustifiably denied.
5. In the interest of ensuring that the respondent upholds, respects and promotes the rule of law and human rights in the exercise of its statutory powers, it is just and convenient that this Court allows this application and grants the applicant all the reliefs sought.

The respondent opposed this application and filed an affidavit in reply through Safina Naggayi, its Head Human Resource and Administration, but briefly states that;

1. The application is not amenable to judicial review as this is a private law contract and not concerned with the respondent's exercise of any of its statutory mandate or with any decision-making process of the applicant.
2. That the applicant's contract was a fixed term hence this application is over taken by events as his contract expired on 3rd September 2021 and was never renewed or extended hence the applicant is devoid of *locus standi*.
3. That the applicant sabotaged the process of his contract renewal and or extension when he willfully failed or neglected to respond or

indicate his acceptance to the offer by the respondent to renew his contract under the prevailing terms and conditions.

4. That the applicant further sabotaged the process of his contract renewal and (or) extension when he committed several actions that would have amounted to a fundamental breach of his employment contract entitling ERA to summarily terminate him if he had a valid employment contract.

The applicant was represented by *Counsel Oketcho Stanley* while the respondent was represented by *Counsel John Musiime & Counsel Kenneth Agaba*

At the hearing of this application, the parties were directed to file written submissions which I have had the occasion to read and consider in the determination of this application.

The following issues were raised for determination before the court;

1. *Whether the application is competently before the court.*
2. *Whether the decision of the respondent to remove the applicant from office was procedurally proper and rational.*
3. *What remedies are available?*

Preliminary objection:

In his submissions, counsel for the applicant raised a preliminary objection in regard to the respondent's supplementary affidavit in reply. He contended that it was filed without leave of Court contrary to the provisions of Rule 7 of the Judicature (Judicial Review) Rules, 2009. He also referred to the decision of this Court in the case of *Water & Environment Media Network (U) Ltd & 3 Ors -v- National Environmental Management Authority, consolidated Misc. Cause No.239 and 255 of 2020* in which the court upheld the provisions above. He prayed that the said affidavit be struck out.

In reply, respondent's counsel contended that it is trite that applications for leave to file a supplementary affidavit and amendments can be made orally given especially that, such applications do not require evidence and referred this court to the case of *DD Barwa Ltd -v- GS Didar Singh [1961] 1EA 282*. That the applicant suffers no prejudice at all since he does not intend to contest the facts introduced.

He also submitted that the law on applications for extension of time and for leave of court was that they can be sought and granted after filing that is ex-post facto. Counsel argued that the matter had been adjourned to the 21st of April 2020 which was the date he had intended to seek leave to formalize the filing of the supplementary affidavit in reply.

In rejoinder counsel for the applicant reiterated their submission that the affidavit was defective and ought to be struck off the record of the court since it was filed fourteen days after the closure of pleadings.

Determination:

Rule 7 (3) of the Judicature (Judicial Review) Rules, 2009 provides that;

“Any respondent who intends to use any affidavit at the hearing shall file it with the registrar of the High Court as soon as practicable and in any event, unless the Court otherwise directs, within sixty days after service upon the respondent of the documents required to be served by sub-rule(1).

This application was filed on 26th December 2021 while the supplementary affidavit was filed on 16th March, 2022. According to the Court record, the respondent did not seek leave of court to file the supplementary affidavit. I have perused this affidavit and I concur with counsel for the applicant that it was an afterthought. The new evidence brought forthwith pertaining the applicant's employment with Busitema University does not touch this matter.

Therefore said affidavit was wrongly filed in Court without leave and the same is struck out since it is contrary to the Judicature (Judicial Review) Rules and the Civil Procedure Rules.

Counsel for the respondent also raised a preliminary objection as to the competence of the application that will be dealt with under issue 1.

Whether the application is competently before this Court?

In submissions, counsel for the applicant first defined judicial review as per Rule 3 of the Judicature (Judicial review) (Amendment) Rules, 2019 as the process by which the High Court exercises its supervisory jurisdiction over the 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.

Referring to the case of *Editors Guild Uganda Ltd & Anor -v- Attorney General, Misc. cause No. 400* counsel submitted that the purpose of judicial review is to ensure that the individual is given a fair treatment by the authority to which he or she has been subjected.

He also relied on **Rule 7A of the Judicature (Judicial review) (Amendment) Rules, 2019** that provides that in considering an application for judicial review court must satisfy that;

- a) *The application is amenable for judicial review;*
- b) *The aggrieved person has exhausted the existing remedies available within the public body or under the law ; and*
- c) *The matter involves an administrative public body or official among others.*

That in the instant case and as per Section 4 of the Electricity Act 1999, the respondent is a public body, with the mandate to generate, transmit, distribute or, sale of electricity.

That in the instant case the applicant was deprived of an opportunity and forum through which his grievances and defence would be handled. That

there was no internal mechanism through which, the applicant would have enjoyed by way of appeal. That this was admitted by the respondent in paragraph 17 of its affidavit in reply. That the application sought to challenge the respondent's decision to terminate an already approved contract of service thus rendering the said decision illegal, unconstitutional, unjustified, unreasonable, against the principles of natural justice and characterized by procedural irregularity. Counsel prayed that the court to find the application competent.

In reply, the respondent's counsel relied on **Section 21 of the Electricity Act** which stipulates that;

- a. *The authority may appoint other officers and staff of the secretariat on such terms and conditions as may be specified in the instruments of appointment.*
- b. *The authority shall, with the approval of the minister, make regulations governing the terms and conditions of employment of the staff of the authority.*
- c. *Notwithstanding anything in the Interpretation Act, regulations made under this section shall not be statutory instruments and shall not be required to be published in the Gazette."*

He submitted that the above provision made it clear that parliament intended for the terms and conditions of employment of "other staff" of ERA to be a matter of private law. i.e contract and his remedy is under Section 93 and 94 of the Employment Act.

He relied on several cases to emphasise that judicial review is only available against a public body in a public law matter to include *Mrs. Anny Katababazi Bwengye -v- Uganda Christianity University Misc. Cause No.268 of 2017* in which Court cited with approval the decision in *Arua Kubala Park Operators and Market Vendors' Cooperative Society Limited Arua Misc. Cause No.3 of 2016*.

In rejoinder, counsel for the applicant submitted that the section 21 did not in any way categorize the authority's employees as private or public as the respondent sought to mislead this court. That the applicant's employment and contract of employment were matters of public laws since they arose from the respondent's statutory duty under Section 21(1) of the Electricity Act.

ANALYSIS:

Rule 3 of the Judicature, (Judicial Review)(Amendment) Rules, 2019, defines judicial review as the process by which the High Court exercises its supervisory jurisdiction over the proceedings of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with performance of public acts and duties.

While **Rule 3A** grants any person who has a direct sufficient interest in a matter to apply for judicial review. **Rule 7A (1) of the Judicature, (Judicial Review)(Amendment) Rules, 2019** provides that the Court, in considering an application for judicial must satisfy itself that;

- a) *The application is amenable for judicial review.*
- b) *The aggrieved person has exhausted the existing the remedies available within the public body or under the law; and*
- c) *The matter involves an administrative public body or official.*

As submitted by the applicant, the respondent is a public body as established under **Section 4 of the Electricity Act**. The claim by the applicant is about the manner or procedure through which a decision to terminate his contract of employment was made. He contended that he was deprived of an opportunity and forum through which his grievances and defense would be handled. That there was no internal mechanism through which the applicant would have enjoyed by way of appeal.

It is true that the applicant was employed by a public body Electricity Regulatory Authority which in the courts view is a public body. Even if the

respondent is a public body the employment relationship with the applicant would not imply any public law issues in their employment relationship. In the case of *R vs East Berkshire Health Authority Ex P Walsh [1985] QB 152 per Sir John Donaldson MR* noted that employment by a public body does not, *per se*, inject any element of public law in employment matters.

Further, with regard to employment and judicial review, the Court must consider the process of appointment and revocation of the appointment and whether the aforesaid are governed by a Statute or the Constitution. Where the appointment or revocation is not governed by Statute or the Constitution then it is a matter of private law. The Applicant is erroneously using this application under judicial review to enforce a private law benefit. This court relies on the decision in *R vs British Broadcasting Corporation Ex P Lavelle [1983] 1 ALL ER 241* which provides that private employment is clearly outside the realms of judicial review.

It is settled law in Uganda, as was held in *High Court Misc. Cause No. 0003/2016: Arua Kubala Park Operators And Market Vendors' Cooperative Society Limited v Arua Municipal Council*, which quoted with approval *R v East Berkshire Health Authority Ex Parte Walsh [1984] 3 WLR 818*, that the remedy of judicial review is only available where the issue is of breach of "public law", and not of breach of a "private law" obligation. To bring an action for judicial review, it is a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed by the public at large.

According to of the text *Public Law In East Africa, Ssekaana Musa, 2009, LawAfrica Publishing*, the learned author states, at page 36, that 2 (two) things must be established for judicial review to be available, 1) the body under challenge must be a public body whose activities can be controlled by judicial review, 2) *the subject matter of the challenge must involve claims based on public law principles, not the enforcement of private law rights.*

Public law is the system which enforces the proper performance by public bodies of the duties which they owe the public. On the other hand, private law is concerned with enforcement of personal rights of persons, human or juridical, such as those emanating under property, contract, duty of care under tort and mainly regulates relations between private persons: *Arua Kubala Park Operators And Market Vendors' Cooperative Society Limited v Arua Municipal Council. (supra)*

The learned author of **Public Law in East Africa (supra)** at page 45, states that disputes arising out of the employment relationship will be private law disputes, and thus claims to enforce a right derived from contract or from statutory requirements, which have been incorporated into a contract, are private law claims enforceable by ordinary action for damages or a declaration or injunction.

The subject matter under challenge involves enforcement of private law rights. The real matter in issue between the Applicant and Respondent arises out of an employment contract/relationship, and the applicant's complaint reveals that the underlying issue herein is a labour complaint. The applicant's contract of employment was terminated which is the genesis of this application. This nature of dispute has an alternative remedy under the Employment Act 2006.

In *Arua Kubala Park Operators And Market Vendors' Cooperative Society Limited v Arua Municipal Council (Supra)*, the Honourable Mr. Justice **Stephen Mubiru** held that where a relationship is regulated by the law of contract, like in the instant Application, administrative law remedies should generally not be available. The Learned Judge further held that it is important that parties are held to their contractual obligations through ordinary suits and not by invoking public law remedies. A party should not take advantage of public law simply because it contracted with a public body, and thereby obtain an advantage in the enforcement of that contract, that would otherwise not be available against a non-public body or private person.

The subject matter of the claim being pursued in the judicial review application must involve strictly matters of public law not private law. Public bodies (like private bodies) may enter into contracts or commit torts. Individuals may only be seeking to enforce essentially private law rights. Judicial review is not available to enforce purely private law rights. Contractual and commercial obligations are enforceable by ordinary action and not by judicial review. *See R v Lord Chancellor ex p. Hubbit and Saunders [1993]COD 326.*

Employment by a public authority does not per se inject any element of public law. It could be different if there were statutory 'underpinning' of employment such as statutory restrictions on dismissal, which would support a claim for ultra vires, or a statutory duty to incorporate certain conditions in the terms of employment, which could be enforced by a mandatory order. Where a public authority takes action in relation to an employee, such as disciplinary action or termination of an employment relationship, this will normally be a matter of contract or employment law rather than judicial review. *See Mrs Anny Katabazi-Bwesigye v Uganda Christian University HCMC No. 268 of 2017; R v Derbyshire CC Ex p Noble [1990] I.C.R 808; Evans v University of Cambridge [2002] EWHC 1382; R (Tucker) v Director General of the Crime Squad [2003] EWCA Civ 57*

It is a well-established proposition that where a right or liability is created by statute which gives a special remedy for enforcing the same, the remedy provided by statute must be availed of in the first instance. Being a labour complaint, the applicant ought to have filed a matter before the labour officer or the Industrial court. A court's inherent jurisdiction should not be invoked where there is a specific statutory provision that would meet the necessities of the case.

There are various reasons why legislation may create an avenue of redress into which the Court may divert challenges, including a desire to make access to justice available more locally; a wish to prevent the court from

becoming overburdened with cases; the fact that the tribunal or other specialist body may have more expertise in the subject of the claim than court.

The applicant was appointed to the position of compliance Engineer in accordance with the powers of the authority for a period of 5 years. On 21st July, the applicant applied for renewal of his contract and the same was granted on 6th August 2021 for five years which was however terminated by the respondent after allegations of misconduct by the applicant. The respondent also informed the applicant that the new contract had expired owing to the applicant's failure to accept the contract offer.

These facts disclose that the dispute herein relates to the applicant's rights under the Employment Act. In that case, the Labour Officer or the Industrial Court are best suited or specialized in handling and determining labour disputes.

This application is incompetently before this court for failing to exhaust the existing available remedies under the Employment Act and is therefore dismissed with costs.

I so order.

SSEKAANA MUSA

JUDGE

31st OCTOBER 2022