

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS CAUSE NO. 13 OF 2021
TOUCH MEDIA LIMITED T/A TOUCH FM LIMITED:.....APPLICANT
VERSUS
UGANDA COMMUNICATIONS COMMISSION:.....RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This is an application for judicial review brought under sections 33 & 36 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71 and Rules 3(1) a and 6(1) of the Judicature (Judicial Review) Rules 2009.

The applicant sought that;

1. An order of certiorari doth issue quashing and declare as and void or otherwise unconstitutional, ultra-vires, illegal and a nullity the decision of the respondent.
2. An order of mandamus directing and compelling the respondent to issue a no objection certificate to the changing of ownership of FM radio frequency 95.9Mhz from the applicant to United States Agency Global Media t/a Voice of America in Uganda.
3. The costs of this application be provided for.

This application was supported by the sworn affidavit of Franco Baitwa the Managing director of the applicant whose grounds were briefly that;

1. The applicant a limited liability company operated an FM radio station under the broadcasting carrier frequency 95.9Mhz in Kampala that was duly licensed by the respondent.
2. The applicant commenced the process of disposing off its radio and transfer of its radio broadcasting license to United States Agency Global Media t/a Voice of America.
3. The respondent contrary to its obligations withheld the transfer of license certificate to United States Agency Global Media t/a Voice of America after the parties fulfilling all requirements.
4. The applicant is aggrieved by the respondent's decision and seeks review on the grounds that the decision is unfair, illegal and irrational for failure to heed to statutory procedures and requirements.

The respondent filed an affidavit in reply sworn by Martha Kamukama, the legal manager of the respondent opposing the application whose grounds were briefly:

1. That the application was misconceived, an abuse of court process and ought to be struck out.
2. That the applicant initiated the process of transfer of its licence to United States Agency Global Media t/a Voice of America without obtaining the respondent's consent.
3. That the respondent lawfully and reasonably exercised its mandate in investigating the sale of the applicant's licence to a third party before

approving the transfer to United States Agency Global Media t/a Voice of America.

4. That the respondent was under no obligation to issue a broadcasting licence to United States Agency Global Media t/a Voice of America when the required conditions had not been met as the same could only be considered upon evaluation of its application.
5. That the respondent lawfully executed its statutory mandate in declining to issue approval for the licence to United States Agency Global Media t/a Voice of America.

The parties agreed to the following issues for determination.

1. *Whether the application is competently filed in this court?*
2. *Whether there are legal grounds for judicial review?*
3. *Whether the applicant is entitled to the reliefs sought?*
4. *Whether the respondent's decision complained of is tainted with illegality and irrationality?*

The applicant was represented by *Mrs. Assumpta Kemigisha Ssebunya* and *Ms. Annet Kisekka* while the respondent was represented by *Mr. Waiswa Abdul Salaam* and *Ms. Rita Ssekadde* in-house lawyers jointly with *Mr. Richard Bibagamba* of K&K Advocates.

The parties filed final written submissions that were considered by this court.

Whether the application is competently filed in this court?

The respondent raised preliminary points of law contending that the matter was incompetently before this court.

The respondent stated and submitted that there was a pending suit in this court between the same parties litigating under the same title over the same subject matter which contravened **Section 6 of the Civil Procedure Act**. That the applicant in this matter sought the decision of the court that the respondent acted illegally in not granting consent to its transfer of licence therefore not fulfilling its statutory obligation which is the same issue raised in the pending suit High Court Civil Suit No. 269 of 2020.

Counsel for the respondent submitted that the two courts were faced with the risk of coming to varying conclusions on the issues raised which would embarrass the judicial process. Counsel cited *Rubis Energy Kenya PLC vs SAS Africa General Trading Limited & 2 ors [2021] eKLR* and prayed that the application therefore be struck out.

Counsel for the applicant submitted that the law **under Section 6 of the Civil procedure Act** does not bar the applicant from filing two suits. Counsel argued that an ordinary suit cannot be used to address prerogative orders and the law provides that the said prerogative orders be addressed through judicial review and separate from those for enforcement of rights. That High Court Civil Suit No. 269 of 2020 was filed in this court seeking monetary compensation by way of special damages, general damages and costs against the respondent whereas this application sought the court to compel the respondent to fulfil its mandate and not unjustifiably deny the applicant transfer of the broadcasting licence.

The applicant sought prerogative orders that cannot be sought under an ordinary suit.

The respondent also raised a preliminary objection that the suit was time barred. The argument by the respondent's counsel was that the order obtained by the applicant to file the application for judicial review out of

time was irregularly obtained and cannot be a basis upon which this application is sustained.

Analysis

It appears the applicant has already sought remedies in another matter that may appear to be directly related to the issues for determination of this application for judicial review. The court trying the matter in commercial court will have to determine the basis for the refusal to give consent and this will determine the nature of the remedies sought therein.

This court does not wish to make pronouncements on points of law that led to the refusal or denial of the consent to allow the applicant to transfer radio broadcasting licence certificate to Voice of America. This would be prejudicial to the decision in the suit already filed in the commercial court.

It would appear that the main issue for determination in the civil suit in commercial court is: *Whether the respondent fulfilled its statutory obligations in refusing to grant an application for transfer of a broadcasting licence?* While in the present application the main issue is: *Whether the respondent acted illegally or irrationally in not granting consent to its transfer of licence?* These two issues are similar and the courts would be faced with the risk of coming to varying conclusions on the issues raised as regards the transfer of a licence in both matters.

The filing of a suit for damages may not be a bar on an application for judicial review since the two procedures may give different outcomes in form of remedies and generally damages are only granted in extreme and rare circumstances. The House of Lords had to consider the exclusivity of judicial review in *O'Reilly v Mackman [1983] 2 AC 237* Lord Diplock, giving a unanimous decision of the House, held that it would;

“...as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he is entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Ord. 53 for the protection of authorities.”

However, the courts should be less willing to allow claims to be struck out on the purely procedural ground that they should not have brought an action by way of ordinary claim instead by way of judicial review. Although it is an abuse of the process of the court to seek a declaration or injunction by ordinary claim in a public law case where the claim should proceed by judicial review.

It should be noted that certain private law principles, such as tort and contract, apply to public bodies as well as private individuals. There may, therefore, be occasions when the public body is both subject to the special rules of public law designed to ensure that they use their public law powers lawfully and must observe private law principles in exercise of such powers. An individual may be claiming that an action is unlawful and should be set aside, and also that the acts of the public body give rise to a private law right to damages as compensation for any loss incurred.

A claim may principally involve private law principles such as negligence or breach of contract, but the application of those principles may be influenced by the statutory framework within which the a public body operates or may involve questions as the vires of acts of the public body.

There are therefore atleast four possible questions that can arise in a case involving a public body:

- (a) Is the public body violating a principle of public law?
- (b) Is the individual seeking a remedy intended to set aside or nullify the unlawful actions of a public body?

(c) Is the public body violating a principle of private law?

(d) Is the individual seeking a private law remedy, principally damages, to compensate for the interference with his private law rights, or a declaration of those rights or an injunction to prevent further unlawful interference?

Public bodies, just like private entities, can make contracts, commit torts and own land. The public nature of the body may be entirely incidental to claims arising out of such matters. Cases which raise only issues of private law and where remedies sought are private law remedies such as damages are clearly outside the scope of judicial review. Thus, private company or individual cannot enforce a purely contractual right by way of judicial review. See *Uganda Taxi Operators and Drivers Association v Kampala Capital City Authority & Executive Director (KCCA) High Court Miscellaneous Application No. 137 of 2011*; *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152; *R v British Broadcasting Corporation ex.p Lavelle* [1983] 1 WLR 23

It can be asserted that the same set of facts may give rise to issues of both public and private law. A public body may have power to take a decision which will in some way affect or vary a private law right of such an individual or private entity.

Judicial review proceedings will determine whether a decision or action involves a violation of one of the principles governing exercise of public law power, and whether the decision should be set aside or the consequences of the action are nullified.

The private person or entity may choose to pursue claims whose facts give rise to both public and private law issues by ordinary claim procedure rather than seeking judicial review and claiming damages in the course of those proceedings.

The facts presented in this case equally present both public and private law rights and the applicant having already set in motion the private law rights enforcement before the commercial court, this court would decline to hear the present application for judicial review.

The application therefore fails.

Each party shall bear its own costs.

I so order.

SSEKAANA MUSA

JUDGE

11th March 2022