THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO.183 of 2020

OPIO BELMOS OGWANG ---------- APPLICANT

VERSUS

ATTORNEY GENERAL---------- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for enforcement of rights under Article 50(1), 28(1), 41, 44(c) and 173(b) of the Constitution, Section 3(1) and 4, of the Human Rights (Enforcement) Act , 2019, Rules 5(1)(a), 6(1)(a) and 7(1) of the Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules SI No. 31 of 2019, Section 14 and 33 of the Judicature Act Cap 13 and Section 98 of the Civil Procedure Act for the following Orders;

1. *The prolonged Judicial Service Commission disciplinary proceedings against the applicant for more than five years, is in total violation of his right to fair and speedy trial guaranteed under Article 28(1), 42 and 44(c) of the Constitution.*

2. *The Applicant's trial at the judicial Service Commission is in total violation of the Judicial Service (Complaints and Disciplinary Proceedings) Regulations, 2005 SI No. 88 of 2005, judicial Service Commission Regulations, 2005 SI No. 87 of 2005 and the Public Service Standing Orders.*

3. *The Continued disciplinary proceedings by Judicial Service Commission in Complaint No. HRM/204/68/02 against the applicant since 11th August 2015 to date is irregular.*

4. *That the prolonged interdiction and disciplinary proceedings against the applicant be terminated forthwith.*

5. *Costs of the application be provided for.*

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavits in support of the applicant but generally and briefly state that;

1) The applicant is Magistrate Grade 1 appointed and employed by Judiciary in 2008 and confirmed on 20th September 2010.

2) That the applicant was interdicted by Chief Registrar-Courts of Judicature on 2nd April, 2015 on allegation of sexual harassment and he was to Judicial Service Commission for Investigation with a purpose of taking disciplinary action.

3) That the applicant was served with the Judicial Service Commission plea taking notice requiring him to appear before the commission on 10th June 2015 for plea taking. The said plea taking notice had no report of investigation annexed save for the charge sheet only.

4) That the applicant appeared on 29th July 2015 and pleaded not guilty to all the charges.

5) That immediately after plea taking, the applicant raised a preliminary point of law objecting to the trial before conclusion of investigation and finding a prima-facie case as required under Regulation 12 of Judicial Service (Complaints and Disciplinary Proceedings) regulation.

6) That the Commission delayed the ruling and delivered it on 25th July 2019 dismissing the objection 4 years after it was raised.

7) That on the 25th March 2019, the applicant was on 25th March 2019 served with report of investigation and an amended charge sheet, requiring him to appear and plead to the amended charge.

8) That on 17th March 2020, the applicant appeared before the Disciplinary Committee for hearing and was asked to plead to the amended charge sheet, but he declined and requested the committee to stay the proceedings to enable him challenge the legality of the whole disciplinary proceeding through a court petition which the disciplinary committee declined.

9) That the complainant of the alleged sexual harassment voluntarily withdrew the complaint on 11th day of August 2015, after a reconciliatory meeting facilitated by religious leaders and the matter should have been closed from that day.

10) That the Judicial Service Commission investigator never summoned and or interviewed the applicant and his witnesses and he concluded investigations into the allegations without according the applicant the right to be heard.

The respondents opposed this application and filed an affidavit in reply through the Acting Secretary Judicial Service Commission-Ronald Sekagya as follows;

1. That the application is bad in law, premature, speculative and full of conjecture and matters raised are time barred and the applicant has not exhausted all the available alternative remedies.

2. That the applicant was accused of sexually harassing his junior staff by the names of Kakyo Gertrude who was attached to his court in Kyenjojo as Court clerk: The complaint was received, investigated by the commission and the applicant was requested to file a response to the allegations and he did not submit his response to the commission as requested.

3. That upon his failure to file a response, the Commission relied on his response to the Chef registrar and a prima facie case of judicial misconduct was established.

4. That thereafter charges of: conducting himself in a manner prejudicial to the good image, honour, dignity and reputation of the service; abuse of judicial authority and conducting himself in a way that contravenes provisions of the law, Uganda Government Standing orders or other instructions relating to the discipline of Judicial Officer were preferred against the applicant.

5. That the applicant was summoned to appear before the Disciplinary Committee meeting on 20th May 2015 but he did not appear and provided no explanation for his failure to appear.

6. That the applicant was again invited to appear before the Disciplinary Committee on several days to wit: 10th June 2015, 28th July 2015, 29th July 2015, 6th October 2015, 11th November 2015, 20th January 2016, 12th May 2018, 12th December 2018, 19th March 2019, 17th March 2020 to appear before the committee for plea taking and hearing on amended charges.

7. That after the applicant took a plea and the plea of not guilty was entered, he argued that the complaint had been withdrawn by the victim-Kakyo Gertrude; The disciplinary committee adjourned the complaint to 11th November 2015 for both the complainant and the victim to appear and confirm the withdrawal.

8. The applicant and the complainant did not appear on 11th November, 2015 and the Commission contacted the complainant on phone and she indicated that the alleged withdrawal was based on false premise that the Judiciary Internal Disciplinary Committee had advised she withdraws the complaint.

9. That during the disciplinary committee meeting of 20th January 2016, both parties did not appear and this was the last day of the commission member's term of office and as a result the complaint was adjourned sine die.

10. That following the appointment of the new Commission, the applicant was summoned to appear before the Disciplinary Committee on 28th May 2018 for hearing but the applicant did not appear and gave no reason for the non appearance and the matter was adjourned to 17th July 2018. But on the said date, the Committee did not hear any complaints.

11. That the matter came up again on 11th October 2018 in presence of both parties but the matter did not take off and it was adjourned due to lack of quorum. But the applicant on the said date asked for the investigation report which was availed.

12. That the matter came up again for hearing on 12th December 2018, the applicant raised objections which were similar to those raised in 2015 and as a result the matter was adjourned for a ruling on 19th March 2019.

13. That on 19th March 2019, the applicant did not appear instead his counsel through a letter requested for an adjournment and requested that the ruling be delivered in his absence.

14. That the complaint was subsequently adjourned for delivery of the ruling and the applicant's objections were overruled and the matter was fixed for hearing on 10th March 2020, but he failed to appear.

15. That thereafter complaint was scheduled for hearing and both parties present in court and the applicant tried to raise the same objections which had been overruled.

16. That when the Disciplinary Committee insisted on proceeding with the hearing the applicant and his lawyer walked out in protest and the committee proceeded to hear the victim's testimony and after her testimony prosecution closed its case.

17. That the Members of the Disciplinary Committee upon considering the testimony of the complainant made appropriate recommendations to the Commission.

18. That the Commission upon receipt of the recommendations, invited the applicant to appear and show cause why he should not be disciplined and he did not appear. The applicant was also given another chance to appear before the commission on 26th August 2020 to show cause why he should not be disciplined. He promised via his telephone contact to appear but he did not appear.

19. That the applicant was given another opportunity to appear before the commission on the 25th September 2020 to show cause why he should not be disciplined

The applicant did not raise any issues in the matter but rather argued this matter as grounds. Since this is a human rights matter, the only issue derived from pleadings concerning human rights for resolution are;

1. *Whether the application is competently before the court?*
2. *Whether or not the applicant's right to a fair hearing has been violated?*
3. *What remedies are available to the parties?*

The applicant was represented by *Mr Masereka Martin* whereas the respondent was represented by *Mr Musota Brian.*

Whether the application is competently before the court?

The applicant brought this application by notice motion under Articles 50 of the Constitution and that the said Article is couched in mandatory terms. This means that for a claim to fall under this Article, there must be an infringement or threat or freedom of a person.

The Applicants' case as can be deduced from the pleadings is that the decision to prosecute him after a long period is a violation of his rights and specifically a right to fair trial.

The applicant has opted to run away from the strict rules of procedure after he realised that his application was well beyond the 3 months period prescribed for any application for judicial review.

Rule 5 (1) of the Judicature (Judicial Review) Rules 2009 provides that;

> *(1) 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 court will not allow such a litigant to devise alternative procedure in order to circumvent the set procedure. He is only trying to access court through the window instead of the door that has been prescribed by the Constitution. The Enforcement of Human Rights Act was not enacted to substitute a set procedure for challenging administrative action by 'baptising' such claims as enforcement of rights.

The nature of judicial review procedure is based on some clear policy consideration such that the state machinery or administrators are not bogged down with endless litigation over their actions. Judicial review thus is a fundamental mechanism for keeping public authorities within the due bounds and for upholding the rule of law. See ***Wade & Forsyth Administrative Law 10th Edition***

Excessive interference by the judiciary in the functions of the executive is not proper. The machinery of government would not work if it were not allowed some free play in its joints. Otherwise every errant public officer would now run to court claiming violation of their rights in order to avoid disciplinary proceedings like in this case.

This therefore means that if the applicant wants to invoke the jurisdiction of a court, he should come to court at the earliest reasonably possible opportunity. Inordinate delay in making the application for judicial review will indeed be a ground for refusing to exercise such discretionary jurisdiction. Secondly, the applicant should have exhausted the available remedies provided under the Judicial Service Commission Act, which provides for an Appeal against the decision instead of rushing to court at every instance.

There is no proper limit and there is a lower limit of 3 months when a person can come to court. The court is allowed to exercise discretion depending on the facts to determine whether to extend the time to file/apply for judicial review. It will depend on how the delay arose.

The applicant in this case ought to have applied for judicial review within 3 months after the Disciplinary Committee had refused to give him the purport the Investigation report instead of raising several preliminary objections and later claim a violation of rights.

The applicant like all other litigants should not be encouraged to circumvent the provisions made by a Statute providing a mechanism and procedure to challenge administrative action. Every potential litigant would rush to the court in any manner they deem fit and thus rendering the statutory provisions meaningless and non-existing.

Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

The court must come with a very heavy hand on a litigant who seeks to abuse the process of the court; as the Supreme Court of India has observed;
"No litigant has a right to unlimited drought on the court time and public money in order to get his affairs settled in the manner he wishes. Easy access to justice

should not be misused as a licence to file misconceived and frivolous petitions". ***Budhi Kota Subbarao v K. Parasarab, AIR 1996 SC 2687;(1996) 5 SCC 530.***

The applicant is trying to use Human Rights (Enforcement) Act-2019 as a substitute for judicial review and that is why he is clearly seeking to have the disciplinary proceedings against himself to be terminated. This is a clear case of abuse of court process where the applicant and his counsel thought they would craft their case as an enforcement of rights claim to achieve their goal.

It is an abuse of court process to use another remedy under the Constitution and available legislations to avoid a set procedure. In the case of ***Harrikisson v Att-Gen (Trinidad and Tobago)[1980] AC 265 at 268*** *Lord Diplock* underscored the importance of limitation to the constitution right of access to courts:

> "*The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms: but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action….the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate remedy…."*

The applicant heavily contributed to the delay of the disciplinary proceedings by raising several preliminary objections and refusing to attend the disciplinary hearings. It would be erroneous to allow him to turn around and claim a violation of his rights due to the delay in concluding the matters before the disciplinary committee when he was the major contributory.

In addition, the law has allowed the applicant alternative remedies under the Act which ought to be exhausted before he could seek remedies from other

legislations. Therefore, the applicant must exhaust all available existing remedies prior to filing an Article 50 challenge, particularly the remedial framework provided for under Judicial Service Commission Act.

Where an alternative remedy is available, the high court will refrain from exercising extraordinary jurisdiction. This is premised on the fact that where a right or liability is created by a statute which gives a special remedy for enforcing the same, the remedy provided by the statute only must be availed of in the first instance.

The rule of *'Exhaustion of Alternative remedies'* is justified on ground that the remedy provided under the special procedure of judicial review or enforcement of rights is not intended to supersede the modes of obtaining relief before a civil court or to deny the defences legitimately open in such actions and that persons should not be encouraged to circumvent the provisions made by a statute providing a mechanism and procedure to challenge administrative action taken thereunder. Otherwise, without taking recourse to the alternative remedy available under the law then every person would rush to the high court rendering the provisions almost meaningless and non-existent.

The high court cannot allow the constitutional jurisdiction to be used for disputes, for which remedies, under the general law, civil or criminal are available. It is not intended to replace the ordinary remedies by way of a suit or application available to a litigant. The object underlying this rule is that the High court should not be made a substitute for all other remedies available to an aggrieved party for redressal of his or her grievances.

The courts practice some flexibility in its application depending upon the circumstances of the case in which the jurisdiction is invoked. It is not a rigid rule and it is primarily a matter of discretion of the court with some flexibility inherent therein.

This court declines to entertain the application since it was not brought under any known procedure and it was made to avoid the time limit of 3 months within which an application for judicial review should have been brought.

The application is dismissed with costs to the respondent.

SSEKAANA MUSA
JUDGE
11th May 2022