

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISCELLANEOUS CAUSE NO. 25 OF 2018
IN THE MATTER OF THE JUDICATURE (JUDICIAL REVIEW) RULES, 2009
AND
IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS
BY

DR. KUKIRIZA ENOCK :::::::::::::::::::: **APPLICANT**

VERSUS

LUUKA DISTRICT

LOCAL GOVERNMENT :::::::::::::::::::: **RESPONDENT**

BEFORE: THE MR. JUSTICE MICHAEL ELUBU
RULING

This is an application commenced under Section 36 of the **Judicature Act Cap. 13**; Section 98 of the **Civil Procedure Act Cap. 71**; and Rules 3, 4, 6, 7 and 8 of the **Judicature (Judicial Review) Rules, 2009**.

The applicant is **Dr Kukiriza Enock** who brings this application against the Respondent, **Luuka District Local Government**, seeking the following Orders:

1. A Declaration that the appointment process of Dr. Wabwire Mathias Panyako as Senior Medical Officer by the District Service Commission, Luuka District was inconsistent with the law.
2. An Order of Certiorari to set aside, quash and declare as invalid or a nullity, the appointment of Dr. Wabwire Mathias Panyako as Senior Medical Officer by the District Service Commission, Luuka District.

3. An Order of Mandamus, directing the Respondent to rescind the appointment of Dr. Wabwire Mathias Panyako as Senior Medical Officer and repeat the whole exercise by conducting it, in a more transparent manner, by following established principles, rules, regulations and laid down procedures governing recruitment in the public service.
4. An injunction restraining, stopping, prohibiting and forbidding the Respondent, from carrying out any appointment and or promotional exercises without adhering to the established recruitment procedures for the Public Service when handling promotional exercises.
5. An Order for payment of General Damages.
6. Costs of the Application.

The Grounds on which this application is based are stated in the Notice of Motion and particularised in the attached affidavit deposed by the applicant. It is stated that the applicant is a Medical Doctor who, in 2011, joined the Public Service to work in the Ministry of Health as a Medical Officer on a non-pensionable one-year contract. He was deployed to Kawolo Hospital, Lugazi on the 19th of September, 2011. That deployment was cancelled on the 17th day of October 2011 and he was thereafter posted to Kiyunga Health Centre IV, Luuka District.

The non-pensionable one-year contract was renewed from time to time until the applicant was appointed by the respondent, on probation, as a Medical Officer on the 10th day of June, 2014. On the 16th of January 2015 the Respondent confirmed the Applicant's appointment as a Medical Officer of the Respondent by Min. 23/LK/DSC/12/2014 (38) of the District Service Commission. Consequently, the Applicant was admitted to the pensionable establishment of the Public Service with effect from the date of the Applicant's appointment on probation.

That the applicant joined the Public Service in 2011, at the same time as one, Dr. Wabwire Mathias Panyako, and they were both posted to Kiyunga Health Centre IV, Luuka District, as Medical Officers. They have both worked there to-date.

On 02nd October, 2014, the Chief Administrative Officer (CAO) of the Respondent wrote to the Applicant informing him that he had been appointed as a vote Controller for the health sector for the financial year 2014/2015. On 3rd October, 2014, the Applicant wrote back accepting the appointment.

In January 2018 a vacancy for the post of Senior Medical Officer within the Respondent arose.

Instead of forwarding a list of all eligible senior officers working for the respondent to the District Service Commission as required by the Law, on 16th January 2018, the Chief Administrative Officer wrote to the Secretary of the District Service Commission, recommending only Dr. Wabwire Mathias Panyako for the appointment, on promotion, to the Post of Senior Medical Officer.

On the 16th of February, 2018, the District Service Commission, Luuka District held a meeting. The minutes show that the Chairperson of the Commission reported that he had received a call from the Inspectorate of Government querying why some employees in the Health Department had not been considered for promotion following the submission of only one name out of all the eligible contestants. After this, it was resolved by the District Service Commission, that an internal advert be displayed on the notice board so that all the qualified contestants could apply for the post of Senior Medical Officer.

The internal advert for the post of Senior Medical Officer was never displayed on the Notice Board by the Chief Administrative Officer as directed by the District Service Commission, Luuka District.

Instead, on the 26th of June, 2018, the District Service Commission under Min. 05/LK/DSC/06/18(b), appointed Dr. Wabwire Mathias Panyako, on promotion, to the post

of Senior Medical Officer. That was despite its earlier directive to have an advert displayed and other eligible officers considered.

That **The Public Service Commission Regulations, 2009** required the Respondent's Chief Administrative Officer, to forward a list of all eligible Senior Officers in the Respondent's service who were available to fill the vacancy, when reporting the vacancy of the post of Senior Medical Officer to the District Service Commission. It adds that if the CAO should recommend an officer serving with the Respondent to fill the position, then he should forward the officer's name together with the record of their service in the Public Service. That if he recommends an officer to supersede another in office, then he should give reasons why.

In this case the Respondent's Chief Administrative Officer, rather than send a list of all eligible Officers including the applicant, recommended only Dr. Wabwire Mathias Panyako, and forwarded only his name and record to the District Service Commission, Luuka District.

That the applicant's qualifications and work experience met the specifications required for the post of Senior Medical Officer, but the Chief Administrative Officer disregarded the rules and procedure and submitted only the name and record of Dr. Wabwire Mathias Panyako, an act which was procedurally illegal and improper. That the process was not transparent and ignored all established principles, rules, regulations and laid down procedures governing recruitment in the Public Service.

On 12th July 2018, the Applicant filed this Application.

There is no reply from the respondent on record. When this matter came up for hearing on the 14th of February 2019, the respondent's counsel applied for time to file a reply. This court noted that there was proof that the respondent was served on the 17th of October 2018 and no sufficient reason was given for failure to reply. This court accordingly directed that proceeding under Order 17 Rule 4 of **the Civil Procedure Rules**, the court would determine the matter on the evidence available.

Submissions

Although the respondent did not file a reply, the court granted them leave to file written submissions. The parties argued following issues:

1. Whether the circumstances under which the Respondent appointed Dr. Wabwire Mathias Panyako, as a Senior Medical Officer was unlawful
2. Whether the applicant is entitled to the remedies sought.

Determination of issues

Issue 1

Whether the circumstances under which the Respondent appointed Dr. Wabwire Mathias Panyako, as a Senior Medical Officer was unlawful

It was submitted for the Applicant that the decision of the Respondent to appoint Dr. Wabwire Mathias Panyako to the post of Senior Medical Officer is tainted with procedural impropriety and irrationality. That procedural impropriety is when the decision making authority, fails to act fairly in the process of its decision making.

That Regulation 18 (1) of the **Public Service Regulations, 2009**, provides that when considering any claim of any public servant for promotion, merit and ability shall be taken into account as well as seniority, experience and formal qualifications. Further, that Regulation 18 (2) of the **Public Service Regulations, 2009**, provides that any recommendation made to the commission for promotion shall state whether the person recommended is a senior officer in the department or grade, eligible for promotion and where that is not the case, detailed reasons shall be given in respect of each person in that department or grade over whom it is proposed that the persons should be appointed.

That the right to fair treatment in administrative decisions is non-derogable. That the decision of the CAO not to give a chance to the Applicant or any other eligible candidates was improper and amounts to a denial of natural justice.

On the **ground of irrationality**, it was argued for the Applicant that the decision of the Respondent's CAO was irrational as against the Applicant and should thus be reviewed. That whereas the CAO is the administrative head of the District, the Service Commission is the authority that recruits for the District. That the CAO did not advertise the position as directed, and despite complaints, went ahead to recommend appointment Dr. Wabwire Mathias Panyako as the Senior Medical Officer of the District.

In reply, the Respondent, argued that the due process of the law was followed, and that, the Respondent's decision to appoint Dr. Wabwire Mathias Panyako to the post of Senior Medical Officer was not irrational. That according to Clause 10 (d) of Part (A-a) of the **Uganda Public Service Standing Orders (2010 edition)**, the power to appoint, confirm, discipline and remove officers from office in the public service is vested in the relevant District Service Commission. That in the exercise of this power, the District Service Commissions are under the supervision of the Public Service Commission which is empowered by Article 166 (1) (d) of the **Constitution of the Republic of Uganda, 1995** to guide and coordinate District Service Commission.

Further, that the procedure to be followed, when making appointments on promotion is laid down in Part (A-g) of the **Uganda Public Service Standing Orders (2010 edition)**. That the public service standing Orders do not prescribe the procedures and criteria to be used in determining the suitability of a person to be promoted in terms of competencies. That criteria is left to the respective District Service Commission to determine. That from the Applicant's affidavit in support, the Respondent's District Service Commission heard and determined the Applicant's complaint, and that it was resolved that an internal advert be displayed. The applicant however, did not apply for the post, and the District Service Commission went on to confirm Dr. Wabwire Mathias Panyako in 2018. That the Respondent's District Service Commission could not have appointed Dr. Wabwire Mathias Panyako without complying with its previous orders.

Determination.

Judicial Review is concerned with Prerogative Orders which are basically remedies for the control of the exercise of power by those in public offices. They are not aimed at providing final determination of private rights which is done in normal civil suits. The said orders are discretionary in nature and court is at liberty to refuse to grant any of them if it thinks fit to do so depending on the circumstances of the case where there had been clear violation of the principle of natural justice (see **John Jet Mwebaze Versus Makerere University Council & 2 others Misc Application No. 353 of 2005**).

Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior Courts, tribunals and other bodies or persons who carry out quasi-judicial functions, or who are engaged in the performance of public acts and duties. Those functions/duties/acts may affect the rights or liberties of the citizens. Judicial review is a matter within the ambit of Administrative Law. It is different from the ordinary review of the Court of its own decisions, revision or appeal in the sense that in the case of ordinary review, revision or appeal, the Court's concerns are whether the decisions are right or wrong based on the laws and facts whereas for the remedy of judicial review, as provided in the orders of mandamus, certiorari and prohibition, the Court is not hearing an appeal from the decision itself but a review of the manner in which the decision was made. See **Kuluo Joseph Andrew & Ors v. Attorney General & Ors Misc Cause No. 106 of 2010**.

In **Pastoli v Kabale District Local Government and Others [2008] 2 EA 300**, it was held that, it is trite that judicial review can be granted on three grounds namely; illegality, irrationality and procedural impropriety. It was stated farther that:

Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the 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 and observe procedural rules expressly laid down in a statute or Legislative Instrument by which such authority exercises jurisdiction to make a decision.

The Applicant's complaint, stems from the letter dated the 16th day of January, 2018, written by Mr. Makumbi Henry Harrison, the Respondent's Chief Administrative Officer to the Respondent's District Service Commission, recommending that Dr. Wabwire be promoted to the post of Senior Medical Officer with effect from the date of his assumption of duty.

The District Service Commission, at its meeting held on the 16th of February 2018, considered the matter. The chairperson reported that he had received a call from the Inspectorate of Government raising a concern that eligible persons had been ignored when only one name was submitted for promotion. It was therefore resolved that an internal advert be displayed on the notice board, so that all qualified contestants could apply and compete for the post.

It is the evidence of the applicant that this advert was not displayed as directed. This court has not been furnished with any evidence to the contrary. The position of the law in such a case is laid out in **Samwiri Massa v Rose Achen [1978] HCB 297**, in which it was held that where certain facts are sworn in an affidavit, the burden to deny them is on the other party and if he or she does not, they are presumed to have been accepted and the deponent need not raise them again. If they are disputed, then he has to defend them.

Because there is no evidence to the contrary, this court therefore finds as a fact that the indeed the internal advert was not displayed as directed.

All the above remaining as it is, the minutes of the District Service Commission meeting which was held on the 26th of June 2018 show under Min 05/LK/DSC/06/18(b) that Dr Wabwire Mathias Panyako be promoted to the post of Senior Medical officer.

This court notes that appointments on promotion are regulated by the **Uganda Public Service Standing Orders, 2010 Edition** and the **Public Service Commission Regulations, 2009**.

Regulation 26 of the **Public Service Commission Regulations, 2009** provides:

(1) Where a vacancy occurs or it is known that a vacancy shall occur in any public office in any Ministry or Department, the Responsible Officer shall notify the Secretary of the vacancy upon clearance by the responsible Permanent Secretary.

(2) If the Responsible Officer recommends that such vacancy should be filled by the appointment or promotion of an officer serving in the Ministry or Department in which the vacancy has occurred or shall occur, he or she shall, when reporting the vacancy to the Secretary—

(a) forward a list of all senior eligible officers in that Ministry or Department who are available to fill the vacancy, together with the records of their service in the public service;

(b) recommend one of those officers to fill the vacancy; and

(c) where his or her recommendation involves the supersession of an officer senior to the officer so recommended, give his or her reasons for recommending such supersession.

The Regulations define “Responsible Officer” to include the Chief Administrative Officer.

The above provisions clearly speak for themselves.

As stated in the **Pastoli v Kabale District Local Government and Others (supra)** procedural impropriety includes a failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision. To succeed on an application for Judicial Review procedural impropriety is one of the grounds on which an applicant can rely.

Illegality on the hand is when the decision making body takes or makes a decision contrary to the provisions of the law.

In the circumstances therefore, I find that it was improper for the Respondent's District Service Commission to consider only one candidate for promotion. It did this in spite of earlier directing that an internal advert be placed to call for eligible officers to apply. The District Service Commission was aware that there was a specific complaint made to the Inspectorate of Government for failure to open up to other candidates. The evidence here is that the advert was not pinned up as directed. That notwithstanding it went ahead to appoint Dr. Wabwire Matthias Panyako, as a Senior Medical Officer in utter disregard of the law as laid down in by Regulation 26 of the **Public Service Commission Regulations, 2009** it appointed.

Therefore, not only was the appointment of Dr. Wabwire Matthias Panyako, as a Senior Medical Officer procedurally improper it was also unlawful.

Issue 2

Whether the applicant is entitled to the remedies sought.

This Court therefore makes the following Orders:

1. The applicant prayed for a Declaration that the appointment process of Dr. Wabwire Mathias Panyako as Senior Medical Officer by the District Service Commission, Luuka District was inconsistent with the law.

Under Rule 2 of **the Judicial Review Rules**, a declaration is a pronouncement by court on the legal position of a party after considering the evidence and applying the law and that evidence to an existing legal situation.

In view of my findings in issue 1, a Declaration hereby issues that the appointment process of Dr. Wabwire Mathias Panyako as Senior Medical Officer, by the District Service Commission, Luuka District was inconsistent with the law.

2. The applicant prayed for an Order of Certiorari. This is an order by court to quash a decision which is ultra vires (see Rule 2 of Judicial Review Rules). Or a decision which is vitiated by some error on the face of the record... it is the means of controlling unlawful exercises of power by setting aside decisions reached in excess or abuse of power (see **John Jet Mwebaze vs Makerere University Council & 2 others Misc. Cause No. 353 of 2005**).

In the circumstances an Order of Certiorari hereby issues to quash the appointment of Dr. Wabwire Mathias Panyako as Senior Medical Officer by the District Service Commission, Luuka District under **Min. 05/LK/DSC/06/18(b)**.

3. The applicant prayed for an Order of Mandamus. Under the judicial Review Rules (Supra) mandamus means a court order issued to compel performance by public officer of statutory duty imposed on them.

Where an applicant prays for an order of Mandamus then he should show that the respondent and/or its agents have not performed a duty that by law they should perform and the High court, through the order of mandamus, should direct them to perform the duty. It enforces the performance of a duty which is imperative and not optional or discretionary. The applicant must show that he has a duty to compel the public body to perform the duty in question (see Kaluma Peter **Judicial Review: Law and Practice** Law Africa 2nd Edition 2012 pg 123 -124).

In view of my findings, I grant this order in the following terms:

An Order of Mandamus, directing the Respondent to rescind the appointment of Dr. Wabwire Mathias as Senior Medical Officer and repeat the whole exercise following

the rules, regulations and laid down procedures governing recruitment in the public service.

4. General Damages.

The applicant here has made a claim for general damages. Such damages are granted in the discretion of the court.

Usually an award of General Damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission (see *Erukana Kuwe v. Isaac Patrick Matovu and another, H.C. Civil Suit No. 177 of 2003*).

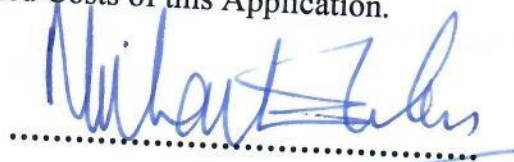
I have also considered the reasoning in **Ochengel Ismael & Paul Samuel Mbiwa v Attorney General Miscellaneous Cause No. 274 of 2019** where it was held that:

Under judicial review proceedings, damages are awarded in the rarest of the rare cases upon court being satisfied of a possible tort of misfeasance. Otherwise, judicial review proceedings will turn into ordinary proceedings for damages and yet it is not intended for that purpose. It is confined to correcting public wrongs through prerogative orders under the Judicature Act.

After carefully evaluating the evidence and the submissions of the Applicant on the issue of General Damages, I am not persuaded to grant them in these circumstances.

5. Costs of the Application.

The Applicant is awarded Costs of this Application.



Michael Elubu

Judge

23.1.2023