THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 116 OF 2022

IN THE MATTER OF THE JUDICATURE ACT CAP 13 (AS AMENDED)

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

DR. BAKAME DOMINIC RWABIKANA :::::::::::::::::::::::::::::::::: APPLICANT

VS

ATTORNEY GENERAL OF UGANDA :::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Article 42 of the Constitution of the Republic of Uganda, Sections 33, 36 and 37 of the Judicature Act Cap 13, and Rules 4, 7 and 8 of the Judicature (Judicial Review) Rules 2009 seeking orders that;

a) An Order of Certiorari doth issue quashing and setting aside the Permanent Secretary's decision to stop payment of pension and gratuity to the Applicant.
b) An Order of Mandamus be granted requiring the Permanent Secretary in the Ministry of Public Service to reinstate and effect arrears of payment of pension and gratuity due to the Applicant within 14 days from the date of judgment.
c) The Applicant be paid general damages.
d) Costs of the suit be paid to the Applicant.

[2] The grounds upon which the application is based are summarized in the Notice of Motion and also set out in the affidavit deposed by the Applicant in support of the application. Briefly the grounds are that the Applicant is a former soldier who worked in National Resistance Army medical services now UPDF from 1985 until 2000 when he was formally discharged at the rank of Captain. He also joined Civil Service through the Ministry of Health at Mulago Hospital in 1995 and worked until 2014 when he attained the mandatory retirement age while at the level of consultant surgeon. After his retirement, the Applicant received part of his gratuity and his pension was regularly paid until sometime in October 2020 when payments stopped without any communication. He wrote to public service through his lawyers, made every effort to follow up and exhausted all possible remedies within government to no avail. He concluded that all payments due to a public servant are duly approved by the Permanent Secretary, Ministry of Public Service and that the actions of the Permanent Secretary amounted to improper, irregular and illegal exercise of power. He prayed to the Court to grant the orders sought.

[3] The Respondent opposed the application through an affidavit in reply deposed by **Dr. Byanyima K. Rosemary**, the acting Executive Director, Mulago National Referral Hospital, who stated that with effect from July 2015, payment of pensions and gratuity was decentralized and the responsibility of approvals and payments was transferred to accounting officers of ministries and agencies. When the Ministry of Public Service was verifying records of pension country wide, it found out that the Applicant was working with Mulago National Referral Hospital from 15th October 1983 until 29th September 2014 when he retired and was receiving pension up to August 2020 under IPPS No. 918246. At the same time, the Applicant was a UPDF Captain from 1982 to 2014 earning a salary under IPPS No. 946997. The Applicant was, therefore, holding two appointments and drawing two salaries and pensions from the consolidated fund contrary to the Uganda Public Service Standing Orders. The

Applicant's pension was stopped and Mulago Hospital was required to furnish the Permanent Secretary Ministry of Public Service with a report on the matter.

[4] The deponent further stated that the Permanent Secretary, Ministry of Public Service in a letter dated 17th September 2020 informed Mulago Hospital of its findings on the Applicant's information on IPPS and pension files to the effect that the Applicant had retired as a senior consultant from Mulago Hospital after serving from 15th October 1983 to 29th September 2014 and was receiving pension although there was no record showing payment of Commuted Pension Gratuity (CPG) in respect of the service as a medical personnel. Information further revealed that at the same time, the Applicant had worked and had retired as Captain in the Uganda Peoples' Defence Forces (UPDF) from 1st January 1985 up to 1st October 1999. He was paid commuted pension gratuity (CPG) and pension since 1999 until 2020 when pension payment was stopped. The letter confirmed that the Applicant had held two appointments and drew two salaries concurrently from public funds between 1985 and 1999, a salary and pension between 1999 and 2014 and two pensions since 2014 to 2020; which was contrary to the Uganda Public Service Standing Orders. The deponent thus opposed the application for judicial review.

Representation and Hearing

[5] At the hearing, the Applicant was represented by **Mr. Gawaya Tegulle** while the Respondent was represented by **Mr. Brian Musoota**. It was agreed that the hearing proceeds by way of written submissions which were duly filed and have been taken into consideration in the determination of the matter.

Issues for Determination by the Court

[6] Four issues are up for determination by the Court, namely;

a) Whether the Respondent's affidavit in reply should be validated by the Court?

b) Whether the application for judicial review is properly before the Court?
c) Whether the application discloses any sufficient grounds for judicial review?
d) What remedies are available to the parties?

Resolution of the Issues

Issue 1: Whether the Respondent's affidavit in reply should be validated by the Court?

Submissions by Counsel for the Applicant

[7] It was submitted by Counsel for Applicant that the Respondent's affidavit in reply was filed way out of time should and be struck out leaving the application unopposed. Counsel argued that courts ought to take judicial notice of the fact that the Attorney General's Chambers are notoriously lax when responding to suits and it is necessary for the rule of law and good governance that the office is put in a position where they feel the pressure that other litigants feel so as to entrench the respect for courts of law. Counsel prayed that the affidavit in reply be struck off the record and the suit considered undefended.

Submissions by Counsel for the Respondent

[8] In response, Counsel for the Respondent submitted that the delay was caused due to circumstances beyond the Respondent's control and that validation of the affidavit shall not prejudice the applicant as he could be given an opportunity to file an affidavit in rejoinder. Counsel prayed to Court, in the interest of justice, to invoke its inherent powers under the Section 33 of the Judicature Act, Section 98 of the CPA and Order 51 rule 6 of the CPR and validate the affidavit in reply which the Respondent duly served upon the Applicant's advocate.

Determination by the Court

[9] The Respondent did not file an affidavit in reply within time when they were served with the application. They sought leave to file the reply out of time which was granted by the Court and the same was to be filed by 13th January 2023. Even then, the Respondent did not file the reply until 9th March 2023 which was way out of time. Strictly, the Respondent's affidavit in reply would have been rejected and/or struck out for offending the rules of procedure and directions given by the Court. Nevertheless, it is clear to me that taking that route would not serve any interest of justice in the matter. Since the Applicant was served with the affidavit in reply and was able to rely on it during the submissions, I would agree that validation of the late reply will not prejudice the Applicant in any substantial manner. Relying on the provisions under Section 98 of the CPA, Section 33 of the Judicature Act and Order 51 rule 6 of the Civil Procedure Rules, I would exercise discretion to allow validation of the late reply. As provided for under rule 6 of Order 51 CPR, any possible prejudice to the opposite party may be catered for by way of an order as to payment of costs. In the circumstances, I have allowed to validate the affidavit in reply filed by the Respondent out of time and have relied on the same in the determination of this matter.

Issue 2: Whether the application for judicial review is properly before the Court?

Submissions by Counsel for the Respondent

[10] It was submitted by Counsel for the Respondent that the application was premature before court on account of failure to comply with rule 7A(1)(b) of the Judicature (Judicial Review) (Amendment) Rules 2019 to the effect that an aggrieved person has to exhaust the existing remedies available within the public body or under the law. Counsel stated that the Applicant has not demonstrated in his application that he wrote to the accounting officer of

Mulago National Referral Hospital either to review, reverse or deal with the complaint contained in this application. Counsel prayed that the application should be found premature before the Court and be dismissed with costs.

Submissions by Counsel for the Applicant

[11] In response, Counsel for the Applicant submitted that the Applicant had in paragraphs 6 and 7 of the affidavit in support of the application averred that he had, through his lawyers, written to the Ministry of Public Service and made every other effort to follow up on his mater but did not get a proper response from the concerned persons who kept tossing him back and forth. Counsel stated that those averments had not been denied in the affidavit in reply and invited the Court to follow the principle in *Samwiri Massa v Rose Achen [1978] HCB 297* to the effect that where facts are sworn to in an affidavit and are not denied or rebutted by the opposite party, the presumption is that such facts are accepted. Counsel concluded that the Applicant had made every effort to resolve the matter within government but was frustrated and had therefore exhausted all the available remedies.

Determination by the Court

[12] Rule 7A (1) (b) of the Judicature (Judicial Review) (Amendment) Rules, No. 32 of 2019 provides that one of the factors to be considered by the court when dealing with an application for judicial review is that *"the aggrieved person has exhausted the existing remedies available within the public body or under the law"*. The position of the law is that where there exists an alternative remedy through statutory law or any procedures within the public body, then it is desirable that the alternative remedy should be pursued first. As such, the alternative remedy ought to be legally provided for and as or more effective than judicial review. See: *Leads Insurance Company Ltd v Insurance Regulatory Authority, CACA No. 237 of 2015*.

[13] On the case before me, no procedure has been cited by the Respondent that was available and was not taken by the Applicant. It has been suggested by Respondent that the Applicant ought to have written to the accounting officer of Mulago Referral Hospital communicating his complaint. However, the Applicant has shown through evidence that he wrote to the Permanent Secretary of the Ministry of Public Service, which office he believed was in charge of pensions, and he did not receive any response. He physically followed up with the same office and he was referred to the Commissioner Pensions. The latter officer advised the Applicant verbally and refused to commit himself by any formal response. This evidence is contained in the Applicant's affidavit in support of the application and was not controverted by the Respondent. It is therefore deemed to be correct and believable.

[14] In view of such evidence, it becomes quite insensitive on the part of the Respondent to argue that the Applicant ought to have written to Mulago Hospital and yet his correspondence to the Ministry of Public Service was not responded to. In any case, the Respondent did not lead any evidence showing that any procedure existed within the law or the responsible public bodies for addressing complaints by persons whose pension payments have been abruptly stopped. In the premises therefore, the claim that the Applicant did not exhaust any alternative remedies is devoid of any merit. This application was not brought prematurely and is properly before the Court.

Issue 3: Whether the application discloses any sufficient grounds for judicial review?

Submissions by Counsel for the Applicant

[15] It was submitted by Counsel for the Applicant that the decision to stop payment of his pension was tainted with illegality, irrationality and procedural impropriety on account that he was not given a hearing. Counsel cited the case of *Ridge v Baldwin 1964 AC 40* on the right to a fair hearing and submitted

that the Applicant has never been informed of the reasons for stopping payment of his pension. Counsel submitted that the right to a fair hearing is non derogable and no matter the grievance the Respondent had against the Applicant, the Applicant had to be given a hearing. Counsel relied on the provisions of Articles 28, 42 and 44 of the Constitution of Uganda and argued that there was no attempt to give the Applicant a fair hearing, and that the ministry of public service acted as prosecutor, judge and jury in utter breach of the rules of natural justice.

Submissions by Counsel for the Respondent

[16] In reply, Counsel for the Respondent submitted that in the present case where the Applicant was earning two salaries on the government payroll, there was no need for a hearing. Counsel stated that there was no violation of any right to a fair hearing and the Applicant is not entitled to the orders sought. Counsel further submitted that the Applicant was involved in an illegality of which he cannot be seen to benefit. Counsel argued that even if the Applicant succeeded on the ground of procedural impropriety, the orders he seeks ought not be granted because he is guilty of an outright illegality of drawing two salaries and two pensions from the consolidated fund contrary to section F-a (14) of the Uganda Public Service Standing Orders. Counsel concluded that since the current application seeks prerogative orders which are discretionary and are not aimed at providing final determination of the private rights, the Court is at liberty to refuse to grant any of them and prayed that the suit be dismissed with costs.

Determination by the Court

[17] Judicial review is concerned not with the merits of the decision but the decision making process. Essentially, judicial review involves an assessment of the manner in which a decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as

such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. The duty of the court therefore is to examine the circumstances under which the impugned decision or act was done so as to determine whether it was fair, rational and/or arrived at in accordance with the rules of natural justice. See: *Attorney General v Yustus Tinkasimmire & Others, CACA No. 208 of 2013* and *Kuluo Joseph Andrew & Others v Attorney General & Others, HC MC No. 106 of 2010*.

[18] It follows therefore that the court may provide specific remedies under judicial review where it is satisfied that the named authority has acted unlawfully. A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of unreasonableness or irrationality); or without observing the rules of natural justice (unlawful on grounds of procedural impropriety or unfairness). See: *ACP Bakaleke Siraji v Attorney General, HC MC No. 212 of 2018*.

[19] On the case before me, the decision challenged by the Applicant is the halting of payment of his pension payment by the Respondent without any explanation or reason. It is alleged by the Applicant that the decision of the Respondent was unlawful on grounds of illegality, procedural impropriety, and irrationality. I will examine each of the grounds separately.

The Ground of Illegality

[20] Illegality has been described as the instance when the decision making authority commits an error in law in the process of making a decision or making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are

instances of illegality. **Lord Diplock** in the case of *Council of Civil Service Unions v Minister for Civil service (1985) AC 375,* stated thus;
"*By illegality as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulated his decision making power and must give effect to it. Whether he has or not is, per excellence, a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercised''*.

[21] A public authority or officer will be found to have acted unlawfully if they have made a decision or done something without the legal power to do so. Decisions made without legal power are said to be ultra vires; which is expressed through two requirements: one is that a public authority/officer may not act beyond its statutory power and the second covers abuse of power and defects in its exercise. See: *Dr. Lam-Lagoro James v Muni University, HC MC No.007 of 2016*.

[22] On the case before me, it is alleged by the Applicant that the action of halting his pension payments was done illegally. On the other hand, it was stated by the Respondent that the Permanent Secretary Ministry of Public Service had, in a letter dated 17th September 2020, informed the Respondent that it had been established that the Applicant held two appointments concurrently and drew two salaries from public funds from 1985 to 1999, a salary and pension from 1999 to 2014 and two pensions from 2014 to 2020; contrary to section F-a (14) of the Uganda Public Service Standing Orders.

[23] Section F-a (14) of the Uganda Public Service Standing Orders provides that a *"public officer shall not hold two appointments concurrently and shall not draw more than one salary from public funds"*. To begin with, by drawing two salaries and two pension payments from the consolidated fund, the Applicant acted in contravention of the above legal provision and, therefore, acted

illegally. The Respondent or any responsible officer of the government did not, however, take any legal steps against the Applicant. They however chose to stop both pension payments at the same time. This itself was wrong as two wrongs do not make right. According to Section 9(1) of the Pensions Act Cap 286, *"Every officer employed in the public service who has qualified for a pension shall be entitled to it"*. Therefore, pension, like salary, is an entitlement to a public officer and cannot be withdrawn except in accordance with the law.

[24] As I pointed out above, no legal step has been shown to have been taken by the pension authority before the Applicant's pension payment was stopped. The most the pension authority could have done was to stop one of the pension payments as they inquired into the circumstances under which the Applicant came to receive two pension payments. Total withdrawal of the Applicant's entitlement to pension payment was an illegal action on the part of the Permanent Secretary Ministry of Public Service or any other pension authority who took the decision. It has thus been proved by the Applicant that the act of totally withdrawing his pension was contrary to the law and was therefore illegal. This ground of the application has been satisfied by the Applicant.

The Ground of Procedural Impropriety

[25] As a ground for judicial review, "procedural impropriety" has been defined as "the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision." See: *Council of Civil Service Unions & Others v Minister for the Civil Service [1985] AC 374*. Under the law, procedural impropriety encompasses four basic concepts; namely (i) the need to comply with the adopted (and usually statutory) rules for the decision making process; (ii) the requirement of fair hearing; (iii) the requirement that the decision is made without an appearance of bias; (iv) the requirement to comply with any procedural legitimate

expectations created by the decision maker. See: *Dr. Lam – Lagoro James v Muni University (HCMC No. 0007 of 2016).*

[26] It was stated in evidence by the Applicant that payment of the Applicant's pension was halted without any communication to him. The Applicant made attempts to follow up on the issue with the concerned officials but was not given any formal response. On their part, it was stated by the Respondent that there was no need to give the Applicant any hearing since he had committed an illegality by accessing two salaries and two pension payments.

[27] While I recognize that there were no adopted or statutory rules for the decision making process that needed to be complied with by the pension authority before stopping or withdrawing the Applicant's pension, it is imperative to note that the pension authority had to observe the principles of natural justice. Procedural propriety in public law matters calls for adherence to the rules of natural justice which imports the requirement to hear the other party (*audi alteram partem*) and the prohibition against being a judge in one's cause (the rule against bias). Natural justice requires that the person accused should know the nature of the accusation made against them; secondly, that he/she should be given an opportunity to state his/her case; and thirdly, the tribunal should act in good faith. See: *Byrne v. Kinematograph Renters Society Ltd, [1958]1 WLR 762*. Upon this premise, even where there are no adopted or statutory rules of procedure that the decision maker was obliged to follow, and the matter is not before a court or tribunal within the context of the right to a fair hearing under article 28 of the Constitution of Uganda, the common law requirement of fair hearing has to be complied with for a decision to be said to have been reached with procedural propriety or fairness.

[28] In the present case, upon discovery that the Applicant had accessed two pension payments, the pension authority had the duty to formally write to the

Applicant at the very minimum requiring him to show cause why his pension payment should not be stopped. The Applicant had to be heard upon his explanation however convinced the pension authority was upon their discovery. The act of unilaterally stopping both pension payments without any notice to the Applicant was contrary to the rules of natural justice and constituted an instance of procedural impropriety and unfairness. This ground of the application also succeeds.

The ground of Irrationality

[29] In judicial review parlance, irrationality refers to arriving at a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. See: *Council for civil Service Unions (supra).* In *Dr. Lam – Larogo (supra)*, it was held that in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[30] On the case before me, I do not find any justification as to why the pension authority stopped both pension payments even when they believed the Applicant had committed some wrongful act. The decision taken by the authority therefore defies logic and I find it unreasonable in the circumstances. This ground of the application also succeeds.

[31] In all, therefore, on issue three, the Applicant has established that the decision by the pension authority, represented by the Respondent, to totally stop his pension payment, was illegal, procedurally improper and irrational.

Issue 4: What remedies are available to the parties?

[32] The Applicant prayed for an Order of Certiorari quashing and setting aside the decision to stop payment of pension and gratuity to the Applicant. From the above findings, it has been established that the Applicant was only entitled to one pension payment. The second pension payment was illegal. It was also shown in evidence that the Applicant had been fully paid his gratuity pursuant to his service in the UPDF. It is the gratuity related to his service with Mulago National Referral Hospital that was not paid. It is clear that the Applicant was not entitled to a second gratuity from the consolidated fund. As such, the decision to stop payment of pension and gratuity in relation to the service at Mulago National Referral Hospital cannot be affected by this decision. It is only the decision to stop payment of pension accruing from the Applicant's service with the UPDF that has been impeached and will be quashed. Accordingly, an order of Certiorari doth issue quashing the decision of the pension authority, represented by the Respondent, stopping payment of the Applicant's pension accruing from his service with the Uganda Peoples' Defence Forces (UPDF).

[33] The Applicant further prayed for an Order of Mandamus requiring the Permanent Secretary in the Ministry of Public Service to reinstate and effect arrears of payment of pension and gratuity due to the Applicant within 14 days from the date of judgment. From the above findings, the Applicant is entitled to an order of Mandamus directing the pension authority, through the Respondent, to reinstate the Applicant's pension payment accruing from his service with the UPDF including payment of arrears from September 2020 until he is reinstated on the pension pay roll. The reinstatement of the Applicant on the pension pay roll shall be effected within sixty (60) days from the date of this order.

[34] The Applicant also claimed for payment of general damages. Although general damages may at times be paid in judicial review, the same are not available for consideration in the present case. This is because there is undisputed evidence that the Applicant took advantage of the system and received two salaries and two pension payments from the consolidated fund. The Applicant has thus been a beneficiary of unjust enrichment. I note that the Respondent did not opt to recover the sums unlawfully obtained by the Applicant. What is clear, however, is that the Applicant cannot receive any extra payment through the Court beyond his pension payment and arrears. The claim for general damages is, therefore, unjustified and is rejected.

[35] Regarding payment of the costs of the suit, the law is that costs follow the event unless the court, for good cause, decides otherwise (Section 27 CPA). In the present case, the application has substantially succeeded and the Applicant is entitled to the costs of the suit. The same are awarded to the Applicant against the Respondent.

It is so ordered.

Dated, signed and delivered by email this 12th day of December, 2023.

Boniface Wamala
JUDGE