

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 165 OF 2022

SARAH ALELE ===== APPLICANT

VERSUS

UGANDA POST LIMITED

ROSETTE ATUKUNDA ===== RESPONDENT

BEFORE: HON. JUSTICE EMMANUEL BAGUMA

RULING

Background.

The Applicant who was an employee of the Respondent on contract basis was on the 11th day of July 2022 suspended from duty by the 1st Respondent's Human Resource officer (the 2nd Respondent). The Applicant being dissatisfied with the decision of the Respondent applied for judicial review in the court.

The application.

This application is brought under Articles 28, 42 & 44 of the 1995 Constitution of the Republic of Uganda [as amended] , Sections 33 & 36 of the Judicature Act,Cap.13 [as amended],Section 98 of the Civil Procedure Act,Cap.71, Rules 5,6,7 & 8 of The Judicature [Judicial Review][Amendment] Rules, SI No.32 of 2019 and Order 52 r 1,2 &3 of The Civil Procedures Rules SI.71-1 seeking for orders that :-

- 1.An order of Certiorari be issued against the respondents quashing the decision or act of the 2nd respondent by which the applicant was suspended from her employment,
2. A declaration to the effect that the decision or act of the 2nd respondent acting in the capacity as Head, Human Resources & Administration of the 1st respondent in suspending the applicant from her employment is null and void in so far as the applicant was not accorded fair hearing,

3. An order of Mandamus directing the 1st & 2nd respondents to restore the applicant to her former position with her salaries, emoluments and benefits,

4. An injunction doth issue restraining the respondents from further threatening and interfering with the applicant's position, salaries, emoluments and benefits as the Regional Supervisor except on reasonable and justifiable reasons,

5. An award of general damages against the respondents for inconveniences, mental anguish, sufferings, psychological tortures, trauma and embarrassment suffered by the applicant,

6. An award of punitive damages against the 2nd respondent and cost of this application.

The application is supported by the affidavit of **Ms Sarah Alele** the applicant whose details are on record but briefly states that;-

1. I am an employee of the Respondent since 9th December 2009 in different capacities and currently the regional supervisor stationed at Gulu.
2. On the 17th June 2022, I was transferred by the 2nd Respondent from Gulu Region to Fort Portal as Regional Supervisor.
3. Upon my transfer from Gulu Regional to Fort Portal Region, the Respondents abdicated their duties and responsibilities when they refused to provide me with transfer allowances.
4. The Respondents further abdicated their duties and responsibilities when they failed to pay salaries for the last six months making life extremely hard and unbearable.
5. I had been sick and often given bed rest following pregnancy and on 21st June 2022, I returned back to Hospital for review where the Doctor recommended for 30 days off duty to allow quick recovery. I brought this to the attention of the respondents who advised me to apply for sick leave.
6. I immediately applied for sick leave to the Respondent on 24th June 2022 through Expedited Mail Services (Speed Post) Bill.
7. My sick leave was deliberately ignored by the respondent who refused to reply the same to date but instead on 11th July 2022, the 2nd Respondent simply suspended me from duty without hearing.

8. I was never given an opportunity to be heard against the allegations leading to my suspension before I was suspended.
9. I have been advised by lawyers which advice I believe to be true that that I am entitled to a right to be heard and treated fairly and just in administrative process.

The respondents in an affidavit in reply sworn by **Rosette Atukunda** the 2nd Respondent and the head Human Resource & Administration opposed the application and briefly stated that; -

1. The applicant's application is incompetent, bad in law, premature and the Respondent's lawyer shall seek leave to cross examine the applicant on his affidavit.
2. The Respondents were not aware of the applicant's health challenges until when she was transferred to another place of work.
3. The alleged medical documents supporting the applicant's health condition were never shared with the Respondent nor with the applicant's immediate supervisor and no hard copies were availed at the time.
4. All regional supervisors were transferred to different regions and that is when the applicant stated that she could not report to her new station of work because she was ill.
5. The claim for salary arrears dating back to 6 months was brought in a wrong forum, out of time and barred by judicial review.
6. The alleged leave application forms and medical documents were never received by people mandated to authorize the said leave.
7. The applicant was advised to apply for sick leave however, no sick leave application had ever been made/received, neither brought to the attention of the head of department nor approved by the head of department.
8. On 6th July 2022, I requested via email from the applicant to submit an explanation as to why she had not been coming to work and also advised her to apply for sick leave. She responded by email on 18th July 2022 stating that she could not respond to the email due to poor health.
9. The applicant was suspended from duty with immediate effect following her abscondment from duty for a period of over one month and informed that she would be invited for a disciplinary hearing on date to be communicated.

10. The applicant was invited for a disciplinary hearing on 16th August 2022 but instead of attending the same, the applicant proceeded to court albeit to defeat the due process of decision making.
11. I have been advised by lawyers of the 1st Respondent legal department that the application is premature because no decision was taken against the Applicant.
12. The applicant is on suspension pending disciplinary proceedings and the said process is legal.

In rejoinder, the applicant reiterated her averments in chief but added that she received the invitation for disciplinary hearing after she had filed the matter in court challenging the decision of the respondent to suspend her.

Legal representation.

Mr. Ecar Pius of GDE Advocates represented the applicant while Ms Mayanja Alice from Uganda Post limited legal department represented the Respondent.

At the hearing of this application, both parties agreed to file written submissions and counsel for the applicant stated that he will frame two for court's determination to wit;-

1. *Whether or not the applicant was accorded fair hearing?*
2. *What remedies are available to the parties?*

Submissions by counsel for the applicant on issue No. 1

Counsel for the Applicant submitted that the jurisprudence developed by the Court of Appeal in Judicial Review is founded in the case of; *His Worship Aggrey Bwire -Vs- Attorney General & Judicial Service Commission [2009]1 ULR 240, Where it was held:*

“That Judicial Review can only be granted on three grounds namely;- illegality, irrationality and procedural impropriety”.

Counsel referred to the case of *Commissioner Of Land . Vs. Kunste Hotel Ltd [1995-1998]IEA (CAK)*, where Court noted that; -

“Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he/she is being subjected”.

Counsel submitted that the gist of this application is seeking for reliefs and orders for judicial review contained under paragraphs 21,22 and 23 of the affidavit in support of Notice of Motion respectively.

Under paragraph 21 of the affidavit in support, the applicant states that “My sick leave request was welcomed with a lot of hostilities as the respondents deliberately ignored and refused to give me the feedback for the same to date, but, instead, on the 11th July 2022, the 2nd respondent in her own wisdom simply decided to arbitrarily suspend me from duty without hearing”.

The applicant further under paragraphs 22 & 23 opined that the allegations leading to her suspension from duty by the 2nd respondent were baseless, unfounded and brought in bad faith and that she was never given an opportunity to be heard.

Counsel referred to Article 28 (1) of the Constitution which provides that; -

“in determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law”.

He also referred to Article 44 which provides that; -

“notwithstanding anything in this constitution, there shall be no derogation from the enjoyment of the following rights and freedom (a)... ... (b)... ..(c) the right to fair hearing (d)... ...”

Counsel submitted that Articles 28 and 44 (c) of the 1995 Constitution were not considered when the decision or the act was made and thus the applicant should have been heard before making the decision to suspend her from employment as it was in the case of *National Council for Higher Education Vs. Anifa Kawooya Bangirana Constitutional Appeal No.4 Of 2011* rendering the impugned decision ultra vires.

Counsel further relied on the case of **Twinomuhangi Vs.Kabale District & Others [2006] HCB 130**, *where* court held that; -

“Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of making a decision. The unfairness may be in the non observance of 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”.

Counsel concluded that the decision of the Respondents to suspend the applicant without according her a hearing was illegal, irrational, procedurally improper and a total violation of the principles of natural justice.

Issue No.2.

What remedies are available to the parties?.

Counsel for the applicant prayed that the applicant be granted the remedies sought in that motion that is quash the decision of the Respondents to suspend her, restore her in her position of employment, award general and punitive damages and issues an injunction restraining the Respondents from further unreasonably interfere with her employment.

Submissions by counsel for the Respondent.

In his written submissions, Counsel for the Respondent raised two preliminary objections however, at hearing he had not indicated that he will raise any PO. Accordingly, the same will not be considered and I will proceed with his written submissions on the merits of the application.

Issue No. 1.

Whether the applicant was accorded a fair hearing.

Counsel submitted that Natural justice envisages a right to fair hearing. In Uganda, the rules of natural justice are embedded in the Constitution under Articles, 28, 42 and 44 which guarantee every person a right to a fair hearing before an administrative body.

Counsel referred to *Halsbury's Laws of England 5th Edition 2010 Vol. 61 para 639*, where it is stated that;

“The rule that no person shall be condemned unless that person has been give prior notice of the allegations against him/her and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adopted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract, to conduct themselves in a manner analogous to courts.”

Counsel submitted that the applicant stated in paragraph 24 of her affidavit in support that she was suspended from work without according her a fair hearing. This was rebutted by the 2nd respondent in her affidavit in reply when she stated that on advice of the 1st respondent's lawyers, it is not a requirement for a hearing to be conducted before suspending an employee.

He stated that the right to suspend an employee is reserved in **Section 63 (1) of the Employment Act** where the employer is conducting an inquiry and has reason to believe may reveal a cause to dismiss an employee, the employer may suspend an employee with half pay.

Counsel submitted that the applicant having absconded from work and this being an act that is likely to amount to gross misconduct, it was imperative that a suspension be issued and investigations be conducted as required by *Section 11.4.3 (b) (i) of Posta Uganda Employee Regulations Terms and Conditions of Service*. The 2nd

respondent deponed in paragraph 13 of her affidavit in reply that she suspended the applicant when she absconded from work and informed her that she would be required to attend disciplinary hearing at a later date.

Counsel submitted that It is thus not a requirement of law for the applicant to be afforded a fair hearing before suspension from work. The fair hearing would only be accorded to her at the stage of disciplinary hearing where she was invited and she didn't attend, but instead filed this claim. As of today, no decision has been made so as to prevent abuse of court process and being in contempt of court.

Counsel submitted that the application is premature as there was no decision made. Since judicial review is about the decision making process, there was no decision made as the process was supposed to commence at disciplinary hearing stage which has not taken place because the applicant opted to lodge this claim in court.

Counsel referred to the case of **Persis Namuganza Vs Attorney General HCMC No. 111 of 2022**; where court stated that;

“the applicant seems to confuse the right to just and fair treatment in administrative decisions under Article 42 with the right to a fair hearing under Article 28 of the Constitution. The two rights are quite different and distinct since the latter is only applicable before an independent and impartial court or tribunal established by law. Therefore, Parliamentary proceedings or investigations cannot be treated as court proceedings in order to require a fair hearing as envisaged under Article 28 of the Constitution”

Counsel concluded that the applicant's claim would be proper for judicial review if she had appeared before the disciplinary hearing committee (which is an impartial quasi-judicial body) and made its decision. The applicant confused fair and just treatment with fair hearing. Suspending the applicant so as to conduct investigations into her conduct does not require a fair hearing nor fair and just treatment until she appears before the disciplinary hearing committee to which she was invited.

Issue No. 2.

What remedies are available to the parties?

Counsel prayed that the application be dismissed with costs for being premature.

Analysis of court.

Issue No. 1

Whether or not the applicant was accorded fair hearing?

In the case of *Commissioner of Land Vs. Kunste Hotel Ltd [1995-1998]1EA (CAK)*, Court noted that; -

“Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he/she is being subjected”.

Also in the case of *Lloyd v Me Mahon [1987] AC 625 at 702 Lord Bridge* succinctly put it that:

" the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirement of fairness demands when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making, the kind of decision it has to make and the statutory or other framework in which it operates."

Section 63(2) of the employment act 2006 states that;-

“the employer in conducting an inquiry that he/she has reason to believe may reveal a cause for the dismissal of an employee, may suspend the employee for a period not exceeding 4 weeks or period of inquiry whichever is shorter.”

In the instant case, the applicant absconded from duty and she was suspended on 11th July 2022, she received the same suspension letter on 18th July 2022, in the same letter it was indicated that she will soon be called for a disciplinary hearing. The invitation for disciplinary hearing was issued on 16th August 2022 but the applicant had filed this suit in court on 12th August 2022.

When the applicant was invited for the disciplinary hearing, she refused to go stating that the same is overtaken by events since she had already filed a suit.

It is my considered view that the Respondent acted within a reasonable time to invite the applicant for the disciplinary hearing given the fact that this is a government corporation with procedures to follow but the Applicant rushed to court to challenge the suspension which pre-empted the disciplinary hearing.

The Respondent was in the process of according the Applicant a right to be heard within a reasonable time but it was frustrated by the prompt filing of the judicial review challenging the suspension.

The suspension in this particular case was not a punishment to the applicant but rather a mean to allow investigations to be carried out in the conduct applicant which findings would help in the disciplinary hearing.

Basing on the above analysis, this application was premature.

Accordingly, this issue fails.

Issue No. 2

What remedies are available to the parties

Having found that the applicant has not established any grounds for judicial review, She is not entitled to the remedies sought.

Conclusion.

In the final result, this application is dismissed with the following orders;

- 1. The application is hereby dismissed.**
- 2. Let the Respondent proceed and conduct a disciplinary hearing of the Applicant's matter.**
- 3. Considering the nature and circumstances of this judicial review, No order as to costs.**

Dated, signed, sealed and delivered by email at Kampala this **28th** day of **April 2023**

Emmanuel Baguma

Judge