THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 301 OF 2021

OTIM JOHN::APPLICANT

VERSUS

1. **UGANDA CIVIL AVIATION AUTHORITY**
2. **UGANDA CIVIL AVIATION AUTHORITY BOARD OF DIRECTORS**
3. **OLIVE BIRUNGI LUMONYA::::::::::::::::::::::::::::::::::RESPONDENTS**
4. **THE MINISTER OF WORKS AND TRANSPORT**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicant filed this application for judicial review under Article 42 $ 44 of the Constitution, Sections 33 & 36 of the Judicature Act, Section 98 of the Civil Procedure Act, Rules 6, 7 & 8 of the Judicature (Judicial Review) Rules 2009 seeking the following orders;

1. A declaration that the 2nd respondent's Resolution dated 4th October 2021 recommending those shortlisted and interviewed for the position of Director General for reconsideration for appointment for the position of Deputy Director General is illegal, unlawful, procedurally irregular and is against principles of natural justice.

2. A declaration that the 4th respondent's appointment of the 3rd respondent as Deputy Director General of the 1st respondent on the basis of the 2nd respondent's resolution dated 4th October 2021 is illegal, unlawful, irregular, null and void.

3. A declaration that the procedure that the procedure adopted by the respondents in the appointment of the 3rd respondent as Deputy Director General of the 1st respondent is illegal, unlawful, unconstitutional, unreasonable, irregular, an affront to the principles of natural justice and in violation of the 1st respondent's Human Resource Manual.

4. A declaration that there is no lawful and legal procedure triggered for the appointment of the Deputy Director General of the 1st respondent.

5. An Order of Certiorari quashing the resolution of the 2nd respondent dated 4th October 2021 recommending those shortlisted and interviewed for the appointment of the 3rd respondent as Deputy Director General.

6. An Order declaring the position of the Deputy Director General of the 1st respondent vacant.

7. An Order of Mandamus compelling the respondents to comply with the legal requirements under the law and Human Resource Manual of the 1st respondent for the appointment of the Deputy Director General of the 1st respondent.

8. An Order for the payment of UGX 200,000,000 in exemplary damages for the blatant, deliberate and willful exercise of authority in an arbitrary, illegal, unlawful, unconstitutional irregular exercise of authority in a manner that is ultra vires and an affront to the rules of natural justice.

9. Costs of the application.

The grounds in support of the application are set out in the application briefly and broadly in the affidavit in support of the applicant-Otim John challenging the 3rd respondent's appointment as Deputy Director General of the 1st respondent on grounds that the appointment was arbitrary, illegal, unlawful, unreasonable, irregular, unconstitutional, ultra vires and an affront to natural justice.

The applicant brought this application in his own interest and in Public Interest to safeguard the rule of law and ensure legality, regularity, reasonableness and Constitutionality in the management and Administration of the Uganda Civil Aviation Authority. The applicant also brought this application as a former staff at the 1st respondent having worked for the period 1993-2016 as Head of Registries.

The 1st and 2nd respondents filed an affidavit in reply through Joseph J. Okwalinga (Acting Corporation Secretary) opposing the application and contended that the applicant has no sufficient interest in the matter to institute and sustain the application.

The 3rd respondent filed an affidavit in reply and stated that she was lawfully appointed Deputy Director General after applying for the position of Director General and being shortlisted for the position.

The 4th respondent filed an affidavit in reply through Bageya Wasswa-Permanent Secretary and Accounting Officer Ministry of Works and

Transport contending that the 3rd respondent was among the six candidates recommended to the Hon. Minister by the Board of Directors and her appointment was done in accordance with the Constitution and Uganda Civil Aviation Authority Act.

The applicant was represented by *Counsel Bukenya Abbas* while the 1st -3rd respondents were represented by *Senior Counsel Ssebugenyi James Mukasa* assisted by *Josephine Muhaise* while *Geoffrey Madette (SSA)* represented the 4th respondent.

The respondents opposed the application and also raised two preliminary objections that is;

1. *The applicant has failed to demonstrate a direct and sufficient interest in the matter which renders the application fatally defective.*
2. *The applicant's affidavit in support of the application is argumentative and incurably defective for offending the rule against prolixity and argumentativeness of an affidavit.*

The parties filed submissions on the preliminary points of law raised that have been considered by this court.

Counsel for the respondents submitted that the applicant lacked the locus standi to bring an application of this nature. It was submitted that the applicant was not a candidate for the position of Deputy Director General of the 1st respondent or involved in any capacity to have a direct or sufficient interest in the matter. The applicant merely alleged breach of the law by the respondents but failed to demonstrate any direct or sufficient interest over and above the legalities alleged that would give him the right to bring an application of this nature.

Counsel cited Rule 3A of the Judicature (Judicial Review) (Amendment) Rules 2019 as well as *Muhumuza Ben v Attorney General of Uganda & 2 others (Miscellaneous Cause No. 212 of 2020*)

In response, counsel for the applicant submitted that the preliminary objections raised by the respondents' counsel were premature and raised outside the content and context of the applicant's pleadings and contended that the applicant had the locus standi to institute the judicial review application. Counsel submitted that he had the required personal and public interest to institute the same without necessarily making it a class of publication case and prayed that the objection as to the locus standi be overruled. Counsel cited *Bitamisi Namuddu vs Rwabuganda Godfrey Court of Appeal No. 89 of 2014*.

Counsel submitted that the applicant brought this application in his own interest to safeguard the rule of law and to ensure legality, regularity, reasonableness in the management and administration of the Uganda Civil Aviation Authority. That this position was not rebutted in the respondents' reply and created a nexus as required in *Bitamisi Namuddu vs Rwabuganda Godfrey Court of Appeal No. 89 of 2014* that is checking on the mode of discharge of duty by public officers. It was counsel's submission that paragraph 1-3 of the applicant's affidavit in support read within the ambit of Rule 3A of the Judicial (Judicial Review) Rules (as amended) gave the applicant locus standi and sufficient interest to challenge the legality of discharge of public duty by bringing a judicial review in form of a certiorari as one of the avenues to challenge such acts.

Counsel further submitted that nowhere in Section 35-37 of the Judicature Act was a third party expressly barred from challenging by way of judicial review conduct and discharge of public duty including recruitment and appointment.

Counsel cited *R vs Inland Revenue Commissioners, Ex parte National Federation of Self Employment and Small Businesses Ltd (1982) A.C 617* in support of his argument of sufficient interest. Counsel prayed that this objection be overruled.

Counsel for the respondents rejoined and reiterated that the applicant had not satisfied the court as required by Rule 3A that he had any direct or sufficient interest over and above his feelings of indignation at the alleged violations by the respondents.

Counsel submitted that the applicant's capacity demonstrated under paragraphs 1 and 2 of the affidavit in support of the application to wit; the applicant was a former employee of the 1st respondent from 1993 to 2016 where he worked as the Head of Registries. However that the recruitment that was being challenged took place in May 2021 which was five years after the applicant left the 1st respondent's employment.

That the applicant was not an employee of the 1st respondent at the time the cause of action arose or a candidate in the recruitment of the Deputy Director General of the 1st respondent. Counsel submitted that the applicant's former employment cannot reasonably form the basis of his alleged interest in the matter in contention as it has no connection to the recruitment and appointment of the 3rd respondent which the applicant contests.

Counsel referred this court to the case of W*ater & Environment Media Network (U) Limited, National Association of Professional Environmentalists and Africa Institute for Energy Governance vs National Environmental Management Authority & Hoima Sugar (Consolidated Miscellaneous Cause No. 239 and 255 of 2020)* in regard to the question of locus standi.

Counsel also rejoined that the applicant's arguments on sections 35, 36 and 37 of the Judicature Act Cap 13 did not impart legal standing on the

applicant to file the application before this court. That in any case, the applicant was supposed to adhere to the specific legislation under the Judicature Act governing judicial review.

Counsel concluded that it remained their submission that the applicant lacked the locus standi to sustain the application for judicial review before the court.

Analysis

Rule 3A of the Judicature (Judicial Review) (Amendment) Rules provides that any person who has a direct or sufficient interest in a matter may apply for judicial review.

The question this court has to consider is whether the applicant has sufficient interest in instituting this application for judicial review or is a mere busy body. The threshold for instituting an application for judicial review is to show sufficient interest in an application in order to be allowed access to the temple of justice. This would enable the court to assess the level of grievance against what is being challenged and to sieve out hopeless applications. The interest must be substantial, tangible and not vague, intangible or caricature.

The court has noted in several authorities that sufficient interest must shown before the court can exercise its jurisdiction in Judicial review. In the case of ***Muhumuza Ben v AG & 2 Others HCMC No. 212 of 2020*** this court held;

The interest required by law is not a subjective one; the court is not concerned with the intensity of the applicant's feelings of indignation at the alleged illegal action, but with objectively defined interest. Strong feelings will not suffice on their own although any interest may be accompanied by sentimental considerations. Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

In particular, a citizen's concern with legality of governmental action is not regarded as an interest that is worth protecting in itself. The complainant (petitioner) must be able to point to something beyond mere concern with legality: either a right or to a factual interest. Judicial review applications should be more restrictive to persons with direct and sufficient interest and should not be turned into class actions or actio popularis which allow any person to bring an action to defend someone else's interest under Article 50 of the Constitution.

……..An application will have standing to sustain public action only if he fulfils one of the two following qualifications: he must either convince the court that the direction of law has such a real public significance that it involves a public right and an injury to the public interest or he must establish that he has a sufficient interest of his own over and above the general interest of other members of the public bringing the action. See also ***Community Justice and Anti-Corruption Forum v Law Council & Sebalu and Lule Advocates HCMC No. 338 of 2020;***

The applicant contends that he is a former employee having worked for the 1st respondent from 1993 to 2016 as the Head of Registries and is therefore conversant with the procedure of recruitment of staff of the 1st respondent. He states that he brought this application for the interest of the public, good governance and rule of law to safe guard the rule of law and ensure legality, regularity, reasonableness and constitutionality in the management and administration of the Civil Aviation Authority a public body since maladministration or improper management of the body directly concerns my interests and those of other Ugandans.

The recruitment that is being challenged by the applicant took place in May 2021 five years after the applicant left the 1st respondent's employment. The applicant was not an employee at the time this cause of action arose and therefore lacks direct and sufficient interest to bring this application against

his former employer required under Rule 3A of the Judicature (Judicial Review) (Amendment) Rules.

This court in ***Jabbe Pascal Osinde Osudo vs Civil Aviation Authority & anor*** **Miscellaneous Cause No. 271 of 2021** stated that;

"Currently, every person and or former employees have developed a sense of entitlement to continue intermeddling in affairs of the former employers. It is not ground enough to continue poking their noses in affairs of a public office after your employment is terminated, as this will be abused and used to settle scores with the institution especially if such employee left acrimoniously like the present applicant (this court takes judicial notice of the manner in which the applicant left Civil Aviation Authority and the several cases lodged in this court)."

This is clogging and 'choking' the court system with all manner of applications with competition for fame or recognition. The court should raise the bar and prevent what is now being termed as *'publicity litigation'* in order to entertain justiciable matters by parties with sufficient interest. See *Aboneka Micheal & another v Attorney General High Court Miscellaneous Cause No. 367 of 2018*

It is the duty of the courts to protect the scarce state resources and the over-burdened court system by ensuring that litigants who appear in court in matters of judicial review have a direct or sufficient interest to come to court. Precious resources would be wasted on the adjudication and defence of claims if mere busybodies could challenge every minor or alleged minor infraction by the state or public officials. Without sufficient interest threshold for standing the floodgates will open, inundating the courts with vexatious litigation and unnecessary court disputes.

This preliminary objection is therefore sustained.

The second preliminary point of law was that the applicant's affidavit in support of the motion was argumentative and contained hearsay evidence.

Counsel submitted that an affidavit ought to adduce evidence and not arguments on matters of law. That an affidavit that fell outside that requirement was considered argumentative and liable to be struck out. Court was referred to the case of Male H. Mabirizi K. Kiwanuka vs AG (Supreme Court Misc. App No. 7 of 2018 among others. It was counsel's submission that in paragraphs 12(a-j) of the affidavit, the applicant swore to matters of law and not fact contrary to Order 19 rule 3(1) of the Civil Procedure Rules.

It was further argued that the applicant's affidavit contained hearsay evidence which was not admissible as seen in paragraphs 4-12 where the applicant supposedly set out the process followed by the respondents in recruitment and appointment of the Deputy Director General of the 1st respondent. It was counsel's argument that this was information outside the applicant's knowledge since he did not participate in the process owing to the fact that he had left employment with the 1st respondent in 2016.

Counsel submitted that this was clearly hearsay evidence that could not be relied on and rendered the affidavit fundamentally defective and liable to be struck out as a whole.

Counsel prayed that the court sustains the objection and strike off the applicant's affidavit in support of the application from the record.

In response, counsel for the applicant submitted that the applicant had disclosed the sources of the information in paragraphs 8, 10 and 12(g) together with the accompanying annextures A, B and C thereto.

Counsel submitted that for one to submit that paragraph 4 to 12 were outside the knowledge of the applicant and therefore hearsay was legally

wrong because the reading of paragraph 4 of the affidavit knowing the dictates of procedure of recruitment and the procedural requirements were not a preserve of lawyers/advocates because the law was meant for the knowledge and benefit of the people.

Counsel concluded that affidavit evidence regardless of what it contained was inviolate and what mattered was that it was the deponent's evidence and must be left untouched and not subjected to the technicalities of the law notwithstanding whether it was argumentative or not. Counsel prayed that the objections be overruled with costs.

In rejoinder, it was counsel's submission that bearing in mind Order 19 rule 3 of the CPR, a deponent could only make statements of belief where the affidavit is sworn in respect of an interlocutory application which was not the application before the court. Counsel submitted that this being an application for judicial review, the applicant was restricted to making statements within his own knowledge in the affidavit sworn in support of the application for judicial review and not those that were hearsay or within his belief.

Counsel reiterated that being a former employee, the information stated by the applicant in paragraphs 4-12 of his affidavit was hearsay and not within his own knowledge and therefore offended Order 19 rule 3.

Counsel concluded that the preliminary points of law had merit and should be sustained by the applicant and prayed that the application therefore be dismissed with costs to the respondents.

Analysis

Order 19 r.3 CPR which governs the procedure of affidavit evidence provides as follows;

"(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit."

Further **Order 19 rule 3(1) of the CPR** provides as follows,

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated"

From the above, it is clear that affidavits deponed to in respect of interlocutory applications may include statements that are based on facts that are outside the deponent's personal knowledge e.g., hearsay and matters of belief. All other affidavits are by law supposed to be free of such matters. ***Black's Law Dictionary 11th Edition (2019)*** defines the word ***interlocutory*** on page 563 as follows,

"interim or; temporary; not constituting a final decision of the whole controversy..."

The instant application is not an interlocutory application and therefore the applicant cannot depose to information that is not within his own knowledge. I, therefore, concur with counsel for the respondent that being a former employee, the information stated by the applicant in paragraphs 4-12 of his affidavit was hearsay and not within his own knowledge and therefore offended Order 19 rule 3.

With the foregoing, I find that the preliminary points of law raised by the respondent have merit and are hereby sustained.

This application is dismissed.

Each party shall bear its own costs.

I so order

SSEKAANA MUSA
JUDGE
31st January 2023