THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 264 OF 2022

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, MANADAMUS AND PROHIBITION

ATWINE REBECCA :: APPLICANT

VS

1. UGANDA RAILWAYS CORPORATION

2. THE BOARD OF DIRECTORS

UGANDA RAILWAYS CORPORATION :::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Sections 36 of the Judicature Act Cap 13 and Rule 6 of the Judicature (Judicial Review) Rules 2009 seeking the following declarations and orders;

a) A declaration that the decision of the Respondent rejecting the renewal of her contract, dismissing or removing her from office, was illegal, unjustified, unreasonable and is against the principles of natural justice and characterized by procedural impropriety.
b) A declaration that the 2nd Respondent Board was not vested with powers to make the decision at that time due to the Presidential directive dated 3rd October 2022.
c) An order of Certiorari quashing the decision and resolution of the Respondent dated 10th November, 2022 not to renew the Applicant's contract of employment as the Principal legal officer.

d) An order of Mandamus be issued compelling the Respondent and their agents to renew the Applicant's contract.
e) An order of Prohibition doth issue against the Respondents, their officials, agents, assignees, or any other persons acting on the Respondent's instructions or deriving interest and authority from it restraining them from forcing the Applicant to hand over or preventing her from accessing the office of Principal Legal Officer including office equipment like computers, printers and communication channels like emails until the determination of this application.
f) An order for general damages and costs of the application.

[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 was appointed to the position of Principal Legal Officer for a term of three years ending 18th November 2022. At that time, the Corporation Secretary had exited and she was appointed as the Acting Corporation Secretary serving in two positions. On 31st August 2022, she received an email from the administrative secretary notifying her of the impending expiry of her contract of which she responded by applying to the Board Chairman for renewal of her contract. The Principal Human Resource Officer informed her that the criteria necessitated transmission of her application to the Board upon endorsement by her immediate supervisor, the Corporation Secretary. The Applicant stated that during her tenure, her immediate supervisor (the Corporation Secretary) had refused to appraise her for two years yet she was allocating to her work and she was providing reports of her assignments. The Applicant stated that she had made several complaints to the Principal Human Resource Officer and the Managing Director and the latter had directed an engagement between the Principal Human Resource Officer, the Corporation Secretary and the Applicant

to be held regarding refusal to appraise the Applicant; but the same was never done.

[3] The Applicant further stated that on 17th November 2022, she was served with a letter stating that a circularized Board Resolution dated 10th November 2022 had resolved that her contract should not be renewed and required her to prepare a hand over report. She appealed against the Board resolution and decision for non-renewal of her contract but the Board of Directors failed to adhere to the rules of natural justice. She averred that the Principal Human Resource Officer misguided the Board that she had appeared before a disciplinary committee for certain offences and that the disciplinary committee had resolved that her contract should not be renewed yet she has never been notified of or appeared before any disciplinary committee for the three years she worked with the corporation. She also stated that the termination letter was on short notice and the Board was not vested with powers at the time of making the decision due to the Presidential directive dated 3rd October 2022. She concluded that the failure by the Board of Directors to consider her request for contract renewal was illegally and irregularly reached.

[4] The Respondent opposed the application through an affidavit in reply deposed by **Mr. Stephen Wakasenza**, the acting Managing Director of the 1st Respondent and a member of the 2nd Respondent. He stated that the application is not amenable for judicial review as it is a private law contract and the Applicant has not exhausted all the internal remedies making the application premature before the Court. The deponent also stated that the application is overtaken by events as the Applicant's contract was for a fixed term and had expired on 18th November 2022 and was never renewed. The deponent averred that the Applicant's performance during her contract of service was unsatisfactory and her behaviour did not meet the standards of the 1st and 2nd Respondents. He averred that the Applicant was appraised by the

company secretary and her work was found unsatisfactory. He further averred that the Respondents conducted a board meeting where all issues regarding the renewal of the Applicant's contract were discussed and the principles of fairness were adhered to. He stated that the decision not to renew the Applicant's contract was based on her performance and not on any offences committed by the Applicant. He further averred that the board was vested in law with powers to pass the decision and its actions were legal and within the ambit of their authority. He concluded that the Applicant sabotaged the process of being awarded another contract when she willfully neglected to indicate her acceptance of the offer to grant her a new contract under the prevailing terms and conditions.

Representation and Hearing

[5] At the hearing, the Applicant was represented by **Mr. Laston Gulume** of M/s ATNA Advocates while the Respondent was represented by **Mr. Kalivayo Blair** and **Mr. Ricky Mudali** of M/s Orima & Co. Avocates. 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 before Court.

Issues for Determination by the Court

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

a) *Whether the affidavit in rejoinder was filed within time?*
b) *Whether the application is amenable for judicial review?*
c) *Whether the decision of the Respondents was tainted with illegality, irrationality and procedural impropriety?*
d) *What remedies are available to the parties?*

Resolution of the Issues

Issue 1: Whether the affidavit in rejoinder was filed within time?

[7] It was submitted by Counsel for the Respondents that while the Respondents' affidavit in reply was filed and served on the Applicant on 25th January 2023, the affidavit in rejoinder which was to be filed within 15 days, was filed on 6th May 2023, a period of over four months after the reply. Counsel submitted that the rejoinder was filed out of time and should be struck out.

[8] In response, Counsel for the Applicant submitted that there is no law that stipulates a time line within which to file an affidavit in rejoinder and that there was no mischief occasioned by the late filing on 8th May 2023 given that the Respondents were to file their submissions in reply on 5th June 2023 and had time to peruse the affidavit in rejoinder. Counsel further prayed that if the Court finds that the affidavit in rejoinder was filed out of time, it should exercise its discretionary power under Section 96 of the CPA to enlarge time and admit the affidavit in rejoinder.

[9] The relevant provision under Order 12 rule 3(1) of the CPR requires all remaining interlocutory applications to be filed within twenty-one days from the date of completion of the alternative dispute resolution; and where there has been no alternative dispute resolution, within fifteen days after the completion of the scheduling conference. Under rule 3(2) thereof, service of the interlocutory application to the opposite party shall be made within 15 days from the filing of the application, and a reply to the application by the opposite party shall be filed within 15 days from the date of service of the application and be served on the applicant within 15 days from the date of filing of the reply. These provisions are fully applicable where the matter before court is an ordinary suit commenced by plaint where the holding of a scheduling conference is envisaged. However, where the matter before the court is an

application in which evidence is by way of affidavits, I hold the view that the timelines for filing a defence in an ordinary suit ought not apply strictly in regard to the filing of a reply to such an application.

[10] Of course, I am alive to the decision in *Stop and See (U) Ltd v Tropical Africa Bank Ltd, HCMA No.333 of 2010*. I however find as more persuasive the authority in *Dr. Lam Lagoro v Muni University HCMC No. 007 of 2016* wherein the learned Judge held that in an application to be determined on the basis of affidavits, all affidavits and pertinent documents should be filed and served on the opposite party before the date fixed for hearing of the particular application. The learned Judge further held the view that an affidavit in reply, being evidence rather than a pleading in *stricto sensu*, should be filed and served on the adverse party within reasonable time before the date fixed for hearing. In that case, the learned Judge called for flexibility in regard to the filing of affidavits in reply and allowed the late filing of the affidavit in reply.

[11] I am greatly persuaded by the latter decision as representing the correct position of the law regarding the filing of affidavits in reply in interlocutory applications where the rules do not provide for specific time lines. I equally believe that the same legal position does apply to the filing of any affidavit in rejoinder subject to two conditions; one that the late filing does not occasion a delay in the hearing of the application; and two, that no substantial prejudice is occasioned to the Respondent in the circumstances of the case. Where any prejudice suffered may be catered for by way of an order for payment of costs, the court may still exercise discretion to allow the late filing of such an affidavit; in line with Order 51 rule 6 of the CPR. On the case before me, there is no evidence of either delay or prejudice that was occasioned to the Respondents owing to the delayed filing of the affidavit in rejoinder. I accordingly exercise discretion and allow the belatedly filed affidavit in

rejoinder as being validly on record. The same is accordingly validated and the objection thereto is disallowed.

Issue 2: Whether the application is amenable for judicial review?

Submissions by Counsel for the Respondents

[12] Counsel for the Respondents cited the provisions of Section 23(i) and (ii) of the Uganda Railways Corporation Act to the effect that the board may engage on behalf of the corporation such other employees as may be necessary for the proper and efficient discharge of the objects and functions of the corporation and that the employees shall hold office upon such terms and conditions as the board may decide. Counsel submitted that although the Applicant was employed by a public body, the employment relationship would not imply public law issues and that Parliament intended that the terms and conditions of employment are to be treated as a matter of private law. Counsel stated that the subject matter under challenge involves enforcement of private rights and the nature of the dispute has an alternative remedy in the Employment Act which the Applicant failed to exhaust; which renders the application incompetent before this court and should be dismissed with costs.

Submissions by Counsel for the Applicant

[13] Counsel for the Applicant cited the provisions of Rule 7A of the Judicature (Judicial Review) (Amendment) Rules 2019 to the effect that in considering an application for judicial review, the court shall satisfy itself that the application is amenable for judicial review, that the aggrieved person has exhausted the existing remedies available within the public body and that the matter involves an administrative public body or official. Counsel submitted that the 1st Respondent is a body corporate established under Section 2 of the Uganda Railways Corporation Act and that the 2nd Respondent is established under Section 8 of the same Act with powers to appoint and renew contracts under Section 23. Counsel stated that the subject matter of the application involves

claims based on public law principles including illegality, ultravires and principles of natural justice. Counsel also submitted that the Applicant exhausted all available existing mechanisms by appealing to the Board and the Hon. Minister of Works and Transport but no response was received.

Determination by the Court

[14] Rule 5 of the Judicature (Judicial Review) (Amendment) Rules, No. 32 of 2019 introduces Rule 7A into the principal rules, which lays out the factors to be considered by the court when handling applications for judicial review. Rule 7A (1) of the rules provides that;

> *(1) The court shall, in considering an application for judicial review, satisfy itself of the following –*
>
> *(a) that the application is amenable for judicial review;*
>
> *(b) that the aggrieved person has exhausted the existing remedies available within the public body or under the law; and*
>
> *(c) that the matter involves an administrative public body or official.*

[15] It follows, therefore, that for a matter to be amenable for judicial review, it must involve a public body in a public law matter. The court must, therefore, be satisfied; first, that the body under challenge must be a public body whose activities can be controlled by judicial review; and secondly, the subject matter of the challenge must involve claims based on public law principles and not the enforcement of private law rights. See: Ssekaana Musa, Public Law in East Africa, P. 37 (2009) Law Africa Publishing, Nairobi. It is, therefore, a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed by the public at large. In that regard, the duty of the applicant in an application such as this is to satisfy the court on a balance of probabilities that the decision making body or officers subject of his/her challenge did not follow due process in making the respective decisions or acts and that, as a result, there was unfair and unjust

treatment of the applicant and which is likely to have an effect on other members of the public.

[16] In the present case, it is not disputed that the Respondents are public bodies that are subject to judicial review. Although the matter raised by the Applicant is based on her employment contract, it is not true that the action has been brought purely for enforcement of her private rights under her relationship with the Respondents as an employee. It is apparent that the application raises issues that pertain to exercise of public authority by the Respondents in their dealings with their employees. Clearly, and irrespective of the merits of the case, the matters raised by the Applicant are of interest to other employees of the Respondents and members of the public at large. It is a matter of public importance that in exercise of their authority, the Respondents' conduct is in accordance with the accepted standards of legality, rationality and propriety. The issues raised by the Applicant call for examination of the Respondents' exercise of power along those lines. In that regard, the application would be amenable for judicial review.

[17] Regarding the rule on exhaustion of existing remedies available within the public body or under the law, it was submitted by Counsel for the Respondents that there was an alternative remedy under the Employment Act which the Applicant did not exhaust. On her part, the Applicant stated that she exhausted any available alternative remedies by petitioning the board and the Hon. Minister for Works and Transport but got no response. This averment was not controverted by the Respondent. The position of the law is that the alternative remedy ought to be legally provided for and more effective than judicial review. See: *Leads Insurance Company Ltd v Insurance Regulatory Authority, CACA No. 237 of 15.*

[18] In the present case, since it has been established that the matter raises questions involving public law matters, the Applicant could not have been expected to go to the labour office which is the court of first instance in labour matters. The argument by the Respondents in this regard is therefore devoid of merit. There is no other more effective alternative remedy that has been shown to have been available to the Applicant other than taking out judicial review. In all, therefore, on this issue, the Applicant has established that the application is amenable for judicial review.

Issue 3: Whether the decision of the Respondents was tainted with illegality, irrationality and procedural impropriety?

[19] Judicial review is concerned not with 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, HCMC No. 106 of 2010*.

[20] It therefore follows 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 vs Attorney General, HC MC No. 212 of 2018*.

[21] On the case before me, the decision challenged by the Applicant is the refusal by the Respondents to renew her employment contract and the decision is challenged on grounds of illegality, irrationality and procedural impropriety. I will deal with the allegations under each ground as below.

The Ground of Illegality

The Submissions

[22] It was submitted by Counsel for the Applicant that by the time of making the impugned decision not to renew the Applicant's contract dated 9th November 2022, the 2nd Respondent had been dissolved by an Executive Order of the President dated 3rd October 2022 and that the 1st Respondent did not have any legal mandate or authority to make the impugned decision.

[23] In response, it was submitted by Counsel for the Respondents that the board that was disbanded by the 3rd October 2022 letter was the previous board. Counsel stated that a clarification was made by a letter from the President dated 17th October 2022. Counsel further stated that at the time of the expiry of the Applicant's contract, the board was properly constituted and had power to handle the Applicant's grievances. Counsel also submitted that for any Executive directive to be binding, a statutory instrument ought to have been passed to that effect. Counsel concluded that the Presidential directive herein did not take away the powers of the board.

Determination by the Court

[24] 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 *Council of Civil Service Unions v Minister for Civil service (1985) AC 375,* made the following statement;

"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 par 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".

[25] 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 their statutory power; and the second covers abuse of power and defects in its exercise. See: *Dr. Lam-Lagoro James v Muni University, HCMC No. 007 of 2016.*

[26] In this case, the Applicant raised an allegation of illegality based on the claim that the Board that made the impugned decision had been dissolved by the President on account of the Presidential directive of 3rd October 2022. To begin with, it should be understood that for a Presidential directive to have the force of law, it must comply with the provisions under Article 99 of the Constitution; that is, it must be based on a Statutory Instrument that is made by the President, authenticated by the responsible Minister, and published in the Uganda Gazette. See: *Male Mabirizi Kiwanuka v AG, HCMC No. 194 of 2021.*

[27] On the facts before me, a reading of the said directive indicates that it was by way of a recommendation to the responsible Minister. Under the Uganda Railways Corporation Act Cap 331, the Minister responsible for Works and Transport is the authority empowered to take legal action over matters such as this under the Act. For the recommendation contained in the Presidential directive to acquire the force of law, the Minister had to take action in relation to the directive. By letter dated 17th October 2022, the Minister informed the President, among others, that the Board he was making reference to in his 3rd October 2022 letter had in fact been disbanded before and a new board put in place. Contrary to the argument by the Applicant, this does not amount to a reversal of the Presidential directive; it only amounts to clarification of the prevailing position by the responsible Minister over the matter. As a matter of fact and the law, the responsible Minister was the best placed person to give the true prevailing position. There is no evidence, let alone an allegation, that the information given by the Minister to the President was wrong or was disputed. As such, the allegation that the Board that took the impugned decision was illegally in place or that they acted ultra vires their mandate is not made out by the Applicant. The allegation based on ground of illegality has, therefore, not been established on a balance of probabilities.

The Ground of Procedural Impropriety

[28] Procedural impropriety has been defined to mean "the failure to observe basic rules of natural justice or failure to act with procedural fairness toward 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 (supra*).

[29] On the case before me, the claim by the Applicant was that she was not given a fair hearing before the Respondents made the decision refusing to renew her contract which, in her view, amounted to breach of the principles of natural justice. Looking at the facts, the key term in the contract was that it was a fixed term contract of 3 years, renewable subject to performance reviews after every six months and annual performance appraisals as provided for under the employment contract and sections 5.2(j), 5.4(ii) and 5.6(a) of the 1st Respondent's HR Manual. Although the Applicant completed the 3 years, evidence indicates that she had neither the six monthly performance reviews nor the annual performance appraisals regularly filed on record. Each side gave an explanation as to why the periodic appraisals were not done.

[30] However, whichever side the court chooses to believe; it does not change the fact that the condition for renewal of the contract was not met. There was no contract variation as to dispense with the requirement for availability of performance appraisals before consideration of renewal of the contract. The disagreement between the Applicant and her immediate supervisor (the Corporation Secretary) ought to have been handled before the expiry of the contract. When it was recommended by the Managing Director by the endorsement on the letter dated 8th September 2021 (Annexure E to the affidavit in rejoinder) that the matter be addressed between the Principal Human Resource Officer, the Corporation Secretary and the Applicant, the same was not done and the Applicant took no steps to escalate the matter to the Board then. Escalating the matter at the point of consideration of renewal was futile since the considerations at renewal were different.

[31] During grievance handling, the Respondents have a duty to ensure full adherence to the principles of natural justice as enshrined under the law and in accordance with the provisions of the Human Resource Management Manual and the terms of the contract. However, unless expressly stated by the Human Resource Manual or the contract, there is no duty on the part of an employer to give a hearing to an employee for purpose of renewal of a fixed term contract. For purpose of renewal of a contract, an employer has discretion whether or not to renew and, unless required by the contract, they are not obliged to disclose the reason for the non-renewal of the contract.

[32] In *Joseph Mwangala Mugabi v URA, HCMC No. 87 of 2021*, I had the occasion to deal with a contention concerning non-renewal of a fixed term contract by the Board of the Uganda Revenue Authority. I did point out that an employment contract is within the ambit of the doctrine of freedom of contract and where parties have set down the terms of their engagement, such terms must be respected by both parties unless vitiated or varied. In that case, like in the present one, the relevant human resource manual placed no obligation on the Respondent to constitute a hearing or to assign reasons before exercising the discretion to renew or not the fixed term employment contract in issue.

[33] In *Transparency International Kenya v Teresa Carlo Omondi, Civil Appeal No. 81 of 2018 [2023] KECA 174*, the Court of Appeal of Kenya held that a fixed-term employment contract does not create a legitimate expectation of renewal; and non-renewal of a fixed term employment contract does not amount to unfair termination of employment.

[34] On the facts before me, the question of renewal was subject to performance appraisal as set out under the terms of the contract and the HR Manual. Although the Applicant had issues surrounding her performance appraisal, she sat on her rights and did not escalate the impasse to the 2nd

Respondent before the end of her term; which would have provided an opportunity for the matter to be handled using the grievance handling mechanism in place. By her waiting until the end of her contract, before bringing the matter to the attention of the Board (the 2nd Respondent), she authored her own prejudice since it is a known maxim that equity aids the vigilant. As such, having not complied with the underlying conditions for renewal of her contract, the Applicant cannot sustain any claim based on legitimate expectation. Equally, she has not established that the Respondents had a duty to afford her a hearing in her presence during consideration of her application for renewal. There is no evidence that the 2nd Respondent did not carry out due process when considering the renewal or not of her contract. Evidence indicates that a resolution was taken by the 2nd Respondent. There was no requirement as to a specific procedure that was supposed to be adopted by the Respondents before reaching such a resolution.

[35] In the circumstances, no procedural impropriety or unfairness has been established by the Applicant as having been committed by the Respondents as to affect their decision not to renew the Applicant's employment contract.

[36] In view of my findings on the grounds of illegality and procedural impropriety, I find no need to make any further consideration of any allegations based on the ground of irrationality. I have not found any allegation that is independent of the materials that have already been considered that is capable of disclosing any irrationality or unreasonableness on the part of the Respondents over the impugned decision. I find nothing that points to any irrationality in the said decision and the application would also fail on this ground. Issue 3 is accordingly answered in the negative.

Issue 4: What remedies are available to the parties?

[37] Given the findings above, the Applicant has not established any of the grounds for judicial review on a balance of probabilities. The application has wholly failed and is accordingly dismissed with costs to the Respondents.

It is so ordered.

Dated, signed and delivered by email this 18th June, 2024.

Boniface Wamala
JUDGE