

THE REPUBLIC OF UGANDA

THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NO...103 OF 2021

[ARISING FROM LABOUR DISPUTE REFERENCE NO. 37 OF 2021]

DAVID MUTEGEKI KAHUKA

.....APPLICANT

VERSUS

ATTORNEY GENERAL

.....RESPONDENT

BEFORE:

1.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

- 1. MS. HARRIET MUGAMBWA NGANZI**
- 2. MR. FX MUBUKE**
- 3. MR. FIDEL EBYAU**

RULING

This is an application brought by Chamber summons under S. 98 Civil Procedure Act, and Order 41 R. 1 (a), 2 (1) (2) and R 9 CPR S.1 71-1) for orders that a temporary injunction be issued restraining the Health Service Commission, its agents and representatives from recruiting a new personnel/officer for the post of Senior Health Educationist until the final determination of the main claim and costs of this Application be provided for.

Back ground

According to the Applicant, in 2016, the Health Service Commission advertised for a job of Senior Health Educationist among others. The Applicant applied for the said job, undertook the interview process and was appointed as the Senior Health Educationist officer at the Ministry of Health. However, in November, 2018, his appointment was rescinded by the Health Service Commission without notice and explanation. The Applicant filed a claim in this Honorable Court seeking for re-instatement among other remedies and the matter is pending hearing. In June, 2021, the Health Service Commission re- advertised the position of the Senior Health Educationist Officer and is in the process of recruiting new personnel, hence this application.

The Applicants case

The Applicants case as stated in Chamber Summons and supporting affidavit sworn by the Applicant, Mutegeki David Kahuka , restated the background to the case and added that he would suffer irreparable injury which cannot be substantially compensated in damages, if the Health Service Commission is not restrained from recruiting new personnel for the position of Health Educationist Officer. The application was therefore to cause an order that a temporary injunction is issued restraining the Health Service Commission, its agents and representatives from recruiting new personnel/Officer for the post of Senior Health Educationist until the final determination of the main claim.

The Respondent's case

The Respondent's case as we stated in the Affidavit in reply which was sworn by Twinobusingye Benon, Assistant Commissioner Human Resources Management at the Health Service Commission is summarised as follows:

That, he carefully read and understood the contents of Miscellaneous Application No. 103 of 2021 and he knows that the Respondent advertised a number of positions in an

external advert No. 3 of 2016, one of which was the position of Senior Health Educationist which was promotional. That the person required for this position had to hold a degree in Health Education or its equivalent and at least 3 years working experience. That the Applicant in the instant application holds a Bachelors in Adult Education and he did not have the required experience as claimed, because he only worked as a volunteer and his application form was not endorsed by his employer as alleged.

That, he was informed by the Attorneys from the Attorney Generals Chambers that, the Applicants case does not have a high likelihood of success because his employment was void ab initio and he will not suffer irreparable damages which cannot be compensated in damages as claimed.

That the position of Senior Health Educationist is still vacant because recruitment for the said position was already halted at the request of the Permanent Secretary, Ministry of Health and in the interest of Justice good conscience equity good governance and accountability the orders sought by the Applicant should not issue.

Submissions

It was the submission of Counsel that, the main purpose for granting a temporary injunction is to preserve the status quo pending disposal of the main suit/claim. He cited ***E.L.T KIYIMBA – KAGGWA VERSUS HAJJI KATENDE ABDU NASSER (1985) HCB 43***, which set the conditions for the grant of a temporary injunction as follows;

- i) Firstly that, the applicant must show a prima facie case with a probability of success
- ii) Secondly, that the applicant might otherwise suffer irreparable injury which would not adequately be compensated for by an award of damages.

- iii) Thirdly, if court is in doubt, it would decide an application on the balance of convenience.

Ground 1; whether there is a prima facie case with a probability of success

Citing **Gapco Uganda Limited versus Kaweesa Badru and Anor Misc. Application No. 259 of 2013** which cited American **Cynamide Versus Ethicon (1975) ALLER 504**, Counsel argued that, before granting a temporary injunction, the court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried.

She argued that, the Applicant in the instant case, filed Labour Dispute Reference No. 37 of 2021, which has a likelihood of success. According to her, the Applicant under paragraphs 2 to 8 of the Affidavit in support, states that whereas Applicant applied for the job of Health Educationist and undertook the interview, passed it and was appointed to the said position, which he accepted and he was subsequently deployed at the Health promotion and Education division to start work immediately, in November 2018, without notice and or an explanation, the Health Service Commission rescinded the appointment and ran an external advert in the newspaper, no. 3 of 2016 for the same post of Senior Health Educationist among others.

She refuted the Respondent's assertion that, the Applicant lacked the required qualifications and experience, yet under paragraph 5 of its Affidavit in reply, sworn by Mr. Twineobusinge Benon, the Respondent stated that, the position required an Applicant to hold a bachelor's degree in Health Education or its equivalent and the Applicant possesses the equivalent and the required experience. It was her submission that, the Applicant under paragraph 4 of the Affidavit in rejoinder, stated that, he holds a bachelor's degree in Adult and Community education, an advanced Diploma in Health Promotion and Education from Mulago Paramedical School and a post graduate certificate in Project

monitoring and evaluation as shown by the academic documents attached to the Affidavit as **annexures “K” “L” and “M”**)

It was further her submission that the Applicant worked with the Ministry of Health in the Department of the Community Health Education, for over 3 years and he was directly supervised by the Assistant Commissioner Health Promotion and Education as shown by **annexures “N” “O” “P”**. Counsel argued that while at the Ministry of Health, the Applicant performed the same duties as the Health Educationist Officer therefore he obtained the necessary experience and in 2017, he was also nominated to serve on the National Rapid Response Team. (**See annexure “Q”**), therefore, he had a strong case and serious questions which have to be investigated and determined by this court. She argued that in **GAPCO Uganda Limited (Supra)** it was stated that at this stage, the law does not require court to delve into the merits of the main suit and all that is required to be proved is that there is a serious issue to be tried and that that matter is neither frivolous nor vexatious, the Applicant in this case has proved that, there is a prima facie case with a probability of success, therefore this Application should be granted.

In reply, Counsel for the Respondent also relied on the principles laid down by **Odoki J in the case of E.L.T. Kiyimba Kaggwa versus Hajji ABDU Nasser Katende [1985] HCB 43** already cited by Counsel for the Applicant and stated that the Respondent, in its Affidavit in reply sworn by Twineobusingye Benon, opposes the application for the grant of a temporary injunction on the following grounds:

Whether there is a prima facie case with a possibility of success?

Counsel submitted that, in order for the court to determine whether there is a prima facie case, it must be satisfied that, the claim is not frivolous or vexatious and that there is a serious question to be tried as was stated in the **American Cyanamide case Ethicon [1975]**

ALL ER 504. He contended that the Applicant does not disclose a prima facie case and he has not proved that there is a serious question to be tried by the court and that the issue is not frivolous and vexatious. He also relied on, **Gapco Uganda Limited versus Kaweesa Badru and Sempala Obadia, Misc. Application No. 259 of 2013 (arising out of Civil Suit No. 133 OF 2013 held inter alia that(supra))**. According to him, the Applicant was erroneously appointed to a position he does not qualify to hold and it was a promotional one which required the candidate to hold a degree in Health Education or its equivalent and at least three years of working experience as Health Educator. According to Counsel the Applicant did not have these qualifications.

He argued that, to grant this application would amount to sanctioning an illegality because the applicant does not qualify for the position and he cannot be re-instated to the same position. He also contended that, there is no serious issue to be tried thus the claim is frivolous and vexatious.

DECISION OF COURT

It is trite that, granting of a temporary Injunction is an exercise of Judicial discretion intended to preserve matters in status quo until the question to be investigated in a case is finally disposed of. This court is therefore expected to establish whether the contentions of the applicant are likely to affect or threaten the existing status quo, to cause irreparable injury, if the application is denied.

After carefully considering the Chamber Summons, the Affidavits in support and in opposition to the Application and the Submissions of both Counsel and the law applicable we find as follows:

Indeed, the principles for the grant of a temporary Injunction were set down in ***E.L.T KIYIMBA – KAGGWA VERSUS HAJJI KATENDE ABDU NASSER (1985) HCB 43***, as follows;

- i) *Firstly that, the applicant must show a prima facie case with a probability of success*
- ii) *Secondly, that the applicant might otherwise suffer irreparable injury which would not adequately be compensated for by an award of damages.*
- iii) *Thirdly, if court is in doubt, it would decide an application on the balance of convenience.*

1. Prima facie case

It is trite that, for such an application to be granted, court must be satisfied that, there is a prima facie case in the substantive suit with a probability of success. However, in determining whether there is a prima facie case, court is not supposed to delve in the merits of the case but rather it should consider that the matter is not frivolous and vexatious.

It is not disputed that, the Respondent advertised the position of Health Educationist Officer and the Applicant applied for this position, he was subjected to the recruitment procedures, which he undertook successfully. He was subsequently recruited and deployed for work. He worked for over 1 year, before his appointment was rescinded and according to him, his job was rescinded without any reason and without notification. On the other hand, the Respondent contends that the appointment was rescinded because the Applicant does not have the required qualification.

Even without delving into the merits of the claim, It is our considered opinion that there exists some questions of law to be determined, therefore, it is our finding that, the Applicant has a prima facie case and the claim is not frivolous and vexatious.

2.whether the applicant will suffer irreparable injury which cannot be atoned for by award of damages

It was the submission of Counsel for the Applicant that in **KIYIMBA – KAGGWA VERSUS HAJJI KATENDE ABDU NASSER (1985) HCB 43**, the irreparable injury referred to was not physical but rather that the injury must be a substantial or material one that cannot be adequately compensated for by way of damages. She argued that in this case, the Applicant applied for a job which was advertised, he complied with the entire interview process, which successfully completed and leading to his appointment. Upon recruitment to the position of the new position of senior Education Officer, he worked for a period of over one year before the appointment was rescinded. She argued that, upon termination of his employment, the Applicant lost his permanent job and source of income with no fallback position, therefore if this Application is not granted because there is a likelihood that the Health service commission will appoint a new Officer in the Applicant's position, there is no amount of money which can adequately compensate the Applicant for that loss of income and emotional torture resulting therefrom.

In reply Counsel for the Respondent, citing **Tumusiime Robert v Busobozi Stephen, C.A/0038/2016**, where the High Court, sitting in its appellate jurisdiction held inter alia that;

*“Except in very exceptional circumstances, **an injunction will not be granted** if there is no likelihood of “irreparable” damages or injury. By irreparable injury is meant that which is substantial and could not be adequately remedied or atoned for by damages*

and in **Kiyimba Kaggwa versus Hajji Abdu Nasser Katende (supra)**, in which court observed that irreparable injury does not mean that there must be physical injury and the

possibility of repairing the injury but it means that, the injury must be a substantial or material one. That is one that cannot be adequately compensated for in damages. He submitted that, the Applicant in the instant case, will not be subjected to any damage, loss or injury should this application be denied and even if he did, such injury can adequately be compensated for in damages, therefore the Application should be denied.

DECISION OF COURT

Irreparable injury envisaged in such an application is injury that must be a substantial or material one that, cannot be adequately compensated for in damages.

It is not in dispute that the Respondent advertised the position of Health Educationist and the Applicant applied for the job which was advertised, he undertook the interview process successfully and was appointed and even worked for a period of over one year, before his appointment was rescinded.

In our considered opinion, the rescinding of an appointment if found to be unlawful or wrongful, may not be adequately remedied in damages. Therefore, if the recruitment of another officer is not halted, it may result in irreparable damage to the applicant. In any case, the Respondent, already attested in Its affidavit in reply that, the recruitment exercise was halted, pending the disposal of the main claim, pending, at the request of the Permanent Secretary, Ministry of Health. This Court has no reason to make a ruling to the contrary.

Given the submission by Counsel, for the Respondent that, the recruitment exercise was already halted pending the disposal of the main claim, moreover at the request of the Permanent Secretary, this is sufficient for us to grant the application the question regarding the balance of convenience does not arise.

In conclusion, an order for a temporary Injunction restraining the Health Service Commission, its Agents and Representatives from recruiting a new personnel/officer for the post Senior Health Educationist until final determination of the main claim, Labour Dispute Reference No. 37 of 2021, is granted . No order as to costs is made.

Delivered and signed by:

1.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1.MS. HARRIET MUGAMBWA NGANZI

2.MR. FX MUBUKE

3.MR. FIDEL EBYAU

DATE: 17/12/2021