

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 319 OF 2018

SEMPEBWA COX MOSES NSUBUGA----- APPLICANT

VERSUS

WAKISO DISTRICT LOCAL GOVERNMENT----- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Section 36 of the Judicature Act as amended, Rules 3, 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 for the following Judicial review orders;

- 1.) Certiorari orders quashing the interdiction of the applicant by the Chief Administrative Officer, the agent of the respondent.
- 2.) Mandamus directing the Chief Administrative Officer, the agent of the respondent to reinstate the applicant back to service.
- 3.) Compensatory damages be awarded to the applicant for the unlawful and wanton conduct of the respondent's agent.
- 4.) Costs of the application be provided for.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the applicant-Sempebwa Cox Moses Nsubuga but generally and briefly state that;

- 1) The applicant was called to the service of the respondent by letter dated 11th September 2011 in the position of Town clerk whose service was confirmed on the 4th day of June 2012.
- 2) The applicant is currently the Town Clerk of Kasanje Town Council Wakiso District Local Government.

- 3) The applicant was by letter dated 14th November 2018, interdicted by the Chief Administrative Officer on grounds inter alia of mismanagement of funds of Wakiso Town Council.
- 4) The applicant contends that the interdiction is unfair and unlawful as it defeats the cardinal principles of natural justice and the tenets of the law and constitutionalism.
- 5) As a result of the actions of the CAO, the agent of the respondent, the applicant has suffered great shame, anguish and mental suffering and has been occasioned great loss /damage.

The respondent opposed this application and filed an affidavit in reply through the Chief Administrative Officer Luke L. Lokoda.

The respondent's Chief Administrative Officer contended that he received a complaint of alleged mismanagement of funds for the supply of fill material on Buganda Road Swamp in Wakiso Town Council which occurred during the Applicant's tenure as Town Clerk.

That the applicant was given a notice to show cause why disciplinary action should not be taken against him. The applicant made a response dated 26th October 2018.

That upon receipt of the said letter, the Chief Administrative Officer determined that the case requires more inquiry and value for money audit on the work done and executed on the said Buganda Road.

The on the 14th day of November, 2018, the applicant was interdicted from executing his duties as Town Clerk to pave way for investigations into the alleged mismanagement of funds.

The respondent contends that the challenge for the interdiction is premature since the investigations are not yet concluded. The applicant will be given a chance to defend himself after the investigations are done.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Two issues were proposed for court's resolution;

1. Whether the respondent's interdiction of the applicant was proper or lawful?

2. Whether the Applicant is entitled to the remedies sought?

I shall resolve this application in the order of the issues so raised. The applicant was represented by Mr. Wycliff Tumwesige whereas the respondent was represented by Mr. Nerima Nelson and Mr. Katono James.

Preliminary objection

The applicant's counsel has raised an objection which is to the effect that the affidavit in reply of the application was not dated.

Counsel submitted that the Affidavit in Reply of the Respondent offends the law and therefore should be struck out. The result of striking off the affidavit renders the Application undefended and follows therefore that the orders sought for be granted by this Honourable Court without any contest.

The respondent's counsel in reply contended that the said error or omission is curable under Article 126(2) (e) of the Constitution. The failure to indicate a date is not fatal.

Whereas it is true that the affidavit in reply was not dated, the non-insertion of the date is not fatal to the document since it was an error of the commissioner for oaths and should not be visited on litigant or her counsel.

Secondly, the applicant has properly responded to the affidavit in reply and has filed an affidavit in rejoinder. The applicant has not suffered any prejudice.

The applicant's counsel has prayed that if the respondent's affidavit is struck out, then it would mean that the application is not defended. I do not agree with this submission. The failure by a party to respond by way of an affidavit in reply, it does not mean a party cannot oppose the application on points of law which would not be included in an affidavit.

In addition, even if an application is not opposed, the applicant must proceed to prove the merits of his application supported by law. Such applicant may indeed lose an application which is not opposed by the respondent. These applications are governed by special rules of procedure, and they do not provide for granting remedies sought if the application is not opposed.

The preliminary objection is dismissed.

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case may fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***See; John Jet Tumwebaze vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd vs Attorney General Misc Cause No.125 of 2009, Balondemu David vs The Law Development Centre Misc Cause No.61 of 2016.***

For one to succeed under Judicial Review it trite law that he/she must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The dominant consideration in administrative decision making is that public power should be exercised to benefit the public interest. In that process, the officials exercising such powers have a duty to accord citizens their rights, including the right to fair and equal treatment.

ISSUE ONE

Whether the Respondent's interdiction of the Applicant was proper or lawful?

The applicant's counsel submitted that the Applicant's interdiction by the Respondent was not proper and therefore unlawful, as the process flouted the law and rules of natural justice thus this application for judicial review.

The gist of this Application is based on the complaint of alleged mismanagement of funds for supply of fill material on Buganda Road Swamp in Wakiso Town Council, in which an audit was carried out without the knowledge and involvement of the Applicant, and allegedly revealing some inconsistencies, upon which a letter dated 8th October was addressed to the Applicant by the Respondent's Chief Administrative Officer to explain the findings of the inconsistencies in the audit reports which ironically was not availed to him.

The Applicant respectfully responded to the above letter in detail of his responsibilities then during his tenure as Town Clerk at the Respondent Office since he as a matter of fact well known to the Respondent's agent has been transferred to Kasanje Town Council, even before the Road Work at Buganda Road Swamp in Wakiso Town Council was mid-way, the construction done.

According to counsel for the applicant, the key rationale for interdiction is the reasonable apprehension that the public officer will interfere with investigations or repeat the misconduct. It is imperatively of great importance and a fact well known to the Respondent that the Applicant is no longer a Town Clerk of Wakiso Town Council, but was transferred and is now a Town Clerk of Kasanje Town Council, and thus there was really no justification for his interdiction, thus an irregularity by the Respondent's Chief Administrative Officer.

Therefore the decision by the Respondent's Chief Administrative Officer fell short of a fair, just, and lawful process, for the Applicant was not afforded the right to be heard before a decision to interdict him was taken against him.

The applicant's counsel contends that, it is an irregularity for the Applicant to make an appearance before a Disciplinary Committee that has already been tainted with bias based on the various conductions of findings and reports made from investigations that excluded him, without even providing him with the outcome of the results of the findings inform of reports made.

The respondent's counsel submitted that the interdiction was to allow investigations into mismanagement of funds for supply of fill material on Buganda Road Swamp in Wakiso Town Council.

The respondent contends that the applicant has not cited any provision of the Public Service Standing orders that has been violated. There is no right to be heard before interdiction. The hearing envisaged under the law is intended to be at the stage of investigations and not interdiction.

The applicant is entitled to be interviewed during the course of investigations and if the allegations are found to be baseless, the applicant is entitled to reinstatement and payment of withheld half salary.

The respondent's counsel cited the case of *Oyaro John Owiny vs Kitgum Municipal Council High Court Miscellaneous Application No. 8 of 2018*, Justice Stephen Mubiru stated that: "*Applications to review and quash preliminary findings made during the course of disciplinary enquiry or to challenge the validity of the institution of proceedings ought to be discouraged*"

Determination

The main issue of contention by the applicant is that he is being interdicted for alleged wrongs committed in a different posting from which he was transferred .i.e Investigations of mismanagement of funds from Wakiso Town council and yet he is now stationed at Kasanje Town Council. However all the Town Councils are both under Wakiso District Administration.

The second issue the applicant raises is that he was not accorded a hearing before the interdiction.

Interdiction requires an employee not to attend the work place either for investigative purposes or as a disciplinary sanction.

In **Fredrick Saundu Amolo vs Principal Namanga Mixed Day Secondary School & 2 others** [2014] eKLR, the court had occasion to look into the interdiction question and the decision has been endorsed in many subsequent decisions. The following was held in that case: –

It is important to note that there can be preventive interdicts or punitive interdicts. On the one part being an interdict that is done in the context of allegations of misconduct prior to finding of guilt and the other interdict is implemented as a sanction after the finding of guilt.

A Punitive interdict can only issue in circumstances where the employment contract, the employer code of conduct, the Collective Bargaining Agreement or the law allows for it as a sanction...

*Whether it is preventive or punitive, the interdict, suspension...to be valid must meet the requirements of substantive and procedural fairness. This is the position articulated in **Chirwa versus Transnet and Others** [2008] 2 BLLR 29, at the Constitutional Court of South Africa and reiterated by this Court in **Industrial Petition No 150 of 2012, in the Matter of Joseph Mburu Kahiga et al versus KENATCO Co. Ltd et al**. This is so because, suspensions and interdictions are not administrative acts as the detrimental effect of it impacts on the employee's reputation, advancement, job security and fulfillment...*

There must be a **clear reason why the employee's interdiction is necessary**, independent of any contention relating to the seriousness of the misconduct... Thus a suspension or interdiction should only follow pending a disciplinary enquiry only in **exceptional circumstances**, where

there is reasonable apprehension that the employee will interfere with any investigation that has been initiated, or repeat the misconduct in question. The purpose of such removal from the workplace even temporarily, must be rational and reasonable and conveyed to the employee in sufficient detail to enable the employee to defend himself in a meaningful way...

Once these preliminaries are addressed, **then the employee must be heard on the merits of the case as a cardinal rule**. This is not to revisit the decision to suspend or interdict, the hearing is simply aimed at determining the allegations levelled against the employee and any defences that the employee may wish to make. Only then, after the close of the hearing or investigation is a sanction issued to the employee.

In the case of *Oyaro John Owiny vs Kitgum Municipal Council High Court Miscellaneous Application No. 8 of 2018*, Justice Stephen Mubiru stated that; the decision to interdict is not subject to the rules of natural justice. See also *Cheborion Barishaki vs Attorney General High Court Miscellaneous Application No. 851 of 2004*

The Chief Administrative Officer interdicted the applicant upon receiving a complaint of alleged mismanagement of funds for the supply of fill material on Buganda Road Swamp in Wakiso Town Council, and indeed such serious allegations required the applicant to step aside as the investigations are concluded.

I do not agree with the applicant's argument that since the mismanagement of funds was in a different posting, he should not have been interdicted. The Chief Administrative Officer had to make a decision whether to leave the applicant in office or interdict. May be the argument could have been valid if the applicant was not working in the same district administration.

This was an exercise of discretion as the responsible officer and such exercise ought not to be disturbed. What if the applicant caused another financial mismanagement in the new posting before the completion of the investigations? The purpose of the interdiction as noted herein is to prevent a repeat of the misconduct.

Similarly, the applicant's demand that he should have been accorded a hearing before interdiction is also devoid of any merit. The right to be heard is only applicable during the investigation and formal disciplinary process.

This application was prematurely made before this court and the same is dismissed with costs.

I so order.

SSEKAANA MUSA
JUDGE
25th/02/2019