THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. CAUSE NO. 109 OF 2004

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

AND

MANDAMUS AND IN THE MATTER BETWEEN

JOEL COX OJUKO :: APPLICANT

VERSUS

ATTORNEY GENERAL :: RESPONDENT

BEFORE: AG. JUDGE REMMY KASULE

RULING:

This application is for Judicial Review. It is brought under Sections 36 and 38 of the Judicature Act, Cap. 13 and Order XL 11A Rules 2 and 6 (2) of the Civil Procedure (Amendment) (Judicial Review) Rules: SI No 75 of 2003.

This court (Okumu Wengi .J.) granted leave to the applicant to bring this application on 24th May 2004 in Miscellaneous Cause Number 97 of 2004, the applicant seeks a writ of certiorari to quash the decision of the Attorney General and Solicitor General of the Government of Uganda interdicting the applicant and subjecting him to Criminal prosecution, such a decision being an error on the face of the accord, being in excess of jurisdiction and a violation of the cardinal principles of natural justice.

He also seeks an order of prohibition stopping the two from acting in excess of Jurisdiction and breach of the cardinal rules of natural justice.

An order of Mandamus is sought to compel the said authorities reinstate the applicant to his position as a Senior State Attorney/ Assistant Registrar General of Births and Deaths.

The grounds of the application are that:-

(i) The Acting Solicitor General at the material time acted ultravires his powers or exercised his jurisdiction with material irregularity when he interdicted the applicant without recourse to the rules of procedure,

(ii) The Attorney General acted without jurisdiction when he ordered the interdiction of the applicant,

(iii) The applicant was denied his inalienable right to a fair hearing,

and

(iv) The applicant has been kept on interdiction for a long time contrary to the Public Service Commission directive and principle of natural justice.

The applicant, Mr. Joel Cox Ojuko, a qualified lawyer, is employed in Uganda Public Service as a State Attorney with the Ministry of Justice and Constitutional Affairs since January 1990. By 2002 he had risen to the rank of a Senior State Attorney/Assistant Registrar General of Births and Deaths, Registrar General's office.

Over time, the Registrar General's office was the subject of allegations of Corruption and other malpractices from the Public.

Police CID raided the office and arrested some officers.

The applicant was summoned by police to make a statement.

On 2nd December, 2002, the Acting Registrar General, as immediate supervisor, transferred the applicant from the office of Assistant Registrar General of Births and Deaths to the Registry of Business Names and Documents. The transfer was necessitated "Following the regrettable events of 22nd November, 2002,", so stated the Internal Posting Instruction.

The applicant, on receiving the internal posting instruction, wrote to the Acting Solicitor General on 6th December, 2002, requesting that his transfer be suspended till police investigations are complete. He also complained against the instructions of the Acting Registrar General to the Registry staff not to present any birth and death certificate to the applicant for his signature and advice, and also for the removal from him of the official vehicle. Since the Acting Registrar General had refused to give him hearing the applicant prayed the Acting Solicitor General for an "urgent intervention and an opportunity for a fair hearing."

What followed was an interdiction letter of the applicant by the Acting Solicitor General pursuant to Regulation 36, Public Service Commission Regulations and Government Standing Orders Chapter 1 Section F-r7.

The letter stated that the attention of the Acting Solicitor General had been brought by the Criminal Investigation Department (CID) that Criminal papers implicating the applicant with *illegal charges for Birth Certificates, abuse of office, illegal registration of companies, and Employment of non-staff* had been submitted to the Director of Public Prosecutions for perusal and further management. As investigations were to continue, the applicant was interdicted from his office with immediate effect. The interdiction was to last until the applicant's case is disposed of. The applicant was to receive half salary and not leave Uganda without the Solicitor General's permission.

On 8th January 2003 the Director of Public Prosecutions consented to a police charge sheet number HQS-Co-1021-2002; whereby the applicant was charged in count 1 of Abuse of office C/s 83 (1) of the Penal Code Act. The particulars of the offence were that in 2001 to November 2002, at the Registrar General's office, the applicant, as Senior State Attorney in Charge of the Registry of Births and Deaths, in abuse of authority of his office, carried on or directed to be carried on in government office premises, a document lamination business, an arbitrary act prejudicial to the interests of his employees.

The charge had been preferred by one Edison Mbiringi P/SS, Uganda Police.

On 16th December 2002, the Acting Solicitor General notified Public Service Commission of the interdiction of the applicant.

On 14th January 2003, the Public Service Commission wrote advising the Acting Solicitor General to make a formal submission for the Commission to note the applicant's interdiction in accordance with the laid down procedure.

No proper evidence has been adduced before Court as to what is the present status of the case of the applicant with the Public Service Commission.

The Respondent filed on 17th June 2005, an affidavit sworn by the Learned Solicitor General, Lucien Tibaruha. This application was filed on 31st May 2004 and served upon the Respondent on 4th June 2004.

Rule 7(4) of the Civil Procedure (Amendment) (Judicial Review) Rules SI 75 of 2003 provides that:-

"Any Respondent who intends to use any affidavit at the hearing shall file it with the Registrar of High Court as soon as practicable and in any event, unless the court otherwise directs, within fifty six days after service upon the Respondent of the documents required to be served by sub rule (1) of this rule."

The affidavit in reply on behalf of the Respondent filed on 17th June 2005 was manifestly out of time. No direction of the court was first sought before the same was filed. The court rejects the same. The essence of the applicant's complaint is that he was never given an opportunity to give his side of the story to the authorities involved in his interdiction, namely:- the Attorney General, the Solicitor General, the Minister of Justice and the Director of Public Prosecutions. He was thus condemned unheard.

He further complains that ever since his interdiction no disciplinary proceedings have been preferred against him and there are no indications that the interdiction is about to be lifted.

The Respondent opposes the application, submitting that the applicant's interdiction was proper under Rule 36 of the Public Service Commission Regulations, as well as the Government Standing Orders, Chapter 1 F-r7.

He further submits that the applicant's case is to be resolved by the Public Service Commission and that the said Commission conducts a hearing at which the applicant will have an opportunity to defend himself.

Finally the Respondent asserts that the decision to interdict the applicant was done in exercise of statutory and mandatory duty on the basis of credible reports of misconduct by the applicant and because there was need to investigate by the CID, police, alleged criminal misconduct by the applicant, in the course of his employment as a public servant.

Prerogative orders are remedies where by courts control the exercise of power by those in public offices.

Originally, in England, they were only available to and for the benefit of the crown against the ordinary people. Through their systematic application the crown was able to make public authorities and inferior tribunals do the bidding of the crown by keeping them within their proper jurisdiction of exercise of authority. This resulted in efficiency, uniformity and order in the judicial system. The orders ceased to be a preserve of the crown and became available even to commoners.

In Uganda the 1995 Constitution whose chapter four is an elaborate Bill of Rights, has made the process of Judicial Review become an essential judicial remedy.

Article 42 of the Constitution makes it a right for one appearing before an administrative officer or body to be treated justly and fairly; and if not so treated, seek redress in a court of law in respect of any administrative decision taken against him or her.

Article 50 (1) gives right to any one who claims that a fundamental or other right has been infringed or threatened to apply to a competent court for redress.

Article 173 (b) protects a public officer from being dismissed or removed from office or reduced in rank or otherwise punished without just cause.
Chapter Four and articles 42, 50(1), 173(b) of the 1995 Constitution has given greater importance to the process of Judicial Review.

Certiorari issues to quash a decision of a statutory or public authority which is ultravires or is vitiated by an error on the face of the record.

Originally certiorari would only issue where there was an exercise of judicial or quasi-judicial authority or function. Its application is now wider. Certiorari now extends to acts and orders of a statutory body or authority, which has power to impose a liability or give a decision which determines the rights of the affected party See:
Mwesigye Enock V. Electoral Commission **HCMA 62/98 (19.12.98 at Kampala) 107 [1998] 11 KALR**

The primary object of certiorari and prohibition had been to make the government machinery operate properly and in the public interest rather than private interest. This too has changed over time, are now also certiorari and prohibition. ***Lord Atkin, L.J. in The King V. Electricity Commissioners***, Ex-parte London.
Electricity Joint Committed [1924]
1KB 171 at 205 propounded that:-

"Whenever anybody of persons, having legal authority to determine the rights of subjects and having the duty to act judicially act in excess of their legal authority,

they are subjected to the controlling jurisdiction of the King's Bench Mission exercised in these writs."

Prohibition is often a twin sister of "Certiorari". It is issued by Court to forbid some act or decision which would be ultra vires or initiated by error.

A mandamus issues to compel performance of a statutory duty. It is often resorted to compel public officers vested with statutory responsibilities to perform those duties and functions.

Judicial Review as a Judicial remedy is now well recognized in East Africa; and as already pointed out, particularly so in Uganda.

Proof of this is the long list of court authorities on Judicial Review, of this Region:-

In **Re An Application by Magindas Himbhaj Desai**: [1954] T.L.R 192 certiorari lies, if a statutory Tribunal acts without or in excess of jurisdiction, the provision in the law that the decision is not to be questioned in court, not withstanding.

See also: In Re **An Application by Buboba Gymkhana Club [1963] EA 478**

In Re **An Application by HirJi Transport Service [1961] EA 85.**

In Re An Application by Gideon Waweru Gathuguii [1962] EA 520

and

of recent ***Masaka District Growers Co-operative Union Vs. Mumpiwakoma Co-operative Society Ltd*** **[1968] EA 630.**

Director of Pensions Vs. Cockar [2000] 1 EA 38.

More specifically for Uganda See: Re: **Mustapha Ramadhan: High Court Miscellaneous Application No. 230 of 1996 :[1996] 5 KALR 86**.

In the matter of **Retirement of David Behimbisa Bashakara: High Court Miscellaneous Application No. 48/2001** (Musoke-Kibuuka .J.) unreported,

: High Court Miscellaneous Application No. 131 of 2000: High Court, Mbale: Rugadya Atwoki .J. 18/09/02 : Ibaad Sherif Vs. *Pallisa Town Council*

: High Court Mbale Miscellaneous Application Number 129 of 2000 *John Kashaka Muhanguzi Vs. kapchorwa District Council*: (unreported)

: In the matter of an interdiction of Bukeni Gyabi Fred : **High Court Civil Miscellaneous Cause No. 39 of 1999** Kibuuka – Musoke .J. (unreported)

:Denis Bireije Vs Attorney General Miscellaneous Application No. 902 of 2004 R.O. Okumu Wengi. J. (unreported).

Bearing in mind the principles of the law contained in the above referred to authorities, it is necessary to consider the facts of this application and apply the law to them. The events of 22nd November, 2002, and those soon thereafter are, on the whole, not in dispute. They are well brought out in paragraphs 7 and 8 of the applicant's affidavit dated 28th May, 2004, filed in support of the application:-

Paragraph 7:

> **"That is November 2002, the police seized the Birth and Death Registry and arrested the subordinate staff and Mr. Bisereko wrote a letter transferring the applicant to another section and notified UNICEF and Uganda Bureau of Statistics not to regard the applicant as the officer responsible for births and deaths registration (See annexture "A" and "B" "**

Paragraph 8:

"That the applicant notified the Solicitor General to intervene but instead the Applicant was interdicted on the 16th day of December 2002 and Criminal Charge of abuse of office were preferred against me for allegedly keeping a private laminating machine without being given an opportunity to defend himself against the said allegations (See Annextures "C" "D" and "E" "

The applicant does not assert that the CID acted without any reasonable grounds on 22nd November 2002.

Neither does the applicant assert that the police acted at the instigation of any one else, other than in executing their duty to detect, prevent crime commission and crime suspects.

The applicant claims in paragraph 6 of his affidavit of his head of Department, Mr. Bisereko Kyomuhendo, calling him in November 2000 and suggesting that he had a company that could produce birth certificates cheaply and the same should be recommended to UNICEF to which suggestion the applicant declined.

The implied connotation is that there was animosity over the issue between the applicant and his head of Department.

However, without more concrete evidence this court cannot conclude that this is what moved the whole CID to invade the applicant's offices.

According to paragraph 3 page 7 of Annexure "G" to the applicant's affidavit, a loose minute by the Ag. Registrar General dated 14th April 2003, to the Hon. Minister of Justice and Constitutional Affairs. The Registrar General reports to the Minister that the police had finalized their investigations and the Director of Public Prosecutions had approved the Criminal Charging of the applicant in December 2002. the charging had not taken place because the applicant had jumped police bond and had since eluded police.

The applicant is surely aware of this allegation of jumping police bond and eluding police. He produced annexure "G" by attaching it to his affidavit. It is curious that the applicant makes no specific denial of this allegation. Neither does he state that on being aware of the allegation he produced to police and protested against. Nor does he give any explanation to Court as to what happened to on the charges preferred against him by the police and consented by the DPP. This conduct of the applicant is not consistent with the innocence of the applicant of the allegation.

The Solicitor General asserts having interdicted the applicant pursuant to Rule 36 of the Public Service Commission Regulations. The Rule provides:-

"Where a responsible officer considers that the Public interest requires that a public officer should cease to exercise the powers and functions of his office, he may interdict the officer from the exercise of those powere and functions, if proceedings for his dismissal are being taken or are about to be taken or if Criminal proceedings are being instituted against him."

In the considered view of this court, the facts as contained in paragraphs 7 and 8 of the applicant's affidavit constituted legitimate grounds for the immediate interdiction of the applicant.

The contention of the applicant that he ought to have been given a hearing before being interdicted is not well founded.

This is because the criminal investigations that the CID had carried out, and was continuing to carry out, and which necessitated the interdiction, included an explanation from the very applicant, as regards the allegations of possible commission of Crimes by the applicant in the course of his work in a public office. It is only after the police had come to the conclusion, the applicant's explanations notwithstanding that the investigations pointed to the applicant as a crime suspect, that the CID forwarded the investigations to the DPP and detailed the Solicitor General as the responsible officer of the applicant.

Both the Uganda police and the Director of Public Prosecutions are creatures of the Constitution: Articles 120 and 121.

To prevent and detect crime is one of the functions of the police article 212 (c). Section 31 of the police Act empowers the police to institute Criminal proceedings against any one before a magistrate or undertake any other legal process against a person Uganda with an offence.

Under Article 120 (3) of the Constitution the Directors of Public Prosecutions has powers to direct the police to investigate any information of a criminal nature and to institute criminal proceedings against any one in a court of law, save a court martial.

In carrying out the duties of the office, the Director of Public Prosecutions is not Subject to the direction or control of any person or authority. The DPP is only guided by public interest, interests of the administration of Justice and the need to prevent abuse of legal process.

In the case of the applicant, the police, on detecting possible crimes being carried out at the applicant's office involving the applicant and some of his staff, commenced criminal investigations, passed over the investigation to the DPP and informed the Solicitor General. The Solicitor General found it proper under Rule 36 of the Public Service Regulations to interdict the applicant.

In the considered view this court of the applicant having been given the opportunity to give his explanation to the police about the possible crimes the CID police was investigating, it was not necessary that before interdicting the applicant, the solicitor general ought to have given another hearing to the applicant.

The conclusion that it was in the public interest that the applicant be interdicted while criminal investigations against him continue and or the DPP decides upon the matter cannot be faulted by this court.

The applicant further complains that his interdiction was unlawfully directed by the Attorney Genera. He relies on annexure "F" and "G" to his affidavit as proof of this. The annexures are loose minutes by the Acting Registrar General to the Ag. Solicitor General (Annexure F) and the Hon. Minister of Justice and Constitutional Affairs (Annexure G) respectively about the applicant other staff and investigation.

The Attorney General is by constitution the principal adviser of Government: Article 119 of the Constitution.

On 3rd December, 2002, The Honourable Attorney General met the Acting Solicitor General, the Commissioner Contracts and Negotiations and the Ag. Registrar General about the events of 22nd November, 2002.

It was reported to the meeting that those employees from the Registry of Births and Deaths, who had been questions by the CID and been released on police bond had immediately resumed their work at the Registry.

The Attorney General disagreed with the resumption of duty by these employees and directed that the officers be interdicted. However, before any interdiction was done, the Ag. Registrar General was to make a report to the Ag. Solicitor General as a basis for action.

In the view of this court Honourable the Attorney General as principla legal adviser to Government, was within his constitutional powers to tender the advice he gave.

It is also good common sense and promotes a perception of Justice that if a public officer makes himself/herself to be the subject of Criminal investigations and to be released on police bond in connection with duties of his/her public office, that such officer keeps away from his/her office until the investigations are completed one way or the other.

At any rate, in this instance of the applicant, the Attorney General's directive to interdict was subject to the Ag. Registrar General making a report to the Ag. Solicitor General as a basis for

action. Depending on the report so made the Acting Solicitor General was to make the ultimate decision whether or not to interdict.

The Court thus finds that the complaint that his interdiction was unlawfully directed by the Attorney General as not sufficient for this court to quash the interdiction.

The applicant further contends that since at any one moment he has never been given an opportunity to give his side of the story to all the authorities involved in this matter, to wit the Attorney General, the Solicitor General, the Minister of Justice and the Dpp; his interdiction ought to be quashed.

The applicant, intentionally, the court so believes, leaves out the Uganda police, amongst the authorities that have caused his interdiction. He thus concedes in a way that as far as police is concerned, he was afforded an opportunity to be heard.

The police on raiding the applicant's office, required him to report to police, questioned him, and then referred the matter to the Dpp and reported to the Solicitor General as the supervising officer of the applicant.

The court finds that this being the case; the issue of the applicant being given an opportunity to be heard before being interdicted does not arise such opportunity was part and parcel of Re-investigations before being interdicted by police. Such a similar opportunity will be availed to the applicant if later on the police and DPP determine that the applicant has to stand criminal trial or not. The same opportunity will also be availed to the applicant if Public Service Commission takes up his case.

This part of the applicant's complaint is rejected by court.

The applicant lastly complains that ever since his interdiction in December 2002 no disciplinary proceedings have been preferred against him and there are no indications that the interdiction is about to be lifted.

The applicant, as already pointed out, has not in any way indicated to court as to why he has no clearance from the police and the DPP with regard to the criminal charges as contained in the police charge annexure "E" to his affidavit. In the absence of any evidence of termination of those charges, the court infers that the same are still pending against the applicant.

It would appear also from annexure "H" to the applicant's affidavit that by the 16th December 2002, the applicant's case of interdiction had been forwarded to the Public Service Commission by the Solicitor General.

No evidence has been furnished from the Public Service Commission as to what is the present status of the case of the applicant with the Commission since 14th January 2003 when annexure "H" to the applicant's affidavit was written. The burden is on the applicant to provide the necessary evidence upon which the court can make specific findings to grant the prayers he seeks.

The court is not satisfied that this burden has been discharged by the applicant as regards the status of his case with the Public Service Commission.

The grant of any prerogative order is a matter of the exercise of the discretion of the court. That discretion must be exercised judiciously. The decision of the court must be based upon common sense and justice after considering the relevant matters of the cause: See Hoffman – La Roche V. Secretary of State for Trade and Industry: [1975] AC 295 and See also: High Court Civil Application for Judicial Review No. 35 of 2005: ***John Jet Tumwebaze V. Makerere University Council and 2 others.*** See also: High Court Miscellaneous Cause No. 413 of 2005 ***Amanda Magambo V. Electro Commission.***

After considering all relevant matters of this application and giving the consideration to the legal principles applicable, this court finds that this is not such a case where the court in the exercise of its discretion should grant the orders of Certiorari, prohibition and mandamus prayed for by

the applicant. The court declines to grant the said orders to the applicant. The application stands dismissed with costs.

Remmy Kasule
Ag. Judge
10th October 2005