

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA
(CIVIL DIVISION)
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
AND
IN THE MATTER OF THE JUDICATURE (JUDICIAL REVIEW) RULES, 2009
MISCELLANEOUS CAUSE NO. 106 OF 2010

- 1. KULUO JOSEPH ANDREW**
- 2. APOPHIA MUHIMBURA ATUKUNDA**
- 3. MOSES MAPESA WAFULA=====APPLICANTS**

V E R S U S

- 1. THE ATTORNEY GENERAL**
- 2. UGANDA WILDLIFE AUTHORITY**
- 3. DR. MUBALLE BOYSIER OUMAR**
- 4. JACOB OULANYAH**
- 5. TIBASIIMWA RURANGA**
- 6. MASOKOYI SWALIKH WASSWA**
- 7. ANDROA ROYCE GLORIA AYOKURU=====RESPONDENTS**

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING:

This application for judicial review was brought under section 38 of the Judicature Act, Cap 13 (as amended by Act No.3 of 2002), The Judicature (Judicial Review) Rules S.1 No. 11 of 2009 and other enabling laws.

Reliefs Sought:

- (a) An order for mandamus to issue requiring the Minister of Tourism, Trade and Industry to appoint a Board of Trustees for the Uganda Wildlife Authority in accordance with

the qualifications set out in paragraph 1 of the Schedule to the wildlife Act, Cap. 200 as amended by Statutory Instrument No. 26 of 2006.

- (b) An injunction to restrain the 3rd, 4th, 5th, 6th and 7th respondents from acting in the office of Chairman and Trustees respectively of the Uganda Wildlife Authority for which they are not entitled.
- (c) An injunction to issue restraining the respondents from:
 - (i) Implementing the purported termination of the 3rd applicant as Executive Director or terminating his contract of employment.
 - (ii) Initiating or continuing disciplinary proceedings against any other staff of the Uganda Wildlife Authority or terminating their employment.
 - (iii) Terminating any contracts, tenancy agreements, sport hunting permits, memorandum of understanding and concessions already awarded to various persons.
 - (iv) Negotiating and awarding any contracts, tenancy agreements, sport hunting permits, memorandum of understanding and concessions to any persons.
 - (v) Changing signatories to Bank Accounts or opening new Bank Accounts for the Uganda Wildlife Authority.
 - (vi) Changing the emoluments terms of the Trustees or staff of the Uganda Wildlife Authority.
- (d) A declaration that the 2nd applicant was wrongly terminated and by an illegal Board.
- (e) A declaration that the purported termination of the 3rd applicant by the illegal Board of Trustees and not the Minister is illegal.
- (f) In the alternative, an order that the 2nd and 3rd applicants be awarded damages for wrongful termination.

Grounds of Application:

These are set out in the motion as follows:

- (a) The Board of Trustees of the Uganda Wildlife Authority as currently constituted has five (5) members (the 3rd, 4th, 5th, 6th, and 7th respondents) who were appointed by the Minister in contravention of the law and outside his jurisdiction and they continue to

act in office illegally and the Minister has refused or neglected to appoint a Board of Trustees properly qualified under the law.

- (b) The Board of Wildlife Authority which continues to be in office illegally has without reasonable authority and in breach of the rules of natural justice:
 - (i) terminated the contract of service of the 2nd and 3rd applicants and several other staff;
 - (ii) terminated several contracts, tenancy agreements, sport hunting permits, memorandum of understanding and concessions and threatens to terminate others;
 - (iii) purported to terminate the contract of service of the 3rd applicant and is threatening to terminate his contract of service and those of other staff.

- (c) The Board of Wildlife Authority which continues to be in office illegally is continuing to mismanage the affairs of the Uganda Wildlife Authority and in particular threatens to:
 - (i) negotiate and award contracts, licenses and concessions;
 - (ii) change signatories to the Bank Accounts and open new Bank Accounts; and
 - (iii) change the emoluments of the Trustees and staff.

Points of Agreement:

At the conferencing the parties agreed that:

1. The term of the old Board of Trustees expired on 30/6/2009.
2. The new Board was appointed on 14/04/2010.
3. The 3rd applicant's contract expired on July 11, 2010.
4. On 25/02/2010 the Minister re-appointed the 3rd applicant for a new 5 year term with effect from 11/07/2010.
5. On 12/08/2010 the Chairman of the Board of Trustees wrote to the 3rd applicant terminating his employment contract.
6. On 13/08/10 the Minister wrote to the 3rd applicant revoking his appointment and employment contract.
7. The 2nd applicant was appointed on a four year contract as Director Corporate Affairs with effect from 1/12/09.
8. The 2nd applicant's contract of employment was terminated with effect from 8/7/2010.

9. The 1st applicant is a Tour Operator.

Issues:

1. Whether the application is competently before court in view of the fact that the Board was appointed on 14/4/2010 and application filed on 16/08/10.
2. Whether the 2nd and 3rd applicants can challenge their termination by way of Judicial Review.
3. Whether the appointment of 3rd – 7th respondents as members of the Board of Trustees was in accordance with the Law.
4. If the appointment was not in accordance with the law, whether the 3rd – 7th respondents continue to act in office illegally.
5. Whether in the event of court declaring that appointment of 3rd – 7th respondents was in contravention of the law, all their actions as Board of Trustees are null and void.
6. Whether the termination of the 2nd applicant's contract was lawful.
7. Whether the termination of the 3rd applicant's contract was lawful.
8. Remedies:

Counsel:

Mr. Peter M. Walubiri for the Applicants

Kituuma -Magala for 2nd – 7th respondents

Ms. Patricia Mutesi for 1st respondent .

The Remedy of Judicial Review

It is trite that judicial review is concerned not with the decision in issue per se, but with the decision making process. Essentially, judicial review involves the assessment of the manner in which the decision is

made; it is not an appeal and the jurisdiction is exercised in supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality.

As Lord Hailsham of St. Marylebone LC stated in **Chief Constable of North Wales Police Vs Evans [1982] 3 ALL E.R. 141:**

“ The purpose of judicial review is to ensure that the individual receives fair treatment, not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide from itself a conclusion which is correct in the eyes of the court”.

I consider the above to be the legitimate purpose of judicial review. I will be guided by it throughout these proceedings.

Issue No.1: Whether the application is competently before court in view of the fact that the Board was appointed on 14/4/2010 and the application was filed on 16/8/10.

Rule 5(1) of the Judicature (Judicial Review) Rules 2009 provides that **an application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the court considers that there is good reason for extending the period within which the application can be made.**

The argument of learned counsel for respondents is that the above Rule gives court powers to extend the period within which the application can be made; that the applicants never made any application seeking this Honourable court for extension of time; that the application is accordingly incompetent and a nullity because the incorrect act to file the application after three months is of a fundamental nature and court may be pleased to dismiss it with costs to the respondents.

Learned counsel for the applicants does not agree. According to him, the appointment and continued stay in office of the 3rd – 7th respondents is akin to a continuous tort. His view is that acting in office for which one is not entitled is an illegality which subsists each day that it continues; for each day of legality, the cause of action continues. Hence his likening it to a continuing tort. In any case, so argues counsel, illegality can be raised at any time and once pointed out, court can not ignore it. He relies on **Makula International Ltd Vs His Eminence Cardinal Nsubuga & Anor [1982] HCB 11.**

In the above case the Court of Appeal held that the appeal was incompetent since the order extending time within which to appeal was made without jurisdiction. That conclusion notwithstanding, the court went ahead to consider the appeal on the quantum of costs on grounds that costs as taxed violated the applicable legislation and was therefore illegal. It was on the basis of this that court declared that a court of law cannot sanction that which is

illegal and an illegality once brought to the attention of court overrides all questions of pleadings, including admissions. In similar vein learned counsel has invited me not to sanction an illegality even if the application was filed outside the three months period.

I should perhaps note at this stage that the 2nd and 3rd applicants' challenge as to termination of their employment are within the stipulated three months rule. Those challenges are therefore competently before court. The problem is with the Board that was appointed in April 2010 and the challenge thereto filed in August 2010, outside the three months period.

From my reading of the Judicial Review Rules in question, I get the impression that time limits therein are more intended to ensure expeditious determination of the applications for judicial review than to oust the jurisdiction of courts to hear the parties after the prescribed period. I am saying so because the rules do not state the legal consequences of failure of a party to comply with it. Like I said in **Wakiso Transporters Tours & Travel Ltd & Others Vs IGG & Others HCMC No. 0053 of 2010** (unreported), if the law maker intended it to be so strictly construed, it would have stated so in express terms. The issue in that case was the 56 days rule in Rule 7 thereof regarding filing of reply to the notice of motion.

Even if court were to accept the suggested strict interpretation of Rule 5(1) in connection with this matter, I would still find, as I did in **Nampogo Robert & Anor Vs Attorney General HCMC No. 0120 of 2008**, that there is allowance under the said rule for court to exercise a discretion in favour of an applicant, where court considers that there is a good reason for extending the period within which the application shall be made. In the event of upholding the objection, the application would be struck out and the applicants would still be entitled to file yet another application for extension of time under Rule 5(1) in the sense that the alleged illegality would still subsist and the state of affairs would still have to be remedied. In a case such as this involving alleged violation of human rights, such a course would further serve to violate the human rights of the applicants. Given that our Constitution mandates courts to administer justice expeditiously and without undue regard to technicalities; and mindful of the fact that the administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights (**per Supreme Court in RE Christine Namatovu Tebajjukira [1992 – 93] HCB 85**), I am inclined to overlook the legal obstacle, in the greater interests of justice in accordance with

Article 126 (2)(e) of the Constitution and Section 98 of the Civil Procedure Act, and allow the applicants to proceed with this application, on the understanding that the claims for wrongful termination are unaffected by the three months limitation period provided for under the said Rules and that a legality once brought to the attention of court cannot be swept under the proverbial carpet albeit the application having been filed outside the prescribed time limit.

Accordingly, the objection stands over ruled and so it is.

Issue No. 2: Whether the 2nd and 3rd applicants can challenge their termination by way of Judicial Review.

The argument of learned counsel for the respondents on this point is that the right of the employer to terminate the contract of service whether by giving notice or incurring the penalty of paying compensation in lieu of notice cannot be fettered by the court, implying that the two dismissed applicants cannot expect this court to order for reinstatement.

I would think that this argument was made without taking cognisance of the purpose of the remedy of judicial review.

Judicial review is the process of control of public executive bodies or persons. It has established several important principles, for example, that administrative bodies have a duty to hear both sides- **Ridge Vs Baldwin [1964] AC 40** and that actions taken under a statute must be in pursuance of the purpose of the Act.

In **Ridge Vs Baldwin & Others**, supra, one of the leading authorities on termination of employment relationships, it was held, and I agree, that even if the respondents had power to dismiss the appellant without complying with regulations, they were bound to observe the principles of natural justice. It was further held that a decision reached in violation of the principles of natural justice, especially the one relating to the right to be heard, is void and unlawful. True, judicial review will not normally be permitted if there is alternative appellate provision: **R Vs Brighton Justices, ex parte Robinson [1973] 1 WLR 69**. However, the instant case is not an appeal. The applicants have alleged that the decisions to terminate their contracts of employment were reached in violation of the principles of natural justice, in the sense that they were not heard. In these circumstances, it is immaterial that there is an alternative remedy of filing an ordinary suit. The acts of the respondents are amenable to judicial review on that account. This objection therefore lacks merit. In short,

the answer to this issue is yes, the two applicants can challenge their termination by way of judicial review.

See also **Rose Mary Nalwadda Vs Uganda Aids Commission HCMC No. 0045 of 2010** where a similar remedy was considered and granted.

Issue No. 3: **Whether the appointment of 3rd – 7th respondents as members of the Board of Trustees was in accordance with the law.**

The importance of proper management of wildlife resources cannot be overemphasized. The Constitution mandates Parliament to ensure protection and preservation of the environment. It provides:

“245. Parliament **shall, by law, provide for measures intended:**

- (a) to protect and preserve the environment from abuse, pollution and degradation;**
- (b) to manage the environment for sustainable development; and**
- (c) to promote environmental awareness.**

Pursuant to the above mandate, in 1996 Parliament enacted the Uganda Wildlife Act, Cap 200. One of the objects of this law was the sustainable management of wildlife. To enable sustainable management of Uganda’s wildlife resources, Parliament established the Wildlife Authority as a body corporate. Its functions are stipulated in Section 5 thereof. It is not necessary to reproduce them here. Section 7 thereof establishes the Board of Trustees as its governing body. The composition of the Board was prescribed in the schedule to the Act. And under Section 7(4) thereof, the Minister is empowered, with prior approval of Parliament, to amend the Schedule. Indeed under the Uganda Wildlife (Amendment of Schedule) Instrument No.26 of 2006, the Minister with the approval of Parliament amended the schedule to the Act. The amendment provides new selection criteria for members of the Board.

It provides as follows:

“1. **The Board shall consist of not more than nine members to be appointed from the following sectors-**

- (a) three members selected on the basis of their proven professional experience in -**

- (i) **finance or economics;**
- (ii) **management of large enterprises;**
- (iii) **matters relevant to management of protected areas;**
- (b) **a representative of tour operators;**
- (c) **three representatives of the private sector involved in activities related to wildlife;**
- (d) **the following ex-officio members to be appointed from the Ministry responsible for –**
 - (i) **Wildlife ; and**
 - (ii) **Finance”**

The Statutory Instrument amending the parent Act was gazetted on 16th June, 2006.

It has been submitted by learned counsel for the applicants that the Minister has no jurisdiction to appoint persons to the Board who do not qualify under the quoted law.

Given the use of the word ‘shall’ in the enabling law (which connotes its mandatory nature) and trusting, as I should, that Statutes ought to be construed according to their object and intent, there is no reason for me to fault learned counsel’s submission. It is trite that when a statute authorizes a body to undertake a certain task, in our case to manage the environment for sustainable development, it will most likely also stipulate the procedure to be followed in executing that task. In the instant case, the procedure is laid down in S.1 2006 No.26. The execution of the task will be null and void if the prescribed procedure is not followed. **See: Local Government Board Vs Arlidge [1915] AC 120** in which Shaw J. stated, and I agree, that **“if a statute prescribes the means (the Local Government Board) must employ them”**.

I have already indicated that actions taken under a statute must be in pursuance of the purpose of that Act and not to frustrate it.

In the instant case, the current Board Chairman, Dr. Muballe is a professional Doctor of human medicine. He may be a successful surgeon, given his apparent vast experience in that field. However, there is no evidence on record of him having “proven professional experience” in finance or economics, management of large enterprises or being knowledgeable in matters relevant to management of protected areas. His other colleagues, Mr. Jacob Oulanyah, a lawyer; Mr. Tibasiimwa, an educationist; Mr. Masokoyi, a University administrator; and Ms Ayokuru, an agriculturalist are certainly not any better. They too may be experts in their individual professional fields but their CVs are silent on “proven

professional experience” in finance or economics, management of large enterprises or knowledge in matters relevant to management of protected areas.

And whereas the law also provides that the Board should have a representative of tour operators and three representatives of the private sector involved in activities related to wildlife, and that the Ministers responsible for Finance and Wildlife should appoint the ex-officio members, none of them is represented on the Board. In all these circumstances, it is plain to me that the appointment of the 3rd – 7th respondents is tainted with illegality in the sense that it was not done in accordance with the law.

I so hold.

Issue No. 4: If the appointment was not in accordance with the law, whether the 3rd – 7th respondents continue to act in office illegally.

The appointing authority in this case appears to have had its own selection criteria of the Board members. The concept of ultra vires is one to control the actions by persons or public bodies not authorized necessarily, or by implication, by law. Thus since anything done not authorized by law is ultra vires, I would think that the answer to this issue is quite obvious.

In R VS Secretary of State for Environment, ex parte Hammersmith & Fulham London Borough Council [1991] UKHL3 the Lords stated, and I agree with them, that challenge to a ministerial exercise of discretion, like the instant one, will be allowed if:

- (i) bad faith is exhibited;
- (ii) absurdity was present;
- (iii) legally relevant issues were ignored;
- (iv) the point of the statute was frustrated.

I would think, in the context of this case, that legally relevant issues were ignored by the Hon. Minister and as a result the point of statute was frustrated. This is, therefore, a fit and proper case where the remedy of judicial review ought to be granted. I would make a finding that the Board was illegally constituted and therefore lacks capacity to continue in office.

Issue No. 5: **Whether in the event of court declaring that the appointment of 3rd – 7th respondents was in contravention of the law, all their actions as Board of Trustees are null and void.**

The applicants are seeking an injunction to restrain the 3rd – 7th from staying in office illegally and from performing a range of acts listed in the application. Mr. Walubiri has invited me to find that this issue, in as far as it relates to past actions of the Board was erroneously framed; that it is outside the scope of the pleadings.

Both counsel for the 1st respondent, Ms Mutesi, and Mr. Kituuma – Magala for the remaining respondents are in full agreement with Mr. Walubiri’s submission.

In view of that concession on the part of all counsel and believing, as I should, that a declaration that all actions of the board are null and void would be an absurdity, irrational and unreasonable, I am inclined not to make any such finding.

Issue No. 6: **Whether the termination of the 2nd applicant’s contract was lawful.**

Section 7(2) of the Uganda Wildlife Act provides that a member other than the Executive Director may be removed from office by the Minister for inability to discharge official functions due to infirmity (of body or mind), incompetence or misconduct/misbehavior. From the pleadings, the 2nd applicant’s contract was terminated because she was “recruited illegally” which is not among the statutory reasons for termination of contracts such as hers. Moreover, she was not given a fair hearing or any hearing at all. This was in contravention of Articles 28(1) and 44(c) of the Constitution and also a breach of the rules of natural justice. Article 44(c) of the Constitution provides:

“Notwithstanding any thing in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-

- (a)
- (b)
- (c) **the right to fair hearing”**

There was, therefore, procedural impropriety, which was considered in **Council of Civil Service Unions Vs Minister for the Civil Service [1985] AC 374**, as failure to observe basic rules of natural justice or failure to act with procedural fairness towards a person who will be affected by a decision, or the failure by an administrative authority/tribunal to observe

procedural rules that are expressly laid down in the legislative instrument by which jurisdiction is conferred (in the instant case Section 7(2) of the Uganda Wildlife Act.).

It is not anywhere indicated that the 2nd applicant was ever called upon to clear her name. It is a fundamental principle of natural justice that a decision which affects the interests of any individual should not be taken until that individual has been given an opportunity to state his/her case and to rebut any allegations made against him/her and give an explanation to issues at hand. All this was not done with regard to her. Any decision arrived at by such procedure that is grossly against natural justice is unlawful. In **Pascal R. Gakyaro Vs Civil Aviation Authority CACA No. 60 of 2006** the court observed that the appellant was being deprived of an office of a public character with the attendant statutory benefits. That the principles of natural justice demanded that he be given an opportunity to be heard in defence for whatever worth it might be. The court concluded that the overall effect of a denial of natural justice to an aggrieved party renders the decision void and of no effect.

Applying the same principle to the instant case and with the greatest respect to those who terminated her services, therefore, I would answer this issue in the negative and I have done so.

Issue No 7: Whether the termination of the 3rd applicant's contract was lawful.

Section 9(1) of the Act provides that there shall be an Executive Director appointed by the Minister on the recommendation of the Board. The tenure of the Executive Director is five (5) years and he/she is eligible for re-appointment: Section 9(8). Under section 9(9), the Executive Director ceases to hold office if he/she resigns or if he/she is removed from office by the Minister upon recommendation of the board for gross misconduct or inability to discharge his/her functions or if he/she dies.

In the instant case, it is plain that the 3rd applicant was appointed under a mistaken belief that the previous Board had recommended him for re-appointment. This would render his contract void. He (3rd applicant) avers that the Minister was performing the functions of the Board since the life of the previous Board had expired and the new one had not been appointed. This averment cannot hold because the Minister could not exercise a power which he did not have merely because the Board had expired.

Since under the law the 3rd applicant could only be appointed by the Minister on the recommendation of the Board and neither the previous Board nor the new Board recommended him for re-appointment, it cannot be said that he held any valid appointment by the time the new Board purported to terminate him. In my view, in the absence of a recommendation by the Board, the best the Minister could do in the circumstances would be to assign him duties of the Executive Director pending a recommendation for re-appointment by the new Board.

Clearly his expired contract has never been validly renewed. In all these circumstances, the issue of termination being lawful or otherwise does not arise.

Issue No.7 is therefore, neither here nor there.

Issue No. 8: **Remedies:**

The first prayer is for an order for mandamus to issue requiring the Minister of Tourism, Trade and Industry to appoint a Board of Trustees for Uganda Wildlife Authority in accordance with the qualifications set out in the relevant legislation.

The applicants have made out a case for this remedy. The prayer is granted.

The second is a prayer for an order of injunction to issue restraining the 3rd – 7th respondents from acting in the office of Chairman and Trustees respectively of Uganda Wildlife Authority for which they are not entitled. Basing myself on the finding in issue No.3, I also grant this prayer.

The third is for an order declaring that the 2nd applicant was unlawfully terminated.

Having found as I did in issue No.6, this prayer is also granted.

The fourth is for an order declaring that the 3rd applicant was unlawfully terminated.

Having found as I did in issue no.7, this order is withheld.

The fifth is a prayer for an order granting to the second applicant general damages of shs.30,000,000= for unlawful and malicious termination.

I have considered awards in comparable cases, particularly **Bank of Uganda Vs Betty Tinkamanyire SCCA No.12 of 2007**. In my view, her prayer for shs.30,000,000= as general damages for unlawful and malicious termination is modest. I have therefore allowed it.

The sixth is a prayer for an order to grant to the 3rd applicant all his unpaid emoluments for the 5 year contract.

In view of my conclusion that there was no valid contract to terminate, I am unable to grant this prayer. I should perhaps add that the new properly constituted Board shall be at liberty to review the 3rd applicant's credentials and decide whether or not to re-appoint him.

The seventh prayer is for an order that the respondents pay the costs of this application. Given that the 3rd – 7th respondents did not vet or appoint themselves into office, an order for costs against them is undeserved. I would order that the applicants' costs of this application be met by the 2nd respondent. It is so ordered.

The last prayer is for an order of interest on the decretal sum.

This is also deserved in respect of the 2nd applicant. The award of general damages to her shall attract interest of 25% per annum from the date of this Ruling till payment in full.

Orders accordingly.

Dated at Kampala this 5th day of November 2010.

Yorokamu Bamwine

JUDGE