THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. CAUSE NO. 249 OF 2013

MAUDAH ATUZARIRWE ::::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

1. **UGANDA REGISTRATION SERVICES BUREAU**
2. **THE BOARD OF DIRECTORS UGANDA REGISTRATION SERVICES BUREAU**
3. **THE CHAIRMAN BOARD OF DIRECTORS UGANDA REGISTRATION SERVICES BUREAU**

RESPONDENTS

4. **THE REGISTRAR GENERAL**

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

RULING

This is an application for Judicial Review brought under Sections 36(1), (b), (c) and (e), 38 of the Judicature Act Cap. 13 as Amended by Act No. 3 of 2002, and Rules 3, 4, 5 and 6 of the Judicature (Judicial Review) Rules 2009 SI No. 11 of 2009 seeking the following;

1. An Order of Certiorari quashing the decision of the 2nd, 3rd and 4th respondents dated 5th March 2013 terminating her contract of employment in The Uganda Registration Services Bureau, the 1st respondent on grounds that the applicant was not given a chance to defend herself on accusations of fraud and financial impropriety raised against her.

2. An Order of Certiorari quashing the decision of the 2nd, 3rd, and 4th respondents dated 14th December 2012 communicated by the 4th respondent to the top management on 21st December 2012 changing the URSB's organizational structure that was made illegally and wrongfully that had the effect of affecting the applicant's position and her employment contract in the 1st respondent.

3. An Order of prohibition, prohibiting the implementation of the said decision of the 2nd, 3rd and 4th respondents and the decision dated 5th March 2013 terminating the applicant's employment in the 1st respondent on ground that it was made illegally and irregularly.

4. A Declaration that the 2nd, 3rd and 4th respondents acted illegally and unlawfully and occasioned a miscarriage of justice to the applicant for making a decision on malicious accusations by the 4th respondent on an unsubstantiated and inconclusive internal audit report orchestrated in concerted efforts by the 3rd and the 4th respondents and the 2nd, 3rd and 4th respondents on behalf of the 1st respondent in the course of their employment without giving her a fair hearing and which was tainted with bias.

5. A Declaration that the recommendations and decisions of the 2nd, 3rd and 4th respondents jointly and severally were illegal, irregular and offended the rules of natural justice.

6. A Declaration that the applicant concluded the probationary period and as such was confirmed by the 1st respondent as the Director of Business Registration/Liquidation and be reinstated back into her employment with Uganda Registration Services Bureau.

7. A Declaration that the impugned Audit Report dated 26/02/2013 and impugned administrative petition dated 1st February 2013 and impugned alleged minutes of the Management meeting dated the same day be struck out from public records in so far as the said records to the performance, career, personality and or any acts whatsoever purportedly done or imputed on the applicant during her career at the 1st respondent.

8. An order of Injunction restraining the respondents, their agents and or servants from the implementation of the decision dated 5th March 2013 terminating the applicant's employment in the Uganda Registration Services Bureau and or the various decisions of the respondents against the applicant changing her status as Director Business Registration/Liquidation.

9. An Order that the applicant is entitled to damages for the inconvenience suffered and costs of the application be provided by the respondents jointly and severally.

The application is premised on the following grounds:

1. The 2nd, 3rd and 4th respondents by letter dated 5th March 2013 terminated the applicant's employment in the Uganda

Registration Services Bureau illegally and irregularly as the 2nd – 4th respondents did not even accord the applicant a hearing in arriving at the impugned decision.

2. The above impugned decisions dated 5th March 2013 and 21st December 2012 are illegal and void in as much as the later was arrived at in utter disregard of the approved structure by the Ministry of Public Service and the employment contract dated 28th June 2012 between the applicant and The Uganda Registration Services Bureau as these decisions are subsequent to the malicious and ill intentioned, unsubstantiated and unjustified accusations and allegations of the 4th respondent against the applicant as indicated in the 3rd respondent's letter to the applicant dated 1st February 2012.

3. The alleged investigations, and the above mentioned decisions dated 5th March 2013 and 21st December 2012 are tainted with bias as the applicant was denied an opportunity to defend herself by the 2nd, 3rd and 4th respondents and accordingly the respondents did not accord the applicant a fair hearing and the same are contrary to the rules of natural justice and are in utter breach of the applicant's right to employment.

4. The 2nd, 3rd and 4th respondents acted ultra vires their powers when they assumed powers to revise the said organizational structure which had been approved by the Ministry of Public Service.

5. The 4th respondent systematically orchestrated the abovementioned illegal actions and decisions together with the 2nd and 3rd respondent in utter disregard of the applicant's performance assessed at 85% by the 4th respondent who engaged in witch hunt by recommending that the 2nd respondent should not confirm the applicant's appointment, and by basing on malicious, ill intentioned, biased unsubstantiated accusations and allegations in the Internal Audit Report.

The application was supported by an affidavit, and another one in rejoinder, deponed by the applicant filed on 12th March and 23rd May 2013 respectively. It was opposed through the following affidavits:

1. Affidavit in reply sworn by Guma Gumisiriza on the 9th May 2013 and filed on 13th May 2013.

2. Affidavit in reply by Bemanya Twebaze sworn on 9th May 2013 and filed on 13th May 2013.

3. Additional affidavit in opposition to application for judicial review sworn by Etiang Michael, Assistant Records Officer on 9th July 2013 and filed on the same date.

4. Additional affidavit in opposition to application for judicial review sworn by Wakeda Martin Luther, Assistant Records Officer on 9th July 2013 and filed on the same date.

In her submissions, the applicant indicated that she had abandoned all the orders/prayers sought except an Order for

Certiorari quashing the decision dated 5th March 2013 terminating her employment contract with the 1st respondent, coupled with the findings that what was terminated was not a probationary contract, but her full contract and that the applicant was entitled to damages and costs.

The undisputed brief background to the present application is that under an Agreement executed on 28/6/2012 the applicant was employed by the 1st respondent as the Director Business Registration and Liquidation for a period of three (3) years effective 02/07/2012, subject to a probation period of 6 (six) months extendable for three (3) more months. The contract was to be executed in accordance with the Human Resource Manual.

By an Internal Memo dated 26/2/2013 from the Head of the 1st respondent's Internal Audit Department, the applicant was notified of findings of an Internal Audit pointing to her involvement in acts of financial impropriety. The applicant on 5/3/2013 wrote to the 4th respondent denying/contesting the findings of the audit and requesting for institution of a forensic inquiry in respect thereof. Later on the same day by letter authored by the 3rd respondent in his capacity as chairperson of the 2nd respondent, the applicant was notified of the extension of her probation period for three (3) months effective 3/01/2013, and also of the termination of her employment with the 1st respondent on basis of the Internal Audit Report.

The applicant contends that what was terminated was not her probationary appointment with the 1st respondent but rather, the

applicant's full employment contract entered on 28/6/2012 effective 02/07/2012 for three (3) years.

The applicant in her affidavits denied the averments by Bemanya Twebaze and Guma Gumisiriza in their respective affidavits in reply that at the time of termination the applicant had not been confirmed in her employment as her performance had been found unsatisfactory. She averred that she successfully concluded the maximum probation period of six (6) months on 02/01/2013, and her performance was assessed at 85%; and that as per the 1st respondent's Human Resource Manual, confirmation was subject to performance.

The communication to the applicant of the extension of the probation was done on 5/03/2013 in the same letter communicating her termination. (See Annexture 'B' to the applicant's affidavit in support). It is the applicant's submission that a probationary period could not be extended and communicated to an employee retrospectively, without the employee consenting/agreeing to the extension. The Human Resource Manual provided for the consent by the employee of any extension of her probation. Further, the applicant contends that the minutes of the Board meeting of 12/2/2013 resolving to so extend the probation did not show that she agreed to the extension. Counsel, therefore, submitted that where an act was mandated by Law to be done by securing the consent or the approval of someone, where such consent or approval is not sought, the act is illegal, null and void. (***Makula International Vs Cardinal Nsubuga & Anor, [1982] HCB 168);*** and ***Kisugu Quarries Ltd***

Vs Administrator General CACA No. 46 of 1996). The Employment Act, 2006, Section 67 (2) thereof, further expressly limits the term of probation in employment to a maximum of six months. According to Section 67(2), any extension has to be consented to by the employee.

Counsel concluded that the purported extension of the probationary period made on 12/2/2013 and communicated to the applicant on 5/3/2013 was illegal, null and void. The applicant having remained in the employment of the 1st respondent from the 1st day of January 2013 when her probation period lapsed, until 12/02/2013 when the purported extension was made and further until the 05/03/2013 when the minutes of the alleged Board meeting were signed and the decision communicated to the applicant she had been deemed confirmed by law. Any issues that were likely to affect her confirmation in the employment had to be raised before the 01/01/2013 when the maximum probationary period was set to expire and the same put to the applicant for consideration.

Counsel further relied on ***Reuben Kajwarire Vs Attorney General, Civil Suit No. 214 of 2005*** for the proposition that an employee becomes a permanent employee upon the lapse of the probation period. (See also ***Ahmed Ibrahim Bholm Vs Car & General Ltd SCCA No. 12 of 1992 [2005] ULS 92*** and ***OM Prakash Maurya Vs U.P Cooperative Sugar Factories Federation, Lucknon & Ors, 1986 Air 1844, 1986 SCR (3) 78*** for the proposition that even in absence of a written order confirming the employee in employment, an employee who has completed the statutory period of probation is

deemed to have been confirmed and where an employee continues in employment of the employer after lapse of the probation period "***the employee stands confirmed by implication".*** The respondent's position as per the averment of Guma Gumisiriza in paragraph 10 of his affidavit in reply that the applicant was on probation and was dismissed on findings of fraud against her, was therefore, baseless. Hence the prayer for an Order of Certiorari quashing the 1st respondent's impugned decision.

The applicant's Counsel further relied on a host of authorities to contend that the decision made by the 2nd respondent on 5/03/2013 terminating her employment with the 1st respondent was made upon malicious, unapproved and unsubstantiated allegations of fraud and financial impropriety where she was not given an opportunity to be heard in disregard of the fundamental principles of natural justice and, the decision itself was/is irrational, illegal, null and void. The applicant stated in paragraph 21 of her affidavit in support;

> "***The said impugned audit report contains unsubstantiated forgeries which are blatant that a tribunal which is fairly addressing its mind to the said forgeries of my signatures would have agreed to obtain handwriting expert/forensic report and Uganda Revenue Authority to get to the truth before effecting an excessive condemnation of a punishment to me unheard…"***

As per paragraph 25 of her affidavit in rejoinder, the applicant accessed and studied the Audit Report on 5th March 2013 after which she mailed a letter to the 4th respondent disputing the

findings therein and denying her involvement in what was raised. She made a request that the 4th respondent institutes a proper forensic inquiry into the origin and authenticity of the said documents which were relied upon during the Audit. It was on the same day that the 2nd respondent sat, considered the Audit Report and without considering and taking up the applicant's request to the 4th respondent, found her guilty, resolved to terminate her employment and so terminated it, and on the same day communicated the dismissal to the applicant. She was found guilty without being heard. The Human Resource Manual required an employee who is suspected of misconduct or having committed an offence to face the Disciplinary Committee whose composition would be determined by the employer, which committee would determine the employee's liability and disciplinary measures to be undertaken. Further, Clause 8.4 of the Human Resource Manual required all cases of misconduct to be reported to the Human Resource Manager who is then required to refer them to the Top Management for consideration and recommendation of action to be taken; but that in all cases, an employee shall have a right to be heard.

Since the applicant was accused of fraud, and financial impropriety, (dishonesty under the Human Resource Manual) and the applicant was not heard in her defence, the 2nd respondent flouted its own procedures. Counsel relied on ***Okuo's case supra***, and ***A.M. Jabi Vs Mbale Municipal Council [1975] HCB 191;*** to state that it was a requirement of natural justice that a person properly employed was entitled to a fair hearing before being

dismissed on charges involving a breach of disciplinary regulations or misconduct, and that an employee on permanent terms was entitled to know the charges against him and to be given an opportunity to give any grounds on which he relied to exculpate himself. In the present case, the Board of Directors being charged with the responsibility/power of depriving a man of his livelihood, ought not to have condemned the applicant without giving her opportunity to be heard in her defence. (See ***Mumira Vs National Insurance Corporation [1985] HCB 111***).

Counsel also relied on ***Ridge Vs Baldwin [1963] A.C 40*** for the proposition that when administrative actions are to be considered policy is always a factor, but the Rules of natural justice are concerned with a fair form of procedure not with controlling policy, and they require minimum procedure to be followed. He also relied on ***Rose Mary Nalwada Vs Uganda Aids Commission MC. No. 0045 of 2010,*** to state before an employer can terminate the contract of employment; he must follow what he agreed with the employee in the contract of service and the rules and regulations governing the employment. If he did not, the resultant decision would be *void ab initio* even if the Board would have come to the same decision had the rules of natural justice been complied with. (See also ***Picture House Ltd Vs Wednesbury Corporation [1948] 1 K.B 223*** and ***De Souza Vs Tanga Town Council, Civil Appeal No. 89 of 1960*** reported in 1961 EA 377 at Page 388).

In the present case, Counsel contended that the applicant was not called upon to be heard on the accusations based on the Internal Audit. The Board just sat and considered her guilty hence the

dismissal. (See also ***Mugisha Richard Bob Kagoro Vs Uganda Wildlife Authority Civil Suit No. 263 of 2007***).

Counsel therefore concluded that the 2nd respondent's decision was null and void for having been reached in disregard of the rules of natural justice, and that such procedural impropriety attracted the remedy of Certiorari.

On irrationality and unreasonableness, Counsel relied on ***Council of Civil Service Union Vs Minister of Civil Service [1984] 3 ALLER 935*** and ***Associated Provincial Picture House Ltd Vs Wednesbury Corporation [1984] 1 K.B. 223***; and ***Nazarari Punjwani Vs Kampala District Land Board & Anor HCCS No. 07 of 2005*** to state that irrationality was when the decision made was so outrageous in its defiance of logic or acceptable moral standards that no person could have arrived at that decision. The present impugned decision was both irrational and unreasonable as it was based on allegations in an audit report, which itself recommended that they had found the transactions in issue to be fraudulent, and therefore the Director of Business Registration should be tasked to explain the anomalies. Further that the fraudulent cases should be taken up by forensic experts where the applicant had denied the signatures in issue. The 2nd respondent however, sat on 5/03/2013 and considered the report but ignored both the applicant's denial of involvement in the questioned transactions and the audit recommendations, and convicted the applicant on alleged fraud and financial impropriety; terminated her contract, and dismissed her. Counsel concluded that the action of the Board was "***outrageously senseless and absurd taking into account***

that the applicant was never heard on the allegations, and the recommendations of the Audit were not taken up." He asked court that the decision should be quashed for unreasonableness and irrationality.

Counsel for the respondent did not agree. He referred court to ***Fr. Francis Bahikirwe Muntu & 4 Others Vs Kyambogo University, MA 45 of 2005*** for the grounds warranting judicial review, to wit; illegality, irrationality, and procedural impropriety, and submitted that the present application disclosed no ground warranting judicial review as none of the above grounds was disclosed.

Counsel submitted that there was no allegation of illegality, and the respondents did not act illegally. What was alleged in the application was that the applicant's termination of employment was illegal in that she was not given a chance to be heard before the impugned decision was made by the 2nd respondent and that this therefore amounted to procedural impropriety.

It is the respondents' case that the decision to terminate the employment of the applicant was not riddled with procedural impropriety because of the following reasons;

1) There was no legal requirement to give the applicant a hearing before termination of her contract because the applicant was still on probation.

2) Without prejudice, the applicant was summarily dismissed under Section 69 of the Employment Act for gross misconduct and summary dismissal without notice or hearing is effective and legal and cannot be set aside once made by a competent authority. The 2nd respondent acted legally within the confines of the law and the contract of employment.

3) Further, without prejudice, the applicant participated in the making of the auditor's report and was interviewed before the making of the report.

Counsel contended that the applicant was still on probation when her services were terminated. According to Clause 6.1 of the employment contract, which was signed on 28/6/2012 and commenced on 2/7/2012, the applicant was to undergo probation for a period of 6 months. Clause 6.2 of the contract of employment gave the respondent the authority to extend the probation period for a maximum of three months if the applicant would not have successfully completed the probationary period. Once the applicant had signed the contract of employment allowing extension of probation, no further agreement was necessary. The applicant was notified on 4/2/2013 of the decision taken by the Board on 1/2/2013 not to confirm her. (Annexture 'B' to affidavit of Guma Gumisiriza). She was invited to appear on 12/2/2013 to answer to concerns raised by the 4th respondent before the Board could determine her suitability for confirmation on that date. She attended the meeting and gave her defence. It

was decided that her probation be extended for another 3 months.

Counsel submitted, therefore, that the probation was properly extended and the applicant was on probation when her contract was summarily terminated. And according to Section 67 (10 and (2) of the Employment Act to state that where dismissal brings an end to a probationary contract, Section 66 of the Employment Act, which requires a hearing, did not apply. By signing the agreement/contract of employment and appearing before the Board to determine whether she was to be confirmed or not, the applicant unequivocally consented and agreed to the employer's right to extend her probationary period and therefore no further consent/agreement was required by the 1st respondent to extend the applicant's probationary period, which extension complied with both the law and the contract of employment. The applicant gave her consent to extend her probationary period under Clause 6.2 of the employment contract.

On the need to have the confirmation in writing, Counsel sought to distinguish the authorities relied on by the applicant's Counsel in that the provisions of the agreements governing the parties in those authorities were not mentioned therein; whereas in the present case it was expressly stated.

Counsel concluded that since in the present case the respondents did not fail to observe any procedural rules laid down in statute or legislative instrument, there was no procedural impropriety.

Without prejudice to the above arguments, Counsel submitted that the termination was a summary dismissal authorized under Clause 16 of the Employment Contract, where the right to notice is done away with. The Internal Audit conducted by the respondent revealed grave financial impropriety and misconduct by the applicant; causing financial loss to the 1st respondent. According to the affidavit in reply by Guma Gumisiriza, the applicant participated in the making of the Audit report, wherein a staff member is alleged to have confessed to carrying out the fraud with the applicant. She was also interviewed during the investigations, and was later dismissed on basis of the Internal Audit Report. She could not, therefore, claim she was not given an opportunity to be heard. The respondents were justified to summarily dismiss the applicant as she had fundamentally broken her obligations under her contract. (S. 69 (3) of the Employment Act).

Counsel further relied on ***Stanbic Bank Vs Kiyemba Mutale SCCA No. 02 of 2010***; ***Doreen Rukundo Vs International Law Institute SCCA No. 8 of 2005***; and ***Bank of Uganda Vs Betty Tinkamanyire SCCA No. 12 of 2007***, for the proposition that the right of the employer to terminate the contract of service, whether by giving notice or paying in lieu thereof, could not be fettered by courts; and that termination was effective even if wrongful. Counsel, therefore, contended that a dismissal, even if wrongful, cannot be quashed.

On whether the respondents' actions were irrational, Counsel relied on paragraph 6 of Guma's affidavit in reply that the applicant was, according to her contract of employment,

supposed to perform her duties diligently and faithfully, and was still on probation. According to the same contract, the respondents had powers to dismiss summarily an employee who was guilty of gross misconduct. According to the Uganda Registration Services Bureau (URBS) Act, the Minister did not have any authority to change the decision of the Board as he tried to. The applicant's performance was assessed in her presence and she was heard, so she was not confirmed and she was aware. Since during her probationary period the Internal Audit found that she was involved in acts of gross misconduct, that is to say, forgery and fraud, any reasonable employer would have dismissed the applicant summarily under those circumstances. The decision taken by the 2nd respondent was, therefore, not irrational.

Counsel concluded that no ground had been proved warranting judicial review.

In his submissions in rejoinder, Counsel for the applicant reiterated his contention that the 2nd respondent had no jurisdiction to extend the probation period set by the Employment Act that had elapsed on 2/1/2012, therefore the purported act of extension was a nullity. Counsel further rejoined that contrary to the allegations of summary dismissal by the respondents' Counsel, the applicant was never summarily dismissed, but rather her contract of employment with the 1st respondent was improperly and irrationally terminated.

On the right to be heard, Counsel submitted that the applicant was terminated on reason of alleged fraud, and financial

impropriety which under the Employment Contract and Human Resource Manual is a misconduct. The termination therefore fell under S. 66 (1) which bars termination without a hearing.

As to whether a wrongful termination could be quashed, Counsel rejoined that Article 139 of the Constitution of the Republic of Uganda grants the High Court unlimited jurisdiction in all matters and causes, and the Judicature (Judicial Review) Rules, 2009 empowered the High Court to entertain Judicial Review applications and "review" decisions made by public bodies/officers and provide the appropriate remedy. So as long as a decision by a public official/body terminating and/or dismissing an employee has been made illegally, irrationally or improperly, the High Court has jurisdiction to quash such a decision; and under Section 71(5) of the Employment Act, Courts of law have jurisdiction to order reinstatement of an employee who has been dismissed unfairly.

Counsel for the applicant, therefore, reiterated his earlier prayers.

I have considered the application, all the pleadings, and the submissions of Counsel on either side.

The High Court derives the power to grant prerogative orders from Section 36 (1) of the Judicature Act, Cap 13. Prerogative orders are remedies for the control of the exercise of powers by those in public offices, and the remedy is available to give relief where a private person is challenging the conduct of a public authority or public body, or anyone acting in the exercise of a public duty. The orders which may be for mandamus, certiorari,

prohibition or declarations are discretionary in nature, and in exercising its discretion the court must act judiciary, and according to settled principles. Such principles may include common sense and justice, whether the application is meritorious and whether there is reasonableness, vigilance, and not a waiver of rights by the applicant. (See ***John Jet Tumwebaze Vs Makerere University Council and 3 Others – Civil Application 353 of 2005).***

The grounds, a combination, or any of them that an applicant must satisfy in order to succeed in a judicial review are illegality, irrationality, and impropriety. Lord Diplock J, summed up these remedies in ***Council of Civil Service Union Vs Minister for the Civil Service [1985] AC at P. 410*** as follows***:***

> ***"Judicial Review has I think developed to a stage today when ……. one can conveniently classify under three heads the grounds upon which administrative action are subject to control by Judicial Review. The first ground I would call 'illegality' the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. By 'illegality' as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By 'irrationality' I mean what can now succinctly be referred to as 'Wednesbury' unreasonableness' ……. it applies to a decision, which is so outrageous in its defiance of***

logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well-equipped to answer, or else there would be something badly wrong with our judicial system…….. I have described the third head as procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid out in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

Further in ***Kuluo Joseph Andrew & 2 Others Vs Attorney General & 6 Others Misc. Cause No. 106 of 2010*** (unreported) Bamwine, J, as he then was, stated:

"It is trite that Judicial Review is not concerned with the decision in issue perse 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 a 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."

By a letter dated 5/3/2013, the applicant's services were terminated. The termination letter reads as follows:

"5th March 2013

Maudah Atuzairwe
Director Business Registration

Re: TERMINATION OF YOUR EMPLOYMENT

On the 12th February 2013, the Board decided to extend your probation for 3 months effective 3rd January 2013.

On 5th March 2013 the Board considered an Internal Audit report on a matter of Non-Tax Revenue (NTR) collection. You were implicated in aspects of alleged fraud and financial impropriety.

In view of that report, the Board has decided that your probationary appointment be terminated with immediate effect.

You are to hand over all URSB assets in your possession immediately.

Isaac Isanga Musumba
CHAIRMAN BOARD OF DIRECTORS
UGANDA REGISTRATION SERVICES BUREAU
c.c. Hon. Minister, Ministry of Justice & Constitutional Affairs
c.c. Solicitor General
c.c. Permanent Secretary, Ministry of Public Services
c.c. Auditor General
c.c. The Registrar General."

The applicant seeks for orders of certiorari to quash the above decision of the respondents to terminate her employment. It is the respondents' case that in line with Section 67 of the Employment Act there was no legal requirement to give the applicant a hearing before termination of her contract because she was still on probation. Counsel for the applicant has, on the other hand, laboured to prove that the applicant was no longer on probation since when the 6 months' probation ended on 2/1/2013 the respondents had not pointed out any issues preventing confirmation of the applicant's services; and there was no agreement of the applicant to the extension as required by the contract of employment, and the Act.

Similarly, Counsel for the respondents also laboured to establish that the applicant was still on probation when terminated; the confirmation of employment had to be done in writing, and as far as the requirement for acceptance of the extension was concerned, the applicant, by signing the employment contract had consented to any extension of probation to be made. Hence the 3 months' extension communicated to the applicant on 3/5/2013 vide her termination letter was effective.

A lot of reliance was placed by the parties on provisions of the Employment Act, 2006, the contract of employment, and the Human Resource Manual of the 1st respondent. The provisions which I find relevant are reproduced below;

Employment Act, 2006

Section 66;

"***Notification and hearing before termination;***

(1) Notwithstanding any other provision of this Part, an employer shall, before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance, explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before reaching any decision to dismiss an employee, hear and consider any representations which the employee on the grounds

of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make.

(3) The employer shall give the employee and the person, if any, chosen under subsection (1) a reasonable time within which to prepare the representations referred to in subsection (2).

Section 67;

"Probationary contracts"

(1) Section 66 does not apply where a dismissal brings to an end a probationary contract.

(2) The maximum length of a probationary period is six months, but it may be extended for a further period of not more than six months with the agreement of the employee.

Section 69 (4);

"Summary termination

(1) Summary termination shall take place when an employer terminates the service of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) An employer is entitled to dismiss summarily, and the dismissal shall be termed justified, where the employee has, by his or her conduct indicated that he or she has fundamentally broken his or her obligations arising under the contract of service."

Section 2 of the Employment Act (Interpretation Section): "Probationary Contract" means;

"***a contract of employment, which is not of more than six months duration, is in writing and expressly states that it is for a probationary period.***"

The relevant clauses in the employment contract between the applicant and the 1st respondent are as follows:

Clause 2;

"(1) You have been appointed as Director Business Registration/Liquidation under Business Registration/Liquidation Department in the Uganda Registration Services Bureau, after successfully completing the interviews. This appointment shall be confirmed in writing upon your successful completion of your designated period of probation.

(2) The term of employment is contractual, subject to terms as set out below."

Clause 6 Probation;

"6.1 The Employee shall be required to undergo probation for a period of six (6) months upon whose successful completion your appointment shall be confirmed in writing. During this probation the contract may be terminated by either party giving to the other party one month's notice of the intention of termination in writing or may pay to the other party one month's salary in lieu of such notice.

6.2 The Employer may extend the aforesaid probation period for a maximum of three more months where you have not

successfully completed the designated probationary period.

Disciplinary matters in the Employment Contract;

Clause 13;

“Disciplinary Committee

An employee who is suspected of misconduct or having committed an offence will have to face the disciplinary committee whose composition shall be determined by the employer, and this committee will determine his liability and the disciplinary measures to be undertaken.”

Clause 14;

“Disciplinary measures

The employer will lay out successive disciplinary measures to be meted out to the employee found guilty of misconduct that does not warrant dismissal, by the disciplinary committee, according to the gravity of the offence and these shall include but not be limited to caution, apology, fining and suspension.”

Clause 16.1; The Employee is guilty of any gross default or misconduct

“The Employee shall be guilty of gross misconduct where his or her conduct indicates that he or she has fundamentally broken his or her obligations arising under the contract of service.”

Human Resource Manual of the 1st Respondent;

Clause 2.6.1;

"Staff members shall ordinarily be required to serve a period of probation upon initial appointment. The duration shall be specified in the contract."

Clause 2.6.4;

"An employee who has satisfactorily completed his/her probation in any post shall be confirmed as soon as possible and his/her confirmation will take effect from the date of appointment."

Clause 2.6.5;

"An employee will not be deemed to be confirmed in his/her post unless such confirmation is communicated to him/her in writing."

Clause 2.6.6;

"An employee on probation may be summarily dismissed from the service of the Bureau where the employee has breached his/her obligations under the contract of service. The Board will authorize summary dismissal."

Clause 2.6.7;

"In accordance with Section 67 (4) of the Employment Act, a contract of an employee on probation may be terminated by either party by giving not les that fourteen days' notice of termination or by payment by the employer to the employee o seven days' wages in lieu of notice."

Clause 9.5.5; Summary Dismissal;

"Where aggravating circumstances exist, the Board or Registrar General may sanction summary dismissal in which case all terminal benefits are forfeited."

Clause 9.6;

"The following rules of fairness apply in all disciplinary matters;

i) The employee must be given time to prepare.

ii) The employee has a right to representation provided that representative is an employee of the Bureau.

iii) The employee has the right to an interpreter should one be required.

iv) Both parties have a right to call witnesses to present evidence in support of their case and to cross-question witnesses called by the other party.

v) Both parties have a right to present arguments in mitigation, or aggravation of sanction."

I need to resolve the effect of a probationary contract as provided by the law. I prefer to approach the question of "probationary contract" from a different angle from both Counsel, because it is very crucial to determine whether the employment contract of the applicant could be terminated summarily without a hearing. I have also noted the principles laid down by the superior courts in Rukundo's case (supra). I have, however, also noted that whereas the Rukundo's case was decided based on Cap 219, (the old Employment Act) the determination of the present case will be based on the new Employment Act of 2006 since the termination took place after the new Act became effective.

I will reproduce the definition of the term "Probationary Contract" here below for effect:

"Probationary Contract means a contract of employment, which is not of more than six months duration, is in writing and expressly states that it is for a probationary period."

My understanding of the above definition is that for a contract to be termed a probationary contract to which Section 67 applies, it has to be exclusively for probation, and strictly for a period of six months renewable up to not more than another 6 months. The employment contract in issue was for a period of three years. The three years' duration brought the applicant's contract outside the precincts of a probationary contract envisaged in the Employment Act, even if it provides for a probationary period within it. The heading of Section 67 indeed is stated to be "Probation Contracts." The drafters of the 2006 Act must have seen a need to have a definition of a 'probationary contract' so that it is given its intended meaning, from the usual probationary provisions within many contracts. It should be noted that the erstwhile Employment Act, Cap. 216 did not have such an interpretation.

Since, therefore, the present contract is not a probationary contract, it is court's view that termination by the respondents of the applicant's contract as if it were a probationary contract, basing themselves on S. 67 of the Act, was wrong.

I also see other differences between the Rukundo's case and the present case. In Rukundo case, the contract had not commenced hence the decision by the Court of Appeal and Supreme Court in that case that there could be no breach of contract where the contract had not commenced as no rights had accrued. I,

therefore, find that there was illegality in the way the applicant's contract was terminated as if it was a probationary contract whereas it was not.

I also find that ***Betty Tinkamanyire's case (supra)*** whose cause of action arose on the 16th August 2002, long before the coming into force of the new Act; and also to ***Kiyemba Mutale's case*** were all decided based on the old Act. Indeed in her judgment in Kiyemba Mutale's case (supra) Dr. E. Kisakye, JSC noted thus;

> ***"The Employment Act, 2006 has since introduced several changes in the law with respect to procedures that an employer is required to follow before terminating the services of his employee.***
>
> ***The Act also provides for, among others, situations where reinstatement of an employee may be ordered. Therefore, courts hearing cases arising after the coming into force of the Employment Act, 2006 will have to ensure that employers observed the law and proper procedure when terminating the services of their employees as provided for under the Act."***

I have not deemed it necessary to determine whether the applicant was still on probation or not. Even then, the way I understand the provisions of Section 66 of the Employment Act, even employees on probation have to be given the hearing envisaged under Section 66, unless if they are subject of a "probationary contract" which the applicant was not.

The applicant was summarily dismissed. Counsel for the respondents submitted in the alternative that summary dismissal was in order because the Internal Audit Report had found that the

applicant had participated in fraud, forgery and other misconduct and causing financial loss to the 2nd respondent. Hence there was no requirement for a notice or hearing (***Barclays Bank Vs Mubiru SCCA 1 of 1997***).

Under the Employment Act 2006, the law on summary dismissal is as follows:

i) Summary dismissal means a dismissal without notice or with less notice than the employee is entitled to under the contract or under the Act.

ii) Summary dismissal is justified when an employee, by his conduct shows that he has *fundamentally broken* the contract of service. See Section 69 of the Act.

The phrase *fundamentally broken* as used in Section 69 is not defined in the Act. However, under common law, which applies to this contract by reason of the provisions of the Judicature Act, the law on summary dismissal is, like in ***Barclays Bank Vs Mubiru (supra)*** a dismissal without notice (and without a hearing) and it is reserved for serious misconduct.

There is no exhaustive list of the misconduct that justifies summary dismissal, but according to ***Laws Vs London Chronicle [1959] 1 WLR 698*** one isolated act of misconduct is sufficient to justify summary dismissal. The test is stated in the above case to be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.

Be the above as it may, it is important to note that the post 2006 Employment Act position is that there is a mandatory right to be heard now reserved by Section 66 of the Act for every form of dismissal, a right not available in summary dismissals previously (***Godfrey Mubiru Vs Barclays Bank (supra***)) otherwise, the rest of the common law meaning of summary dismissal as stated above was substantially left intact by the Act. This of course excludes only the probationary contracts (S. 67 of the Act).

Therefore, even if the applicant's conduct (or misconduct) was regarded as one that amounted to disregarding the essential conditions of the contract of service such as to be regarded as having fundamentally broken the contract of service and therefore justifying summary dismissal, the applicant had to be accorded the right to a hearing. The right to a hearing is guaranteed by the Constitution of the Republic of Uganda under Article 42 as follows:

> ***"Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect o any administrative decision taken against him or her."***

Article 44 (c) also provides that the right to a fair hearing cannot be derogated from.

The question here is whether the applicant was accorded such a right to a hearing as required by the law.

At one point, Counsel for the respondents state that the right to a hearing was not applicable since it was a probation contract. He

then contended later that the applicant had actually been given a hearing by the Board when they assessed her performance. But clearly the latter was for purposes of determining whether she should be confirmed or not, not for disciplinary purposes with a view to a dismissal.

It was also contended that the applicant had participated in the making of the Internal Audit Report since she was asked questions and she answered, and that this was, she had been given a hearing. The way I understand it is that the right to be heard reserved under the Act, (and the (Constitution) is meant to be accorded after the employer finds that there is conduct that may call for the dismissal of the employee. I must say that my understanding of the Act, is that this right to be heard even extends to employees who have not completed the probationary period stipulated in a contract of service (as opposed to the probationary contract).

The fact that the applicant was asked some questions during the audit did not constitute the right to be heard reserved under the Act. It is not even contended that she admitted liability when she was questioned during the process of the Audit. It is not disputed by the respondents that the audit report was not conclusive in that it made recommendations that the applicant be questioned on some issues, and that the signatures be referred to the handwriting expert. This was not done. The respondents just based themselves on the inconclusive audit to dismiss her without even hearing from her.

Most probably with an allegation that the applicant was implicated in the audit as having been involved in fraud and impropriety causing financial loss to the 2nd defendant, the respondents took it as an open and shut case of unanswerable charges. However, the law and rules of natural justice require that a reasonable opportunity to be heard must be afforded in clear terms. The reasons for the need to comply with the rules of natural justice were expounded by Megarry J, in ***John Vs Rees [1970] Ch 345 at 402***, which was cited with approval in the Kenyan case of ***Oloo Vs Kenya Posts and Telecom Corporation Court of Appeal Civil Appeal No. 56 of 1981.*** The Honourable Judge had the following to say;

> ***"It may be that there are some who may decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start. Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which somehow, were, of unanswerable charges, which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."***

I find that whatever the employment contract or Human Resource Manual provide on termination, the provisions of the Constitution and the Employment Act 2006 are paramount. Since the applicant was not given any hearing, the decision to dismiss her was irregular for illegality and impropriety.

Remedies available to the parties;

The applicant abandoned all the other orders/prayers sought in the Notice of Motion leaving only the order for certiorari quashing the decision dated 5/3/2013 terminating her employment contract with the 1st respondent; and that the applicant is entitled to damages and costs.

I have found that the decision to terminate the applicant was wrong with irregularities in that there was illegality and procedural impropriety in the way the respondents terminated the applicant's services.

If this court grants the remedy of certiorari it would mean that the impugned decision is quashed, thus declared it null and void. This would imply that the status quo would revive, in that the position would revert to what it was immediately before the applicant was terminated. It would therefore mean a reinstatement. I am also alive to the fact that the 2006 Employment Act provides for reinstatement (Section 71 (5) (a)) in some cases.

The above notwithstanding, it is a well settled principle of law that certiorari is a discretionary remedy. It is one of those remedies in public law which cannot be claimed ***ex debito justiciae***. An applicant who makes out case may yet be denied the remedy on a number of grounds; depending on the facts and circumstances of each case.

In this case the prayer for reinstatement was abandoned as it was not canvassed during the submissions of the applicant. The fact of abandonment of the reinstatement prayer was confirmed by Counsel for the applicant on page 11 of his submissions in rejoinder when he stated;

> "***Your Lordship the applicant is not asking for an order of reinstatement from the Honourable court for whereas she included it upon filing of the application, she did abandon the same upon her submissions to the court. She only seeks an order of certiorari to quash the decision of her termination.***"

As stated earlier, I cannot quash the decision to terminate the applicant without, by implication, thereby reinstating her. And since I stated the remedy is discretionary and may be denied even when a case has been made out, I find this case to be such a case where court is inclined not to grant the remedy because of the full impact of the remedy, especially when reinstatement is not desired by the applicant.

The applicant also prayed for emoluments in terms of:

1) **<u>Salary</u>**

A claim was made for salary for 17 months, with effect from 05/3/2013 when her contract of employment was terminated up to August 2014 at the rate of Shs. 4,424,000= per month totaling Shs. 75,208,000= less any statutory deductions.

2) **Gratuity**

The applicant also claimed for gratuity.

Under Clause 51 of the Agreement the applicant is entitled to a gratuity of 25% (of gross payments) upon completion of each year. The applicant prayed for Shs. 26,544,000= for the 1st and 2nd year which are said to have ended on 1/7/2013, and 1/7/2014 respectively.

I should point out that an award of damages is permissible under Judicial Review. See section 8 (1) (a) and (b) of the Judicature (Judicial Review) Rules (supra).

However, the above claims as made by the applicant were stated to be unsustainable in law. It is, therefore, trite that where contract of employment has been terminated, the employee has no right to claim payment under the contract. This was stated by the Supreme Court in ***Bank of Uganda Vs Betty Tinkamanyire (supra)*** and ***Rukundo Vs International Law Institute (supra).***

This being a case where no reinstatement is being ordered, the applicant can only claim for salary and gratuity up to the point when she was terminated.

General damages

The applicant prayed for Shs. 100,000,000= for general damages because of the rather rudimentary manner in which she was removed by the 2nd respondent, to the applicants inconvenience, coupled with regret, loss and pain.

She also prayed for Shs. 500,000,000= (Five hundred million only) for exemplary damages.

Damages are the pecuniary recompense given by the process of law to a person for the actionable wrong that another has done to him. Damages are, in their fundamental character, compensatory, not punishment. The primary function of damages is to place the plaintiff in as a good position, so far as money can do, as if the matter complained of had not occurred.

General damages are as such the law will presume to be the direct natural or probable consequence of the act complained of. (See ***Strom Vs Hutchinson [1905] AC 515).*** Thus general damages are those which the law implies in every violation of a legal right. (See ***Hulsbury's Laws of England 3rd Edition page 385).***

In ***Philip Vs Ward [1956] 1 ALLER 874*** it was held that general damages are discretionary and are merely intended to place the plaintiff in as good a position in monetary terms as he would have been had the injury complained of not taken place.

As for exemplary damages, when considering the making of an award of exemplary damages, three matters should be borne in mind, that is to say, the applicant cannot recover exemplary damages unless he or she is the victim of punishable behaviours; the power to award exemplary damages should be used with

restraint; and lastly the means of the parties are material in assessment of exemplary damages. One of the categories that exemplary damages may be awarded is where there has been oppressive arbitrary, or unconstitutional actions by the servants of the Government. (See ***Rookes Vs Barnard [1964] AC 1129)***.

In ***Uganda Revenue Authority Vs Wanume David Kitamirike Court of Appeal CA No. 43 of 2010***, court held that;

> ***"Punitive or exemplary damages are an exception to the Rule, that damages generally are to compensate the injured person. These are awardable to punish deter, express outrage of court at the defendant's egregious, high handed malicious, vindictive, oppressive, and/or malicious conduct. They are also awardable for the improper interference by public officials with the rights of ordinary subjects. Unlike general and aggravated damages, punitive damages focus on the defendant's misconduct and not the injury or loss suffered by the plaintiff. They are in the nature of a fine to appease the victim and discourage revenge and to warn society that a similar conduct will always be an affront to society's and also to the court's sense of decency…."***

Counsel for the applicant submitted that the applicant who was a Director, in the 1st respondent, was portrayed as a fraudster, a criminal and a person unfit to serve the public which act had caused her enormous humiliation and regret. By the 2nd respondent flouting the very procedures it set up to follow while handling disciplinary matters and ignoring the Audit's recommendation to carry out a forensic inquiry; by the 4th and 2nd respondents finally taking action against her without giving her an

opportunity to be heard, all ascertain that the action was unfounded, arbitrary and unconstitutional entitling her to exemplary damages.

Having considered the circumstances of this case, I find that the 2nd respondent acts were unlawful and very insensitive to a senior member of staff. The appellant occupied a position of considerable responsibility. Her employment was wrongfully terminated as already found earlier in this judgment. She was highly inconvenienced and embarrassed by being declared fraudulent yet the investigative process was yet to be concluded. She thus lost a well paying job. I find that a case for aggravated, and not exemplary, damages has been made.

Bearing all the aggravating factors in this case, I award the applicant Shs. 100,000,000= (One Hundred Million only) as both general and aggravated damages.

In conclusion, the prerogative order of certiorari is not granted for reasons earlier stated, and the applicant is awarded Shs. 100,000,000= (One Hundred Million only) as general and aggravated damages.

The court further orders that the 1st and 4th respondents conclude the investigations as recommended in the Audit report so as to give a chance to the applicant to clear her name in case the investigations terminate in her favour. This should not, however, be interpreted to mean an order of reinstatement in case the applicant is cleared. Costs of the suit will go to the applicant.

Orders accordingly.

Elizabeth Musoke

JUDGE

16/10/2014