

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS APPLICATION No. 0005 OF 2016

EBERUKU PIUS **APPLICANT**

VERSUS

MOYO DISTRICT LOCAL GOVERNMENT **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application made under the provisions of section 36 of *The Judicature Act* as amended and Rules 6 (1) and (2) of *The Judicature (Judicial Review) Rules*, S.I. No. 11 of 2001, seeking judicial review of administrative decisions taken by the respondent, by way of grant of an order of Certiorari quashing a decision taken by the respondent regarding the applicant's employment with the respondent and orders of prohibition and an injunction to prevent the respondent from taking other specified decisions regarding the same employment. The application is supported by an affidavit sworn by the applicant. The respondent is opposed to the application and filed an affidavit in reply sworn by a one Mr. Oryono Grandfield Omonda, the Chief Administrative Officer of the Respondent.

The background is that the applicant joined service of the respondent on 1st February 2004 as a Sub-County Chief. In the year 2008, he was promoted to the position of Senior Assistant Secretary. At the time of these events, he had been posted to Aliba Sub-County, as a Sub-County Chief. On or about 20th January 2015, he was notified in writing by the respondent's Chief Administrative Officer that there was a vacant post of Principal Assistant Secretary to be filled. He was required to fill the relevant Public Service Form to be submitted to the District Service Commission in order to be considered for promotion to that position. The applicant duly filled in and submitted the form to the District Service Commission, which after considering the

application, promoted him to the position of Principal Assistant Secretary, to report to the District Headquarters effective 1st July 2015.

Later, the District Service Commission received a complaint from another employee of the respondent at the level of Senior Assistant Secretary, querying the procedure through which the applicant had been promoted to the position. Upon that complaint, the District Service Commission recommended a revocation of the applicant's appointment upon which his promotion was rescinded as from 1st April 2015, he was reverted to his previous position of Senior Assistant Secretary and was posted to Laropi Sub-county. The respondent re-advertised the position of Principal Assistant Secretary. The applicant contends he is qualified for the position of Principal Assistant Secretary, was never given an opportunity to be heard by the District Service Commission before his promotion to that position was revoked. He therefore seeks an order of certiorari to quash the decision of District Service Commission revoking his promotion to the post of Principal Assistant Secretary, the decision to revert him to the position of Senior Assistant Secretary and the decision to post him to Laropi Sub-county. He further seeks orders of Prohibition and an injunction restraining the respondent from posting him to Laropi Sub-county. He finally seeks an award of general damages and the costs of the application.

The respondents oppose the application and argue that the notification of the vacancy was not sent exclusively to the applicant. When the Public Service Commission reviewed the procedure through which the applicant had been promoted, it observed that the District Service Commission had not made any shortlist of the various applicants to the position. The applicant was later given an opportunity to appear before the District Service Commission, which he initially declined but subsequently honoured whereupon the observations of the Public Service Commission were read to him. The position was re-advertised and the applicant was free to re-apply for consideration, following the correct procedure this time round.

In his written submissions, counsel for the applicant argued that the respondent followed the proper procedure when promoting the applicant to the position of Principal Assistant Secretary. He cited Part (A-g), Order 2 of *The Uganda Public Service Standing Orders*, (2010 edition). The procedure followed was intended to save costs and to motivate current staff who had the qualifications for the position, being the holder of a Bachelor of Arts Degree in Political Science, a Certificate in Administrative Law and a Post Graduate in Public Administration and

Management. He had served the respondent for more than seven years at the time of the promotion. In revoking the promotion, the respondent violated the applicant's right to just and fair treatment in administrative decisions. In handling the complaint challenging the process of his appointment on promotion, neither the Public Service Commission nor the District Service Commission gave him a hearing or allowed him an opportunity to review the nature of the complaint. For that reason, the remedies sought should be granted to remedy the injustice caused to the applicant due to the embarrassment, suffering and mental anguish he has suffered.

Counsel for the respondent disagrees. In his written submissions, he argues that although there indeed was a vacancy and eligible officers to fill it as required by Part (A-g), Order 2 (a) and (b) of *The Uganda Public Service Standing Orders*, (2010 edition), but the proper procedure was not followed as required by Part (A-c), Order 11 of the Standing Orders and Regulation 26 (2) of *The Public Service Commission Regulations*, 1999. It was not clear as what criterion was adopted in declaring the applicant the best candidate. According to Article 166 (1) (d) of *The Constitution of the Republic of Uganda, 1995* the Public Service Commission has supervisory powers of District Service Commissions. The Public Service Commission stipulated that the District Service Commission did not subject the applicants to any form of assessment in order to arrive at the best qualified candidate for the position. The process lacked transparency, fairness and merit. It was therefore proper that the process be rescinded and a transparent and fair process be conducted as recommended by the Public Service Commission. He prayed the court finds that the applicant is not entitled to any of the remedies sought and be pleased to dismiss the application with costs to the respondent.

According to rule 3 of *The Judicature (Judicial Review) Rules, 2009, S.I. 11 of 2009*, applications may be made under section 38 (2) of *The Judicature Act*, for orders of mandamus, prohibition, certiorari or an injunction (by way of judicial review). Judicial review of administrative action is a procedure by which a person who has been affected by a particular administrative decision, action or failure to act of a public authority, may make an application to the High Court, which may provide a remedy if it decides that the authority has acted unlawfully. While it has been said that the grounds of judicial review "defy precise definition," most, if not all, are concerned either with the processes by which a decision was made or the scope of the power of the decision-maker. A public authority will be found to have acted unlawfully if it has

made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness). Failure to observe natural justice includes: denial of the right to be heard, the rule against actual and apprehended bias; and the probative evidence rule (a decision may be held to be invalid on this ground on the basis that there is no evidence to support the decision or that no reasonable person could have reached the decision on the available facts i.e. there is insufficient evidence to justify the decision taken).

Decisions made without the legal power (*ultra vires* which may be narrow or extended. The first form is that a public authority may not act beyond its statutory power: the second covers abuse of power and defects in its exercise) include; decisions which are not authorised, decisions taken with no substantive power or where there has been a failure to comply with procedure; decisions taken in abuse of power including, bad faith (where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which the power was conferred), where power not exercised for purpose given (the purpose of the discretion may be determined from the terms and subject matter of the legislation or the scope of the instrument conferring it), where the decision is tainted with unreasonableness including duty to inquire (no reasonable person could ever have arrived at it) and taking into account irrelevant considerations in the exercise of a discretion or failing to take account of relevant considerations. It may also be as a result of failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision).

It may as well arise where there has been an excess of jurisdiction, including: error of law (in arriving at their decision, a decision-maker must not misinterpret the legislation under which they are acting or in any way indicate a misunderstanding of the law. Like *ultra vires* therefore, this ground involves persons or bodies acting beyond their lawful authority. Historically though, the term was applied to non-judicial bodies exercising legislative or administrative powers, whereas jurisdictional error was used in relation to inferior courts or tribunals exercising judicial

or quasi-judicial powers) or jurisdictional error (under this ground, a decision-maker must have legal authority to deal with the matter upon which they propose to make a decision) and fraud (In most cases, the sort of fraud which occurs is the falsification or suppression of evidence).

Judicial review on any of those grounds is concerned not with the merits of the decision, but rather with the question whether the public body has acted lawfully. Judicial review is not the re-hearing of the merits of a particular case, but rather the High Court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures. If the Court finds that a decision has been made unlawfully, the powers of the court will generally be confined to setting the decision aside and remitting the matter to the decision-maker for reconsideration according to law.

The court ought to proceed with due regard to the limits within which it may review the exercise of administrative discretion when interfering with an administrative function of an establishment or an employer as stated in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 2 ALL ER 680: [1948] 1 KB 223, thus; - (i) illegality: which means the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationality: which means particularly extreme behaviour, such as acting in bad faith, or a decision which is "perverse" or "absurd" that implies the decision-maker has taken leave of his senses. Taking a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it and (iii) Procedural impropriety: which encompasses four basic concepts; (1) the need to comply with the adopted (and usually statutory) rules for the decision making process; (2) The common law requirement of fair hearing; (3) the common law requirement that the decision is made without an appearance of bias; (4) the requirement to comply with any procedural legitimate expectations created by the decision maker.

It is trite that administrative systems which employ discretion vest the primary decision-making responsibility with the agencies, not the courts. As a result, the judicial attitude when reviewing an exercise of discretion must be one of restraint, often extreme restraint, only intervening when the decision is shown to have been unfair and irrational. The principle in matters of judicial review of administrative action is that to invalidate or nullify any act or order, would only be

justified if there is a charge of bad faith or abuse or misuse by the authority of its power and in matters of administrative decision making in exercise of discretion, the challenge ought to be over the decision making process and not the decision itself. The jurisdiction to decide the substantive issues is that of the authority and the Court does not sit as a Court of Appeal, since it has no expertise to correct the administrative decision, but merely reviews the manner in which the decision is made. It is elsewhere said that, if a review of administrative decision is permitted, the court will be substituting its own decision without the necessary expertise, which itself may not be infallible.

It follows from this that there will be circumstances in which although a decision is not the correct or preferable decision on the facts, it will not be open to judicial review. Conversely, there may be situations where a decision is the correct or preferable one, but may be set aside because it is subject to legal error. As noted earlier, the results or outcomes of the decision-making process are not primary concerns of judicial review. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*: (1986) 162 CLR 24, 40-41 citing *Wednesbury Corporation [1948] 1 KB, 228* the court opined;

The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion, which the legislator has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

Similarly in *Ridge v. Baldwin and Others [1963] 2 All ER 66 at 91, [1964] AC 40 at 96*, it was observed;

a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case.

Lord Brightman came to the same conclusion when in his holding at page 154 where he said:

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

The applicant faults the respondent for having promoted him to the post of Principal Assistant Secretary effective 1st July 2015 only suspend the promotion on 29th June 2015 and later revoke it on 1st April 2016, thereby reverting him to the position of Senior Assistant Secretary, which he held before the promotion, without affording him a hearing. He also queries the respondent's decision to have him transferred from Aliba Sub-County where he was a Sub-County Chief, to the District Headquarters upon his promotion to the position of Principal Assistant Secretary and then to Laropi Sub-county upon revocation of the promotion and resumption of his previous status of Senior Assistant Secretary. He claims that this was a violation of the applicant's right to just and fair treatment in administrative decisions.

There are some preliminary observations to be made about this application. Firstly, judicial review is ordinarily not granted where there are alternative remedies, unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. For example in *R v Lord Chancellor's Department ex parte Nangle [1992] 1 All ER 897* the applicant had been dismissed from his clerical position in the civil service. He appealed the decision to the Permanent Secretary, however the appeal was dismissed. The applicant thus sought judicial review of the decision to uphold the charges and dismiss the appeal. The department applied to dismiss the application on the ground that the conduct of disciplinary procedures in relation to Crown servants was not a matter of public law which was susceptible to judicial review since the applicant was employed by the Crown under a contract of employment and the appropriate remedy was an action for breach of contract. In addition, even if the applicant was not employed under a contract of employment there was an insufficient public law element in the dispute to justify judicial review. The court held that all the incidents of a contract of employment were present in the applicant's relationship with the Crown including offer, acceptance, consideration as well as an intention to create legal relations. Furthermore, despite the statement in para 14 of the *Civil Service Pay and Conditions of Service Code* that the relationship between civil servants and the Crown was regulated by the prerogative and that civil servants could be dismissed at pleasure, it could not have been intended that the conditions relating to civil servants' appointments were to be merely voluntary. In any event, even if there was no legally enforceable contract of employment between the applicant and the Crown the mere fact that the applicant had no private law remedy did not mean that he had a public law remedy. The internal disciplinary procedures of the applicant's department arose out

of his appointment and were consensual, domestic and informal, unlike an appeal to an independent body set up under the prerogative. As such, judicial review would not be an appropriate remedy since there was an alternative and more effective remedy available from an industrial tribunal.

Although contemporary jurisprudence is to the effect that applications for judicial review should be heard and determined without undue regard to procedural technicalities and that availability of other remedies is no bar to the granting of a judicial review relief, it can however be an important factor in exercising the discretion whether or not to grant the relief. I note that the applicant claims an infringement of a constitutional right guaranteed by article 42 of *The Constitution of the Republic of Uganda, 1995* to fair treatment in administrative action, which could have been enforced by way of a suit under article 50 of the Constitution. Secondly, employment disputes are better tried by ordinary suit rather than by affidavit evidence. Courts are hesitant to resolve such disputes by way of judicial review, except where perhaps the redress sought is in respect of violations of fundamental rights arising from an employment relationship, such as the right to be heard during disciplinary proceedings.

That notwithstanding, in *Re National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi* [2006] 1 EA 47, Nyamu, J (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the “three I’s” namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis. Also in *Kuria and three others vs. Attorney General* [2002] 2 KLR 69 that; “this therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit.”

The court will therefore be called upon to intervene in situations where public authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations of applicants, even where such conduct is not strictly within the purview of the

“three I’s.” It is for that reason that the court will determine this application on its merit rather than defer it to be resolved through the available alternative remedies.

At common law, the issue of promotion is not contestable unless it is enshrined in the contract of employment detailing criteria for promotion. An employee has no legal right or entitlement to insist on promotion to the next or any higher post, except if the contract of employment explicitly spelt out the conditions regulating promotions. It is in this regard that an employee could make a claim in terms of those conditions. Therefore, if an employer refuses to apply its mind by promoting an employee, the employee has no legal right to institute an action against the employer and claim that the employer acted unfairly. For this and other reasons, it is why the State has to intervene by enacting laws to protect the rights of employees against unfair labour practices, providing meaningful legal guarantees to civil servants and doing away with arbitrariness.

According to Order 10 (d) of Part (A – a) of *The Uganda Public Service Standing Orders (2010 edition)*, the power to appoint, confirm, discipline and remove officers from office in the public service is vested in the relevant District Service Commission in the case of Local Government staff except the Chief Administrative Officer, Deputy Chief Administrative Officer, Town Clerk and Deputy Town Clerk of City and Town Clerks of a Municipal Council. In the exercise of this power, District Service Commissions are under the supervision of the Public Service Commission which is empowered by Article 166 (1) (d) of *The Constitution of the Republic of Uganda, 1995* to guide and coordinate district service commissions.

The procedure to be followed on promotions is laid down by *The Uganda Public Service Standing Orders (2010 edition)* the relevant provisions of which state as follows;

APPOINTMENT ON PROMOTION (A - g).

2. When recommending a public officer for promotion, the following shall be considered:-
 - (a) Existence of a vacancy; and
 - (b) Eligibility for promotion i.e existence of eligible serving officers with the required competencies and having served for a minimum of 3 years at the lower grade.
4. An officer shall not be recommended for promotion until he / she has served for a minimum of three years in his or her substantive grade.

11. A Responsible Officer must not arouse in the mind of any one of his or her staff hope of promotion which does not rest with the Responsible Officer to fulfill. This also applies to enhancement of salary without promotion, or to salary assessment on first appointment or promotion.
13. The Service Commissions may determine procedures to test suitability in terms of competencies, for the purpose of promotion to all posts in the Public Service as deemed necessary. (Emphasis added).

Responsible Officer; in relation to a public officer means the Permanent Secretary of a Ministry or a Department under which the officer is serving; or head of Department as defined in the Public Service Act. Or Chief Administrative Officer or Town Clerk of a Local Government.

The *Public Service Standing orders* do not prescribe the procedures and criteria to be used in determining the suitability in terms of competencies, the person to be promoted. This is left to the respective District Service Commissions to determine. In the instant application, none of the parties furnished court with any authoritative source which guided the respondent's District Service Commission in considering the applicant for promotion. In absence of evidence of such procedures and criteria laid down by the respondent, the court proceeds on the assumption that the respondent's District Service Commission has not formulated or issued any.

The intention of framers of the *Public Service Standing Orders* in leaving the determination of procedures to test suitability in terms of competencies for the purpose of promotion is clearly that these decisions are to be made on merit in accordance with definite rules, instructions etc., which should be considered and treated as part of the terms and conditions of service of a public servant. Such decisions cannot be made capriciously or subjectively. Decisions on tenure, appointment, promotion and posting / transfer are of utmost importance in the public service. Such decisions should be entrenched and cemented in publicly available rules, instructions, policies etc. providing for an appointment process which is clearly defined, to assure quality, effectiveness and morale of the public service. There is also a public interest in the process for the appointment of public officers being clearly defined in that it is through transparency that the maintenance of the standing of the public service as a service of the State and not the service of any transient interests can be achieved. Potential candidates too need to know what the process is. Such regulations are intended to provide a self-contained, comprehensive structure governing promotions within the service. Transparency is likely to eliminate decision making based on

considerations other than merit. To permit District Service Commissions to waive parts of the process when they think it appropriate would have the potential to create an uncertain and unequal playing field and to undermine the independence and efficiency of public service.

The Supreme Court of Pakistan in the *Corruption of Hajj Arrangements' case (PLD 2011 SC 963)* clarified that even where there are no explicit rules governing the appointment process, and appointments are to be made in the exercise of discretionary powers, such discretion must be employed in a structured and reasonable manner and in the public interest. Appointing authorities cannot be allowed to exercise discretion at their whims, or in an arbitrary manner; rather they are bound to act fairly, evenly and justly and their exercise of power is judicially reviewable. Further in *Muhammad Yasin v. Federation of Pakistan (PLD 2012 SC 132)*, the same court clarified that, when called upon to do so, the Courts are “duty bound to examine the integrity of the selection process”, although they “will not engage in any exhaustive or full-fledged assessment of the merits of the appointee nor [...] seek to substitute [their] own opinion for that of the Executive.” It was noted in that case that just like the appointment of civil servants, their removal and dismissal from service has not been left to anyone’s whims and caprice. It is governed by rules and regulations, indeed, the anachronistic concept where government servants held office during the pleasure of the Crown had no place in a dispensation created and paid for by the people. Consideration of an officer for promotion is to be based not only on the relevant law and the rules (if any) but also is to be based on some tangible material relating to merit and eligibility which can be lawfully taken note of.

All state authority is in the nature of a “trust” (see objective XXVI. (i) of *The Constitution of the Republic of Uganda, 1995* regarding “Accountability”). Its bearers should therefore be seen as fiduciaries. Matters of tenure, appointment, posting, transfer and promotion of public servants, being an exercise of state authority, cannot be dealt with in an arbitrary manner. Decisions in that respect can only be sustained when they are in accordance with the law and established procedures. According to the “Applicability” section at page xiv of *The Uganda Public Service Standing Orders (2010 edition)*, “all public officers are bound by the Standing Orders” where the Definitions Section at page xxi defines a “Public officer” as having the meaning assigned by articles 175 (a), and (b) of *The Constitution*, that is; “any person holding or acting in an office in the public service... in any civil capacity of the Government the emoluments for which are

payable directly from the Consolidated Fund or directly out of monies provided by Parliament ” as well as article 257 (1) (x) and (y) of *The Constitution* where it means “a person holding or acting in any public office,” and where public service means “service in a civil capacity of the Government or of a local government.” In absence of any guidelines made or issued by the respondent’s District Service Commission regarding procedures to test suitability in terms of competencies for promotions within the service, resort then must be made to the minimum framework provided for by *The Public Service Commission Regulations, 2009, S.I No. 1 of 2009* whose relevant provisions provide as follows;

26. Vacancies.

- (1) Where a vacancy occurs or it is known that a vacancy shall occur in any public office in any Ministry or department, the responsible officer shall notify the Secretary of the vacancy upon clearance by the responsible Permanent Secretary.
- (2) If the responsible officer recommends that such vacancy should be filled by the appointment or promotion of an officer serving in the Ministry or Department in which the vacancy has occurred or shall occur, he or she shall, when reporting the vacancy to the Secretary—
 - (a) forward a list of all senior eligible officers in that Ministry or Department who are available to fill the vacancy, together with the records of their service in the public service;
 - (b) recommend one of those officers to fill the vacancy; and
 - (c) where his or her recommendation involves the supersession of an officer senior to the officer so recommended, give his or her reasons for recommending such supersession.
- (3) If the responsible officer does not recommend that the vacancy should be filled by the appointment or promotion of an officer serving in the Ministry or department in which the vacancy occurs or shall occur, he or she shall when reporting the vacancy to the Secretary—
 - (a) report to the Secretary the names of the most senior officers serving in the particular cadre or grade from which the promotion would normally be made and state his or her reasons why he does not consider that the officers named are suitable for promotion to fill the vacancy; and
 - (b) forward to the Secretary a draft advertisement setting out the details of the vacant post and the duties and qualifications attached to it.

From the above provisions, it is evident that an applicant for promotion is already an employee and must have been involved in various issues that would probably impact on whether he or she should be promoted or not. There are various reasons that may motivate for either a promotion of an employee or not, for example; - it could be as a result of the commitment of the employee, leading to attainment of set goals, the person's employment history, record of performance, skills and qualifications, the objective of service delivery improvement, availability of vacancies, availability of resources and other factors. Therefore, promotions can only be made on the basis of objective criteria such as "merit" and "seniority / fitness."

The task of those administering promotions is to see and ensure that there is fairness and justice in the exercise or the process. A person entrusted with discretion must direct himself or herself properly in law and established evaluative criteria. He or she must call his or her own attention to the matters which he or she is bound to consider. He or she must exclude from his or her consideration matters which are irrelevant to the decision he or she has to make. The court will generally leave to the District Service Commission the decision as to what evaluative criteria should be used, how they should be weighted, and how they should be applied. The court will focus its attention instead on the fairness of the procedures adopted and whether similarly situated candidates for promotion were treated equitably. Rarely will a court overturn a negative employment decision because the criteria were unclear but will most readily do so where the procedures were biased.

For example the case of *Mecklenberg v. Montana State Board of Regents* 13 FEP 462, 13 EPD 1 1438 (1976) the plaintiffs challenged the promotion and tenure review procedures at Montana State University, calling them arbitrary because they were not standardized, and discriminatory because women were excluded from the review process. The trial court agreed, saying that the decision, procedures and criteria were so imprecise that they permitted decision makers to use "a number of vague and subjective standards... [and that] there [were] no safeguards in the procedure to avert sex discriminatory practices" (1976, p. 6495). In its order, the trial court required the university to completely overhaul its governance and peer review process to make it more democratic and more objective.

Generally, if a District Service Commission uses fair procedures and can articulate a plausible, non-discriminatory reason for reaching the decision it did, the court will not interfere. Whereas

matters relating to promotions cannot be put in a strait-jacket and flexibility is inevitable, if however, rules and instructions are deviated from in what appears to be an abuse of discretion and as a result merit is discouraged on account of favouritism or considerations other than merit, it should be evident the public service will not remain independent or efficient and in that case there would be a justification for judicial review. The balance between the competing pulls of discretion and rule based decision making is a fine one where perception of fairness and even handed treatment is of utmost importance, hence the need to follow guidelines.

Standing Order 15 (c) of Part (A – a) of *The Uganda Public Service Standing Orders (2010 edition)*, provides that the responsible permanent Secretary shall be responsible for, “.....drawing the attention of Responsible Officers to any acts of commission or omission discovered in their respective Ministries, Departments or Local Governments for corrective action.” In the instant application, the burden lay on the applicant to prove that from the point when existence of the vacancy of Principal Assistant Secretary was declared to the District Service Commission going forwards, his promotion was compliant with the process, if any, laid out by the District Service Commission as mandated by para 13 of part A-g of the *Public Service Standing Orders*. The burden lay on the applicant to prove a *prima facie* case of compliance with the procedural requirements of promotion before the court could examine whether or not there was any illegality or irrationality involved in the respondent’s subsequent revocation of that promotion.

The legal framework for the expected minimum steps in that process, as provided by regulation 26 of *The Public Service Commission Regulations, 2009*, required the Chief Administrative Officer, when reporting the vacancy of Principal Assistant Secretary to the District Service Commission and recommending that it should be filled by the appointment or promotion of an officer serving with the respondent, to forward a list of all senior eligible officers in the respondent’s service who are available to fill the vacancy, together with the records of their service in the public service and to recommend one of those officers to fill the vacancy. Furthermore, to give his reasons for recommending supersession, if the recommendation involved the supersession of an officer senior to the officer so recommended.

From the facts available, the respondent’s Chief Administrative Officer rather than send a list of all eligible officers, instead recommended six eligible Senior Assistant Secretaries to the District

Service Commission. There is no evidence that he specifically recommended any single individual, let alone the applicant, out of the list of six candidates, as required by the regulation. It is not clear as well whether or not he submitted the records of their service alongside the names. When the Public Service Commission received an appeal against this process through which the applicant had been promoted to the position of Principal Assistant Secretary, by its letter dated 2nd June 2015 addressed to the respondent's Chief Administrative Officer and referenced DSC 33/95/01 Vol. 3, it commented as follows;

.....the appeal was presented to the Public Service Commission for consideration during its meeting held on Friday 22nd May, 2015.

During deliberations, Members observed that: -

- a) On 11th November 2014, your office made a submission to the District Service Commission recommending six (6) eligible Senior Assistant Secretaries for consideration for promotion to the post of PAS, Scale U2.
- b) Although all the six candidates possessed the required qualifications for appointment on promotion to Principal Assistant Secretary, the District Service Commission did not subject them to any form of assessment to arrive at the most suitable candidate.
- c) The decision to appoint Mr. Eberuku Pius on promotion to Principal Assistant Secretary was, therefore, subjective and not guided or based on any scientific process. It lacked transparency, fairness and merit.
- d) The whole promotional exercise was handled in an irregular manner without following the laid down procedures on promotion.

In view of the above, the appeal against the appointment of Mr. Eberuku Pius on promotion to the post of Principal Assistant Secretary, Scale U2 **was accepted**.

Members further decided that Moyo District Service Commission be advised to: -

- a) Rescind the appointment of Mr. Eberuku Pius on promotion to the post of Principal Assistant Secretary, Scale U2 and repeat the whole exercise by conducting it in a more transparent manner by following established principles, rules, regulations and laid down procedures governing recruitment in the Public Service.
- b) Always adhere to the established recruitment procedures for the Public Service when handling promotional exercises

The purpose of this letter is to communicate the decision of the Public Service Commission on the appeal and to request you to cause the DSC to take appropriate action as advised.

In making this recommendation, the Public Service Commission was exercising its power under article 166 (1) (d) of *The Constitution of the Republic of Uganda*, 1995 which authorises it to guide and coordinate District Service Commissions. The Public Service Commission in essence recommended that the District Service Commission adopts rule-based management practices in accordance with the letter and spirit of applicable laws and rules in its processes of promotions. This was not a directive but rather advice given to the District Service Commission which the latter was expected to follow, not as an order from a superior authority but instead with the knowledge that the exercise of powers by the District Service Commission in derogation to the direction of law to whose attention it had been drawn, would amount to disobeying the command of law, fairness and transparency in its processes of promotions.

Poor recruitment, selection and promotion decisions in the public service not only give rise to costly grievances, complaints, disputes, litigation and discontentment, but also put a strain on the entire system due to a poor post and person match, resulting in unnecessary redeployment of human resource to uphold productivity. It is not a surprise therefore that the District Service Commission opted to follow the advice, and revoked the applicant's promotion by its minute No. DSC/23/2016 which was communicated to the applicant in a letter written by the respondent's Chief Administrative Officer on 21st March 2016. The applicant contends that both the Public Service Commission and the District Service Commission violated his right to a fair hearing when the former gave the advice and the latter adopted the advice to revoke his appointment on promotion, to the post of Principal Assistant Secretary.

The right to a fair hearing is presumed to apply to public bodies when performing judicial or quasi-judicial functions only. In coming to the decisions they did, both the Public Service Commission and the District service Commission were performing administrative functions in a purely policy-oriented, traditionally administrative sphere of decision-making as opposed to a quasi-judicial function. Both in performance of that function realised that the applicant had assumed that office as a result of a process that was devoid of detailed policies and procedures in place to inform the objective, fair, equitable, consistent and responsible promotion and selection

practices; a process where the framework standardised methods and procedures in place to ensure compliance with the statutorily prescribed values and principles as well as national norms and standards regulating human resource in the public service were not followed; where the latter Commission had not adverted to any skills, competencies, training and traits or similar criteria it required from candidates that vied for the vacant post before appointing the applicant; and where the latter Commission did not have proof of having properly determined valid selection criteria and applied them consistently nor structured their selection processes in accordance with such criteria. The decisions taken by the Public Service Commission and the District Service Commission not having been quasi judicial or disciplinary in nature, the applicant had no right to a hearing before they were taken.

Although there is no right to a hearing with respect to bodies charged with performing purely administrative functions, not of a quasi-judicial nature, in a purely policy-oriented, traditionally administrative sphere of decision-making, however, when arriving at decisions with potentially serious adverse effects on someone's rights, interests or status in exercise of a purely administrative power, an administrative authority has a duty to act fairly which is a less onerous duty than that of observing the rules of natural justice demanded of such bodies when they act in a quasi-judicial capacity, such as when they undertake disciplinary proceedings.

The duty to act fairly is specifically applicable to decisions that are likely to have serious adverse effects on someone's rights, interests or status. This duty to act fairly is flexible and changes from situation to situation, depending upon: the nature of the function being exercised, the nature of the decision to be made, the relationship between the body and the individual, the effects of that decision on the individual's rights and the legitimate expectations of the person challenging the decision (see *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.)). That the doctrine of natural justice, as a legal doctrine which requires an absence of bias (*nemo iudex in causa sua*) and the right to a fair hearing (*audi alteram partem*), could be applied to administrative decision making not of a quasi-judicial nature was first allowed in *Ridge v Baldwin* [1964] AC 40 in which the House of Lords found that the Brighton police authority which had dismissed its Chief Constable (Charles Ridge) without offering him an opportunity to defend his actions, had acted unlawfully (*ultra vires*) in terminating his

appointment following criminal proceedings against him. In some situations, decision makers will be required to observe a high standard of participatory rights guaranteed by the *audi alteram partem* rule and due process. The purpose of the participatory rights in such situations is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. In *Wood v Woad*, L.R. 9, Kelly. C.B. it was held that the *audi alteram partem* rule "is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals," and further in *Fisher v Keane*, 11 Ch. D. 353 at 363 by Lord Jessel, M.R., that "clubs, or by any other body of persons who decide upon the conduct ought not, as I understand it, according to the others, to blast a man's reputation for ever, perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct." Furthermore, according to the decision in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C), it was decided that the duty of fairness owed in such circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have been given a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

In determining whether the respondent in this case met that standard, it must be borne in mind that even though in administrative processes certain ways and methods of judicial procedure may very likely be imitated, and that lawyer-like methods may find especial favour from lawyers, but the judiciary should not presume to impose its own methods on administrative or executive officers (see *Local Government Board v. Arlidge*, [1915] A.C. 120). The respondent was free, within reason, to determine its own procedures, adapted to suit the nature of the complaint and the circumstances of the case. It would be wrong, therefore, to ask of the respondent, in the discharge of its administrative duties, to meet the high standard of technical performance which one may properly expect of a court. All that is required is for the respondent to have done its best to act justly, and to reach just ends by just means, i.e. acting honestly and by honest means. The nature of this standard was explained in *De Verteuil v Knaggs and Another* [1918] A.C. 557, as

“a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice.” A high standard of justice is required only when the right to continue in one's profession or employment is at stake (see *Abbott v Sullivan [1952] 1 K.B. 189*).

The issue that was before the Public Service Commission and subsequently the District Service Commission for determination regarded the fairness, transparency and lawfulness of the process through which the applicant had been promoted to the office of Principal Assistant Secretary. It had nothing to do with the suitability of the applicant for that office nor were there any allegations of wrongdoing levelled against him. The complaint addressed structural defects in the process rather than any suspected personal deficiencies of the applicant. There does not appear to be any value that would have been added to determination of such an issue by hearing from the applicant first. The decision by both Commissions in the circumstances, taken without hearing from the applicant first therefore does not appear to be so irrational, unreasonable or procedurally improper as to warrant the intervention of this court.

On the other hand, the right to a fair hearing is designed to safeguard legitimate individual rights and interests, in respect of persons to whom such action relates, that might materially and adversely be affected by acts, omissions or decisions of any person, body or authority. Such must be legal rights or interests. There are many rights that arise from a contract of employment, but promotion is not one of them, it is more of a privilege than a right. Suitability for promotion is a discretion exercised by the appointing authority, the District Service Commission in this case. That discretion must be exercised in accordance with the requirements of the *Public Service Act*, the *Public Service Standing Orders*, and any other relevant legislation, rules, guidelines and principles. Where the determination of suitability for promotion depends on exercise of discretion of the appointing authority, promotion cannot exist as a matter of right but rather as a prerogative of the employer, exercisable as and when the circumstances favour a decision to that effect. Therefore, unlike a decision whether or not to terminate employment, where employment rights will materially and adversely be affected by leaving employment, hence the right to a fair hearing, with a decision whether or not to promote an employee there is no corresponding right

to a hearing because the employee remains in the employment, with no material or adverse repercussion of such a magnitude as would require a hearing.

Be that as it may, in seeking judicial review of the decision taken in the circumstances of this application where the right sought to be asserted sprung from a process that fundamentally deviated from the accepted or rule-based norm in matters of promotion in the public service without proper justification, the applicant seeks to invoke the powers of court to legitimise a process where there was no apparent screening and short-listing, a process that was unfair to other equally qualified candidates, which is not only flawed and open to criticism, but also possibly did not produce the desired results. Positions in the public service being matters of public interest, the application inevitably has to be tested on the touchstone of the manifest public interest in the process for the appointment of public officers being clearly defined, fair, equitable and transparent so that the public service may be maintained as an independent service of the State rather than any transient interests.

The discretion to promote a public servant is to be exercised, and exercised only, in accordance with such a process. It is not a discretion that may be exercised arbitrarily and without accountability. The Public Service Commission took issue with a process where no screening criteria appear to have been applied in the selection process. The District Service Commission by its subsequent conduct appears to have admitted this error. In order to be fair and objective in the screening of candidates, it is essential that a fixed set of valid criteria be applied in terms of each and every candidate that applies for a position, in order to identify the most suitable candidate. This ensures that the person or body entrusted with the screening of candidates does so in a responsible, objective and accountable manner. This does not appear to have been the case in the instant application. The applicant cannot use judicial review as a means to perpetuate himself in a position attained through a fundamentally flawed process that was conducted in a manner that is contrary to public interest. The situation in this application is akin to one that may give rise to the doctrine of *ex turpi causa non oritur actio* ("from a dishonourable cause an action does not arise"). Even if a promotion may be regarded as an interest for the employees, no legitimate enforceable interest may arise from an appointment process conducted contrary to public policy. It is the duty of this court to promote equal opportunity in public service employment by

eliminating unfair discrimination in any recruitment or promotion policy or practice. To grant this application would be to act to the contrary and against public policy.

The applicant further claims to have been treated unfairly. The right to fair treatment in administrative action is a guarantee that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. It may also include the right to be given reasons for any administrative action that is taken against a person, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person. Having resolved that the circumstances of this application did not confer upon the applicant the right to be heard but rather the right to fair treatment, the right to fair treatment in administrative action nevertheless guaranteed him the right to be given reasons for the administrative action that was taken by the District Service Commission, to the extent that it adversely affected his “assumed” promotion.

The evidence before me shows that the respondent invited the applicant to meet its District Service Commission on 14th January 2016 by a letter dated 7th January 2016. The purpose indicated in the letter was to “brief you on the proceedings of appeal made against your recruitment as Principal Assistant Secretary...” On the 22nd January 2016, the applicant responded that he had received the communication late on 22nd January 2016 and had by that date already been advised by his lawyer “to seek alternative means to respond to your call at an appropriate time.” In paragraph 6 of the affidavit in reply, the respondent avers that the applicant appeared at a later date whereupon the advice given by the Public Service Commission to the District Service Commission was read to him by the Secretary of the District Service Commission. The District Service Commission thereafter by its minute No. DSC/23/2016 revoked the promotion which decision was communicated to the applicant in a letter written by the respondent’s Chief Administrative Officer on 21st March 2016. The Court is concerned with evaluating fairness as Lord Hailsham L. C. ably puts it in *Chief Constable of North Wales Police v. Evans*, [1982] 1 W. L. R. 1155 at 1160;

It is important to remember in every case that the purpose ... is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of

individual judges for that authority constituted by law to decide the matters in question.

It is my considered view that he was given fair treatment by this process which satisfied his right to be given reasons for the administrative action that was taken against his promotion. Moreover, if the applicant enjoyed any right to a fair hearing before the decision to revoke the promotion was taken, that right was respected as well by that process considering the manner in which the decision was taken, after he was given an opportunity to appear before the District Service Commission and hearing from him. I have therefore not found any reason justifying issuance of an order of certiorari regarding the decision to revoke the applicant's promotion to the post of Principal Assistant Secretary and reversion to the position of Senior Assistant Secretary. I consider that claim to be misconceived reasons wherefore the prayer is rejected.

Lastly, the applicant contends that he deserves an order of certiorari, prohibition and an injunction to quash and restrain the respondent from posting him to Laropi Sub-County and from advertising the post of Principal Assistant Secretary. Apart from the claim that his right to be heard was not respected when the impugned decisions were made, which has already been decided to be a misconceived position, he has not advanced any other justification for the orders sought. The guidelines to be followed when public officer is to be transferred from one Local Government to another (and presumably from one duty station to another within the same Local Government) when need arises are specified by Standing Order 2 of part (F - c) of *The Uganda Public Service Standing Orders (2010 edition)* as follows; -

- (a) Posting must always be justified on genuine administrative considerations;
- (b) Postings must never be used as a punitive measure; and
- (c) Postings must be carried out in accordance with deployment plans.

There is nothing before me to suggest that the applicant's posting to Laropi Sub-County was done in violation of those guidelines. To justify grant of the orders sought, it was incumbent upon the applicant to show that his posting to Laropi Sub-County was a negative employment decision that was motivated by discrimination rather than by evaluation of his qualifications, administrative considerations and deployment plans of the respondent. In such a case, the applicant would have been expected to assert that, "but for" the use of an illegal criterion for the

decision (such as his sex, origin, religion, age, retaliation or as a punitive measure), the decision would have been positive, which would have required the court to examine the decision to ascertain what criteria were used to make the decision and whether they were applied fairly in this case.

Alternatively, the court may have intervened if there were averments that in taking that decision, the respondent had failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision; that the decision was procedurally unfair; that it was materially influenced by an error of law; that it was taken with an ulterior motive or purpose calculated to prejudice his legal rights; that the respondent failed to take into account relevant considerations; that the respondent acted on the direction of a person or body not authorised or empowered by any written law to give such directions; that the decision was made in bad faith; that the decision is not rationally connected to- (i) the purpose for which it was taken; (ii) the purpose of the empowering provision; (iii) the information before the respondent; or (iv) the reasons given for it by the respondent, or such similar grounds. Since the applicant has not advanced any averments of that nature, there is no basis for intervening in what is otherwise a purely administrative decision of the respondent.

The respondent's decision to advertise the post too has not been impugned on any sustainable grounds. The process through which the applicant was promoted having been found to be fundamentally flawed, it was necessary to start afresh, this time in compliance with the framework legal structures in place. It is unfortunate that the applicant decided not to participate in that process but in my view it is a process that has been undertaken in satisfaction of the public interest in ensuring that public offices are occupied or filled through a fair, even and justly applied, transparent process. There is no justification from granting injunctive relief in the circumstances.

The Court cannot substitute its own decision for that of the District Service Commission and the Chief Administrative Officer. The limit of the authority of court in judicial review is first to establish whether or not there was illegality, irrationality or impropriety in the process, whereupon if established it may then proceed to direct the District Service Commission and the

Chief Administrative Officer to comply with the legal and procedural requirements but not to substitute, its own decision for that of the District Service Commission and the Chief Administrative Officer. In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the ‘merits’ of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order. I have not found any of such reasons warranting this courts intervention.

In the final result, there is neither a basis for issuing the orders sought nor for the award of damages. This application is therefore dismissed with costs to the respondent.

Dated at Arua this 8th day of December 2016.

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Stephen Mubiru
Judge.