

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISC. CAUSE NO. 0179 OF 2015

MABLE NASAKA MUKULE :::::::::::::::::::: APPLICANT

Versus

1. ATTORNEY GENERAL

2. MINISTRY OF INTERNAL AFFAIRS :::::::::::::::::::: RESPONDENTS

BEFORE: HON.JUSTICE STEPHEN MUSOTA

RULING

This is an appeal by Notice of Motion brought under Section 98 of the Civil Procedure Act, Section 60(7) and (8) of the Uganda Citizenship and Immigration Control Act Cap.66, the Protocol of the East African Common Market, Order 43 Rules 2, 3 and 5 and Order 52 Rule 1 and 3 of the Civil Procedure Rules for orders that:

1. The order to depot the appellant issued by the Minister on 17th November 2015 be set aside.
2. Costs of the application be provided for.

The grounds of this application as enumerated in the Notice of Motion are that:

1. The immigration board rejected the appellant's application for an entry permit on 28th May 2015.

2. The appellant being dissatisfied with the reasons for rejection filed an appeal to the Minister within the prescribed period of 30days.
3. The Minister rejected the appeal on 17th November 2015 citing that the appellant's profession is not among that area where the East African Community Protocol applies.
4. The appellant has only 14 days to lodge her appeal to this court failing which, she is threatened with deportation.
5. The 2nd respondent or its agents are likely to execute the orders arising from the rejection of the appeal by the minister.
6. This court is vested with powers to stay the deportation.

The appeal is supported by the affidavit sworn by the applicant wherein she deponed that:

1. That she is a hotelier by profession and currently working with Sheraton Hotel Kampala as an Executive housekeeper and knowledgeable of the facts pertaining to this case.
2. That she filed her application with the immigration department at the 2nd respondent's office for an entry permit following an offer of employment by Sheraton Kampala and was given immigration No. IM 1846-15.
3. That her application had initially been differed on 7th May 2015 and Sheraton Kampala was requested to justify why her services were specifically needed.
4. That on 1st July 2015, notwithstanding the explanation given she was informed by the Director Human Resource Sheraton Kampala Mr. John Kasangaki that her application had been rejected on grounds that skills are locally available.
5. That an appeal was filed by M/s OARS & BT Advocates as counsel representing Sheraton Kampala which addressed all issues that had been raised in Annexure A2.
6. That on 17th November 2015 she was informed by the Director of Human Resource that the Minister rejected her appeal on grounds that areas of profession under the EAC protocol where persons can go to work freely does not apply to subject's profession.
7. That counsel advised her which advice she verily believes to be true that she can file an appeal before this court to have her case heard on its merits and also in light of the provisions of the East African Common Market Protocol.

8. That she is a professional hotelier having attended Utalli College in Kenya for 3 years between October 1993 and September where she awarded a certificate in housekeeping and laundry on 21st September 1995.
9. That she has been in the hotel profession for a period of 20 years specifically working in the housekeeping department that being her particular area of expertise in hotel industry and have attended numerous courses and seminars in this area as per the attached and marked K & L.
10. That as part of her professional carrier development as an executive housekeeper, Sheraton Hotel Kampala sponsored a 7 months training at the Rooms Academy in Casablanca Morroco from 26th September to 3rd October 2015.
11. That she has had a positive impact at the Hotel in her specialty as she has greatly improved the hotels housekeeping portfolio ever since she joined.
12. That she has been advised by counsel which advise she verily believes that as member of the East African Community she is allowed to provide her services within the community especially where such services are aimed at improving the quality level and standard of the recipient country.
13. That she has been advised by her counsel which advice she believes that the Minister's decision to deny her employment in Uganda contradicts Article 5(2)(c) of the protocol which is to the effect that there should be removal of restrictions by member states (of which Uganda is one) on movement of labour, harmonise labour policies, programs, legislation, social services among other objectives of the protocol
14. That she has been advised by counsel which advice she believes that the Minister's decision to deny her an opportunity to work in Uganda is discriminatory and therefore breach of part D of the protocol on free movement of persons and labour.
15. That by denying her the opportunity to work in the East Africa Community in line with the protocol is akin to rendering useless the efforts of the member states who not only ratified the protocol but whose primary objectives was to harmonise the free movement of goods and services within the community all aimed at building a strong trading block.
16. That it is in the interest of justice and equity that this honourable court grants this application and make orders that she should be allowed to stay a member of the East African Community and provide her services to her employer.

The respondent filed an affidavit in reply sworn by Mr. Bafirawala Elisha a Senior State Attorney in the Attorney General's chambers in which he stated as follows:

1. The affidavit is incurably defective and based on hearsay rather than information that is within the knowledge of the respondent.
2. That he knows both this application present issues that are not justifiable and/or capable of adjudication before this honorable court.
3. That he knows from his legal training and experience that the law applicable to the dispute is the law of the country in which the events constituting the cause of action.
4. That the events and acts giving rise to this application and constituting the cause of action are alleged to have occurred exclusively in Uganda and accordingly the law of Uganda is to be applied as the proper law to this application.
5. That he knows the East African Common Market Protocol has never been domesticated into the municipal law of Uganda by an act of parliament.
6. That he knows the implementation the East African Community Common Market protocol in the domestic context requires the domestication of the protocol and its annexes into municipal law in Uganda.
7. That as such, this court has no jurisdiction to entertain matters relating to violations of the East African Community Common Market protocol or its annexes as the same do not form part of the corpus of the Uganda law.
8. That without prejudice to the foregoing, he knows that the establishment and implementation of the common market is to be progressive and in a phased manner.
9. That he knows that the appellant's area of work doesn't fall under the areas of professional services under the East African Community Common market protocol or its annexes that have been fully liberalized or granted full taxes and national treatment in accordance to Uganda's schedule of commitments on the progressive liberalization of trade services under the protocol.
10. That as such Uganda retains the sovereign right to maintain laws or regulations on the supply of appellant's services so as to meet national policy objectives and give the symmetries existing with respect to the degree of development of services in the region.

At the hearing of the appeal, the appellant was represented by Mr. Brian Tendo while the respondent was represented by Mr. Atwine. Counsel for the parties were given leave to file written submissions which they did.

I have looked at the application as a whole and the affidavits and considered the submissions of respective counsel. I will proceed to resolve the issues as framed. These are:

1. Whether this court has jurisdiction to entertain this matter.
2. Whether the appellant's skills are locally available
3. Whether the appellant is entitled to work in Uganda.
4. What remedies are available to the parties?

Learned counsel for the respondent at the beginning of his submissions pointed out that the appellant's affidavit in support of the application is defective and prayed that it be struck out. He submitted that the affidavit is incurably defective and based on hearsay rather than information that is within the knowledge of the deponent. He contends that the whole affidavit is based on hearsay advice and information from counsel.

In reply learned counsel for the appellant submitted that the appellant followed the right procedure and the appellant's motion is indeed based on evidence grounded in her affidavit. He submitted that counsel for the respondent is doing a disservice to the court by confining understanding of affidavits to Order 19 Rule 3 of the Civil Procedure Rules particularly interlocutory applications ignoring the input of Order 52 of the Civil Procedure Rules on motions and other applications.

I must state that counsel for the appellant is trying to mislead the court. In as much as order 52 provides for the procedure for applications where the rules do not specifically provide for procedure and also the contents of the motion, the accompanying affidavit if any must follow Order 19 Rule 3 of the Civil Procedure Rules. The applicant therefore by proceeding under Order 52 does not in any way fetter the contents of an affidavit as provided by Rule 3 of Order 19. The two go hand in hand.

Order 19 Rule 3 provides as follows:

- 1. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove except in interlocutory applications on which statements of his belief may be admitted provided that the grounds thereof are stated.***
- 2. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies or extracts from documents shall unless court otherwise directs be paid by the party filing the same.***

The above rule therefore makes it clear that affidavits should be confined to matters which the deponent is capable of own knowledge to prove. However the same rule allows statements of the deponents' belief only in interlocutory applications. The appeal before me is not an interlocutory application and I accordingly agree with counsel for the respondent.

Be that as it may, it is not true as submitted by counsel for the respondent that the whole affidavit is based on hearsay. In as much as some parts of the affidavit are hearsay, this court has the power to sever part of the hearsay and leave those within the appellant's knowledge basing on the authority of **Col. Dr. Kizza Besigye Vs Museveni Yoweri Kaguta, Election Petition No. 01 of 2001.**

I will therefore decline to strike out the affidavit and only consider parts of the affidavit that are within the appellant's knowledge for ends of justice to be met.

Issue 1: Whether this court has jurisdiction to entertain this matter.

Section 60(7) and (8) of the Uganda Citizens and Immigration Control Act Cap.66 provides that;

“(7) A person aggrieved by a deportation order made under this section may appeal against the order of deportation within 15 days after the date of the order of the High Court and the person aggrieved by the decision of High Court may appeal against it to the Court of Appeal.

(8) Upon filing an appeal with the registrar of the High Court under this Section, the High Court may upon application by the appellant make an order that the deportation order shall be stayed pending the decision of the High court and the determination of any appeal from the High Court to the court of appeal but the High Court shall give its ruling on the stay of execution of the deportation order within two working days after the application is made.”

It is not disputed that the appellant is due to be deported from Uganda back to Kenya, the minister having rejected her appeal on grounds that the area of profession under the East African Community Protocol where persons can go and work freely does not apply to the subject's profession.

The law allows an appeal to this court to hear and determine an appeal from the decision of the Minister and thus this court is vested with unlimited original jurisdiction to handle such matters. I therefore do not agree with learned counsel for the respondent that this court has no jurisdiction in this matter.

The appeal is also brought under the protocol on the East African Common Market and Uganda is part of the East African Community and a signatory to the treaty. The treaty was domesticated in Uganda through the enactment of the East African Community Act 13 of 2002 and under Article 76 on the Establishment of a Common Market it is to the effect that there shall be established a common market among the partner states. Within the common market and subject to the protocol provided for in paragraph 4 of this article, there shall be free movement of labor, goods, services, capital and right of establishment.

In light of this provision, Uganda is therefore bound by the provisions of the treaty and the protocols made thereunder and the courts therefore have jurisdiction.

Issue 2: Whether the appellant's skills and experience are locally available.

It was counsel for the appellant's submission that the appellant is a professional hotelier having attended UTALI College in Kenya for three years and was awarded a certificate in housekeeping and laundry. He argued that the appellant has been in the hotel industry for a period of twenty years specifically working in the housekeeping department. He further submitted that the appellant has over the years gained skills and experience as defined. She has the ability to use her knowledge effectively in the execution and performance of her duties competently and this explains why she was head hunted by Sheraton Kampala. He contended that the standard of an executive house keeper that was set and applied by the board is in his opinion too low, one which perhaps included low grade Hotels. He submitted that in the absence of any reason to the contrary provided by the 1st and 2nd respondent, the appellant's skills and experience cannot be questioned or downgraded as locally available bearing in mind that there is no single catering institution in Uganda.

In as much as counsel for the appellant framed this issue and submitted on it ably, I am of the opinion that the issue was misplaced and perhaps, this explains why counsel for the respondent did not submit on it. The appeal is against the decision of the Minister and not the board's decision. The Minister in rejecting the appellant's appeal, stated that areas of professions under the East African Community Protocol where persons can go and work freely does not apply to the appellant's profession. He does not state anywhere that the skills are locally available. I will accordingly not dwell on this issue and it is dismissed.

Issue 3:

Counsel for the appellant submitted that in order to operationalize the articles in the treaty, Article 151 provides for the annexes and protocols to the treaty and in this particular case, it is the protocol on the East African Common Market schedule of commitment on the progressive liberalization of services as annexure 5. He argued that the above protocol annex was to set gradual elimination dates or control on the provision of services of some professionals within the community where each member state set elimination dates beyond which a member state was obliged to open up its borders for liberalization of services. He contended that the appellant as a Management Consultant qualifies to work in Uganda as the elimination date was 2010. He submitted that the 2nd respondent in its refusal letter unfortunately took a narrow interpretation of annexure 5 where the appellant's particular profession ie executive housekeeper is not specifically provided for. He submitted that the framers of the provision could not have possibly envisaged all types of professions in order to legislate for them and that it was incumbent upon the 2nd respondent to have a purposive interpretation of the provision in light of the spirit in which it was enacted in order not to defeat the intentions of the protocol/treaty.

In reply learned counsel for the respondent submitted that under Article 10 of the Protocol, the partner states guarantee a free movement of workers from each others' citizens within their territories. He submitted that the implementation of the East African Community Common

Market Protocol is guided by the relevant annexes which are the integral parts of the protocol. He argued that of particular relevance to this case is the free movement of workers and the schedule of commitment on the progressive liberalization of services annexure 5 to the protocol. He contended that free movement of workers and services under the protocol is regulated by the schedule of commitments on the progressive liberalization of service annex 5 to the protocol which also plays an important role with regard to the regulation of the mode for service suppliers. Further he submitted that the appellant's area of work which is housekeeping and laundry clearly does not fall under any of the areas of professional services under the East African Common Market protocol or its annexes that have been either liberalized or granted market access under the Uganda schedule of commitments. He submitted further that the appellant's contention that she qualifies under management consultant services is wholly untenable and not based on any evidence other than vague and generalized statements.

I agree with the submissions of learned counsel for the respondent. The implementation of the East African Common Market Protocol is guided by the relevant annexes and they form an integral part of the protocol. Professions where citizens can freely move and go work in pattern states is provided in Annex 5 of the protocol.

Learned Counsel for the appellant submitted that the appellant's profession falls under management consulting services but I don't agree. The appellant according to annexure 'A' to the affidavit in support of the motion is an Executive Housekeeper. To my understanding and knowledge, this does not fall under Management consultant services. The applicant allegedly attached her employment contract and under para. 1.4, it refers her to the attached annex for the summary of her job description.

She however did not avail this court with a copy of that annex for court to determine whether indeed as an Executive Housekeeper, her job description involved consultancy and short of that,

this court cannot assume it. In absence of that, I am unable to find that the profession falls under Management Consulting Services.

Learned Counsel for the appellant submitted that the Minister took a narrow interpretation of annex 5 and argued that the respondent misdirected itself on the purpose for which the annex was enacted. I must state that when the annexure was enacted, the member states and the draftsmen knew what they intended and if at all they had intended all professions including housekeeping and laundry to be part of the annex, the same would have been drafted short of which this court cannot find otherwise. It is my finding therefore that the Minister was right in stating that the areas of profession under the EACP where persons can go and work freely does not apply to the appellant's profession.

I accordingly dismiss the appeal.

Stephen Musota

Judge

27.06.2016