

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANEOUS CAUSE NO.82 OF 2020

DR. WILBERFORCE WANDERA KIFUDDE:..... APPLICANT

VERSUS

- 1. NATIONAL ANIMAL GENETIC RESOURCES CENTRE AND DATA BANK(NAGRC & DB)**
- 2. DR. CHARLES LAGU, EXECUTIVE DIRECTOR OF NAGRC & DB**
- 3. THE ATTORNEY GENERAL:..... RESPONDENT**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application under Articles 28(1), 42,44(c) and 50 of the Constitution and Section 33, 36 and 38 of the Judicature Act Cap 13 and the Judicature (Judicial Review) Rules, 2009 for the orders that;

- a) An Order of Mandamus doth issue compelling the 1st and 2nd respondents to pay the applicant's salary arrears from the 2nd of November, 2019 to date amounting to 57,000,000/= for six months in accordance with his letter of appointment and contract gratuity for the Financial year 2019/2020 amounting to shs 4,582,966/= in accordance with the applicant's initial contract.
- b) An Order of Mandamus doth issue compelling the 3rd respondent to exercise his constitutional duty as the Legal Advisor to all Government ministries and departments, to prevail on the 1st and 2nd respondent to uphold the policy decision taken by the Minister of Agriculture, Animal Industry and Fisheries to renew the contract of Employment of the Applicant.

- c) An Order of Certiorari quashing the decision of the 1st and 2nd respondents in advertising for applications to fill the position of Technical Manager Production currently substantively held by the applicant.
- d) An Order of Prohibition and Injunction against the respondents from further advertising for applications to fill the position of Technical Manager Production currently substantively held by the applicant in the 1st respondent organisation until expiry of his contract on 2nd November, 2022.
- e) An Order for general damages in the region of 500,000,000/= to be paid to the applicant jointly and severally by the respondents for the mental anguish and suffering occasioned to him after their deliberate failure to pay his salary for six months taking cognisance of bad financial hardships exacerbated by the Covid-19 disease which has caused a complete shut down of the economy.
- f) An Order for punitive damages to be paid personally by the 2nd respondent to the applicant arising out of his wanton acts in his deliberate refusal to pay the applicant salary despite the existence of a valid contract between the applicant and the 1st respondent; or as may be determined by this honourable court.
- g) Costs of the application to be paid to the applicant calculated on a higher scale

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavits in support of the applicant of Dr. Wilberforce Wandera Kifudde and Dr. Daniel K.N Semambo but generally and briefly state that;

- 1) The 1st respondent is a body established by the Animal Breeding Act, 2001 and is under Ministry of Agriculture, Animal Industry and Fisheries; and its Board of Directors is appointed by and answerable to the Minister responsible for Agriculture, Animal Industry and Fisheries.

- 2) That on the 28th October, 2016 the applicant was awarded a contract by the 1st respondent , through its Board of Directors, as Technical Manager, Production for a period of 3 years renewable on expression of interest in writing 3 months before expiry commencing on 2nd November, 2016 and ending 1st November, 2019.
- 3) That more than 3 months to the expiry of the applicant's contract, the Board of Directors of the 1st respondent was not duly constituted. As such, the applicant expressed his interest in having his contract renewed in writing to the Minister of Agriculture, Animal Industry and Fisheries.
- 4) The Minister after due consultations with the relevant stakeholders and appraisal of the applicant's track record renewed his contract with the 1st respondent for 3 years effective 3rd November, 2019 to 3rd November 2022 through a letter dated the 24th September, 2019.
- 5) That the 1st and 2nd respondents, without any notice to the applicant, and in contempt of the order of this court vide *Misc. Cause No. 1 of 2020; Wednesday Lauben v Attorney General and 2 others*, have gone ahead to advertise the position of Technical manager Production, which the applicant substantively holds.
- 6) The 2nd respondent has since failed/omitted/refused to pay the applicant his salary for a period of more six months and his gratuity entitlement for the financial year 2019/2020. As provided in clause of his initial contract despite reminders to him and the Board of Directors which was inaugurated in early 2020.
- 7) That the actions of the 1st respondent and 2nd respondents are tainted with illegality, irrationality and procedural impropriety.

- 8) That the deliberate illegal actions of the respondent have caused a lot of financial stress and occasioned grave suffering and mental anguish to the applicant for which payment of general and punitive damages is warranted.

The applicant also filed another affidavit in support deposed by Dr. Daniel K N Ssemambo, a former Executive Director since the establishment of the 1st respondent in 2003 until 2015 contending that;

- 1) That during his tenure as Executive Director there were times when the Board of Directors was not constituted and under such circumstances, the practice was for the Minister to execute the functions of the Board in order for the activities of the organisation not to be stifled.
- 2) That in 2008, his term of Office as Executive Director had expired and there was no Board and Minister of Agriculture then Eng Hillary Onek reappointed him to continue serving as Executive Director.
- 3) That further in 2014, a similar scenario happened and the then Minister for Agriculture, Hon Tress Buchanayandi extended his tenure as Executive Director for six months.

The respondents opposed this application and the 1st and 3rd respondent's filed an affidavit in reply through the Chairperson of the Board of National Genetic Resource and Data Bank Dr. Johnson Nkuuhe.

- 1) The deponent is aware that the applicant's contract of employment was renewed by the Minister of Agriculture, Animal Industry and Fisheries from 2nd November 2019 until 2nd November 2022.
- 2) That the 1st respondent's Board was not fully constituted until 4th February 2020 when it became fully constituted.
- 3) That there are several other staff of the 1st respondent who are no longer employees of the 1st respondent because their contracts expired and there was no Board to renew the contracts.

- 4) That the renewal of the contract of the applicant was illegal as the Board of Directors of the 1st respondent was not constituted and as such the contract is void.
- 5) That upon appointment of a duly constituted Board, the 3rd respondent is in the process of regularization of its staff contracts in accordance with the staff manual.
- 6) That the 1st and 3rd respondents are not liable for any actions relating to the alleged renewal of the contract of employment of said Kifudde Wandera Wilberforce since it was not made by any of its organs.
- 7) That the 1st respondent as a government organisation needs to fill the vacancies advertised among which is the position of Technical Manager Production to enable service delivery.
- 8) That the retirement age is 60 years according to Human Resource manual and only under exceptional circumstances can an employee's contract be considered for two biennial extensions up to the age of 66 years after which retirement shall be compulsory.
- 9) That the applicant's contract was renewed by the Minister contrary to Organisation's Human Resource Manual and the renewal of a contract without the recommendation of the Board as per the Animal Breeding Act is illegal and in contravention of the provisions set therein.

The 2nd respondent filed an affidavit in reply similar to the one filed by Executive Director briefly as follows;

- 1) That the impugned contract dated 24th September, 2019 is a forgery since on 28th November 2019, the applicant through his lawyers had written a letter dated 27th November, 2020 from Reeve Advocates & Solicitors demanding that the 2nd respondent does not terminate the

services of the applicant because he was still lobbying for a contract from the Minister and had not yet received any response from the Minister by the time of writing the said letter.

- 2) That on 3rd January, 2020 the 2nd applicant received advice from the Solicitor General that the applicant was no longer a suitable employee for the 1st respondent and that in fact, his continued possession and occupation of the 1st respondent's house and other facilities respectively was continued trespass and an illegality under the laws of Uganda.
- 3) That the track record of the applicant is not rosy as alleged since he has in fact been in illegal possession of government stores, where he has been a subject of investigations in respect of a procurement of 6 bulls and has in fact jumped police bond.
- 4) That the applicant is not entitled to any reliefs sought in the application and supporting affidavits.

At the hearing of this application the parties were directed to file written submissions which I have had the occasion to read and consider in the determination of this application.

The applicant's counsel raised two issues for determination by this court;

1. *Whether this is a proper case for judicial review?*
2. *Whether the action of the 1st and 2nd respondent in advertising the position of Technical Manager Production was illegal, procedurally improper and irrational?*
3. *Whether the action of the respondents in not paying the applicant pursuant to his new contract issued by the Minister is illegal and irrational?*
4. *Whether the applicant is entitled to the reliefs sought in the application?*

The applicants were represented by *Mr. Crispus Ayena Adongo & Mr. Kifudde Gordon* whereas the 1st and 3rd respondent was represented by *Ms Nabaasa Charity* and the 2nd respondent was represented by *Mr. Grace Karuhanga and Mr. Kamukama David*.

Preliminary Objections

The 1st and 3rd respondent objected to the affidavit in rejoinder contending that it contained new evidence and documentation that they needed to respond. They prayed that the same be struck out.

The applicant in response contended that the documents were not new to the respondents and that they knew or ought to have known about them. The applicant further submitted that the respondents should have sought leave of court to file a surrejoinder.

Analysis

The general law on applications is ***Order 52 of the Civil Procedure Rules*** which provides;

Rule 3; *Every notice of motion shall state in general terms the grounds of application, and, where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.*

Rule 7: *All applications by summons shall be in chambers and, if supported by affidavit, a copy of any affidavit or affidavits relied upon shall be attached to each copy of the summons directed to be served.*

It can be deduced from the above provisions that the law does not envisage filing of affidavit in rejoinder to an application. Therefore a party who intends to use additional affidavits must seek leave of court to file a supplementary affidavit in support of their application.

Similarly, ***Rule 7 of the Judicature (Judicial Review) Rules, 2009*** provides as follows;

- (1) The Court may, on hearing of the motion, allow the applicant to amend his or her motion, whether by specifying different additional grounds or reliefs or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application.*
- (2) Where the applicant intends to ask to be allowed to amend his or her motion or to use further affidavits, he or she shall give notice of his or her intention and of any proposed amendment, to every other party.*
- (3) Any respondent who intends to use any affidavit at the hearing shall file it with the registrar of the High court as soon as practicable and in any event, unless the court otherwise directs, within sixty days after service upon the respondent of the documents required to be served by subrule (1).*

It can further be seen from the above rules that the law does not provide for filing of the so called affidavits in rejoinder, rebutter, surrejoinder or surrebutter. Any additional or further affidavits shall be filed with leave of court.

According to ***Black's Law Dictionary 11th Edition, 2019***; *Rejoinder* refers to common-law pleading: Defendant's answer to the plaintiff's reply.

Surrejoinder refers to common-law pleading: means the plaintiff's answer to the defendant's rejoinder

Rebutter refers to Common-law pleading: the defendant's answer to the plaintiff's *surrejoinder*; the pleading that followed the *rejoinder* and *surrejoinder*, and that might in turn be answered by the *surrebutter*.

Therefore, it is clear that the above refers to pleadings and not evidence as presented to court. Any party who files an affidavit under any of those headings would be wrong since an affidavit is not a pleading within the meaning of applications.

The applicant's affidavit in rejoinder was wrongly filed in court without leave of court and the same is struck out since it is contrary to the Judicature rules and the Civil Procedure rules.

ISSUE ONE

1. Whether this is a proper case for judicial review?

The applicant's counsel submitted that the powers of the Constitution provides for the foundation of judicial review remedies and entitles any person to apply to court for judicial review remedies. It was their contention that in order for an applicant to succeed in an application for judicial review, the decision complained of must be tainted with illegality, irrationality and procedural impropriety. The applicant is challenging the decision of the 1st and 2nd respondent of advertising the position of Technical Manager Production which the applicant holds a contract.

The 2nd respondent argued that the application was filed out of time since the complaint is based on contract purportedly entered into and commenced on 1st November. Secondly, the application is about breach of contract and therefore not proper for judicial review.

Analysis

According to the ***Black's Law Dictionary*** at page 1013 **11th Edition Thomson Reuters, 2019** Judicial review is defined as a court's power to review the actions of other branches or levels of government; especially the court's power to invalidate legislative and executive actions as being unconstitutional. Secondly, a court's review of a lower court's or administrative body's factual or legal findings.

The power of Judicial review may be defined as the jurisdiction of superior courts to review laws, decisions and omissions of public authorities in order to ensure that they act within their given powers.

Judicial review per the Judicature (Judicial Review) (Amendment) Rules, 2019 means the process by which the high Court exercises its supervisory jurisdiction over proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties;

Broadly speaking, it is the power of courts to keep public authorities within proper bounds and legality. The Court has power in a judicial review application, to declare as unconstitutional, law or governmental action which is inconsistent with the Constitution. This involves reviewing governmental action in form of laws or acts of executive for consistency with constitution.

Judicial review also establishes a clear nexus with the supremacy of the Constitution, in addition to placing a grave duty and responsibility on the judiciary. Therefore, judicial review is both a power and duty given to the courts to ensure supremacy of the Constitution. Judicial review is an incident of supremacy, and the supremacy is affirmed by judicial review.

It may be appreciated that to promote rule of law in the country, it is of utmost importance that there should function an effective control and redressal mechanism over the Administration. This is the only way to instil responsibility and accountability in the administration and make it law abiding. Judicial review as an arm of Administrative law ensures that there is a control mechanism over, and the remedies and reliefs which a person can secure against, the administration when a person's legal right or interest is infringed by any of its actions.

When a person feels aggrieved at the hands of the Administration because of the infringement of any of his rights, or deprivation of any of his interests, he wants a remedy against the Administration for vindication of his rights and redressal of his grievances. The most significant, fascinating, but complex segment in judicial review is that pertaining to judicial control of administrative action and the remedies and reliefs which a person can get from the courts to redress the injury caused to him or her by an undue or unwarranted administrative action in exercise of its powers.

The effectiveness of a system of judicial review under Administrative law depends on the effectiveness with which it provides remedy and redress to the aggrieved individual. This aspect is of crucial significance not only to the person who has suffered at the hands of the administration but generally for the maintenance of regime of Rule of Law in the country.

The weakness of the "remedial and redressal" aspect of administrative law will directly contribute to administrative lawlessness and arbitrariness. According to **WADE & FORSYTH Administrative Law, 34, 8th Edition** 2000, "Judicial review thus

is a fundamental mechanism of keeping public authorities within due bounds and for upholding the rule of law.

In Uganda, great faith has been placed in the courts as a medium to control the administration and keep it on the right path of rectitude. It is for the courts to keep the administration within the confines of the law. It has been felt that the courts and administrative bodies being instruments of the state, and the primary function of the courts being to protect persons against injustice, there is no reason for the courts not to play a dynamic role in overseeing the administration and granting such appropriate remedies.

The courts have moved in the direction of bringing as many bodies under their control as possible and they have realized that if the bodies participating in the administrative process are kept out of their control and the discipline of the law, then there may be arbitrariness in administration. Judicial control of public power is essential to ensure that it does not go berserk.

Without some kind of control of administrative authorities by courts, there is a danger that they may be tempted to commit excesses and degenerate into arbitrary bodies. Such a development would be inimical to a democratic constitution and the concept of rule of law.

It is an accepted axiom that the real kernel of democracy lies in the courts enjoying the ultimate authority to restrain the exercise of absolute and arbitrary powers by the administration. In a democratic society governed by rule of law, judicial control of administration plays a very crucial role. It is regarded as the function of the rule of law, and within the bounds of law and due procedure.

It is thus the function of the courts to instil into the public decision makers the fundamental values inherent in the country's legal order. These bodies may tend to ignore these values. Also between the individual and the State, the courts offer a good guarantee of neutrality in protecting the individual.

The courts develop the norms for administrative behaviour, adjudicate upon individuals' grievances against the administration, give relief to the aggrieved person in suitable cases and in the process control the administration.

In the present case, the applicant is challenging the decision of the respondents' decision of refusing to pay his salary and also advertising his job as Technical Manager Production and yet he purports to have a valid contract extended by the Minister.

The nature of the complaints made by the applicant fall squarely within the ambit of judicial review and it is the duty of this court to interrogate the actions of the decision makers and give appropriate orders.

The argument also presented by the 2nd respondent to show that the application is time barred is equally untenable since the applicant is challenging the decision to run an advert for the said position he is holding. The application was brought within the time frame envisaged under the Judicature (Judicial Review) Rules.

Whether the action of the 1st and 2nd respondent in advertising the position of Technical Manager Production was illegal, procedurally improper and irrational?

The applicant's counsel submitted that the decision by the board of the 1st respondent and 2nd respondent in advertising the applicant's post which he substantially holds was illegal. The procedure followed in advertising for it without according the applicant his fundamental right to be heard was unfair and procedurally improper since they knew that the Minister had renewed his contract and this Honourable court had dismissed an application for judicial review seeking to quash his new employment.

The actions of the respondent in advertising the post of Technical Manager Production were therefore malafide since it involved improper exercise of power and violation of principles of natural justice in respect of a fair hearing that is a right while taking administrative decisions.

The respondents contended that the applicant's contract expired on 1st November 2019 and the Minister purported to renew it from 3rd November 2019 to 2nd November 2022. **Section 24 of the Animal Breeding Act** states that; The Board shall appoint other employees to facilitate the proper running of the Centre under the terms and conditions of the Board.

It was the respondents' submission that the Minister of Agriculture had no powers to appoint other employees and no amount of justification can be applied to circumvent and usurp the powers of the Board which is not possible under the Act. Therefore the contract was illegal and *void ab initio* and the 1st respondent does not recognise it and it could only be recognised by the board.

Analysis

The basis for the challenge of the applicant is that the respondent acted without authority or contrary to the law when they advertised for applications to fill the position of Technical Manager Production which was held by the applicant upon renewal by the Minister of Agriculture.

It is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law-to the extent at least that it expresses this principle of legality-it is generally understood to be a fundamental principle of constitutional law.

Lawfulness thus stands at the core of the general constitutional law principle of legality and applies to all public actions. An analysis of lawfulness in administrative law thus always involves comparing the administrative action to the authorisation for that action in the relevant empowering provision. Therefore lawfulness or lack of mandate provides administrators with the tools to identify specifically what they are entitled to do.

For every action that an administrator takes, there must be a valid authorisation in an empowering provision. In absence of such authorisation the administrative action will be unlawful.

A particularly challenging part of lawfulness relates to the reason, purpose or motive for which the action was taken. This is especially the case where the empowering provision grants a wide discretion to the decision maker/administrator.

The nature of the Animal Breeding Act 2001 spells out the roles and powers of each organs or players in the National Animal Genetic Resources Centre and Data

Bank (NAGRC & DC) in fulfilling its purpose and it such exercise of power or discretionary power that a party may be challenging for lack of mandate.

No administrative power is given without a reason or purpose, doing so would breach the principle of rationality which is a requirement for all public action including legislation. See ***Pharmaceutical Manufacturers Association of South Africa & Another: In Re Ex Parte President of the Republic of South Africa & Others*** 2000 (2) SA 674(CC)

Whatever the administrator's choice may be in exercising his or her (wide) discretionary powers, the administrators purpose in making that choice or his or her reasons for doing so must be aligned to what is authorised in the empowering provision.

Section 24 of the ***Animal Breeding Act 2001*** provides that;

“ The Board shall appoint other employees to facilitate the proper running of the Centre under the terms and conditions of service by the Board.

The applicant's contract expired and in accordance with the provisions of the Act, the Board has advertised to have the same filled in accordance with the law. The applicant on the other hand contends that the position is not vacant since the Minister of Agriculture in absence of the Board had renewed his contract until November 2022.

The question for this court to determine is between the Minister of Agriculture and the Board who is vested with the powers to fill the vacant position of Technical Manager Production. The applicant further contends that during the time when the term of the Board has expired core functions of the Board reverts to the Minister of Agriculture as the appointing Authority of the Board.

The powers of the two players have been clearly demarcated under the Act and no party should overlap the other in execution of their mandate as given by Parliament. The Minister's powers are confined to appointment of the board and the same should never be exercised directly without the board. This implies that at any one time the Board must be fully constituted and made operational.

The law does not envisage what the Minister of Agriculture did and this would amount to an *administrative coup de'tat* for the Minister to refuse to appoint the Board so that he can directly get involved in the day to day management of the Centre or appointment of staff. In the case of **Uganda Blanket Manufacturers (1973) Ltd v Attorney General Supreme Court Civil Appeal No. 15 of 1992** which is very similar to the present case in principle; The Minister of Industry used force and locked out the management of the government-owned company. *"The Supreme Court held that Decree 22 of 1974 provided that the Minister of Industry shall control the management of the company through the Board of Directors. Therefore it was wrong for the Minister to purport to have wound up the board, which was a statutory body so that he could control the management of the company directly, was illegal"* See **Public Law in East Africa by Ssekaana Musa page 96**

Where a statute creates different authorities to exercise their functions thereunder, each of such authority must exercise the functions within the four corners of the statute. A statutory authority must be permitted to perform its statutory functions in respect whereof even any higher authority cannot issue any direction.

Parliament cannot be supposed to have intended that the power should be open to serious abuse by the Minister of Agriculture. It must have assumed that the designated authority would act properly and responsibly, with a view to doing what was best in the public interest and most consistent with the policy of the statute to always ensure that the Board is fully constituted. It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion and power. See **Sundus Exchange & Money Transfer and 5 Others v Financial Intelligence Authority High Court Miscellaneous Cause No. 154 of 2018**

The 1st respondent was acting within its powers to advertise for applications to fill the position of Technical Manager Production purportedly held by the applicant, since the Minister of Agriculture did not have any powers to renew the said contract and it was therefore illegal and null and void.

Accordingly this issue fails and it is resolved in the positive

Whether the action of the respondents in not paying the applicant pursuant to his new contract issued by the Minister is illegal and irrational?

Since the court has found the renewal of the said contract by the Minister of Agriculture to be illegal. This issue fall by the way side. The applicant is not entitled to receive any salary payment.

Whether the applicant is entitled to the reliefs sought in the application?

The applicant is not entitled to any of the reliefs sought.

The application fails and is accordingly dismissed and but each party shall bear its costs. Since the applicant is not to blame for the actions of the Minister of Agriculture who acted illegally.

I so Order

Dated, signed and delivered be email and whatsapp at Kampala this 7th day of August 2020

**SSEKAANA MUSA
JUDGE
7th/08/2020**