

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

MISCELLANEOUS APPLICATION NO. 380 OF 2020
(ARISING FROM HCMC No. 48 of 2018 & HCCS No.84 of 2016)

DR. BADRU SSESSIMBA=====APPLICANT

VERSUS

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|---|---|--------------------|
| 1. THE CHIEF ADMINISTRATIVE OFFICER
(NAKASEKE DISTRICT LOCAL GOVERNMENT) | } | RESPONDENTS |
| 2. NAKASEKE DISTRICT LOCAL GOVERNMENT | | |

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an Application brought under the Articles 20, 28, 40(2), 42 & 50 of the Constitution of the Republic of Uganda (as amended), Section 33, 36(1)(A), & 37(1)(2) Of The Judicature Act Cap 13 and Section 98 CPA, seeking the following reliefs;

1. That the Applicant be reinstated for with to his position of District Health Officer.
2. The Respondents be ordered to pay all salary arrears from date of alleged termination up to time of reinstatement up to time with interest at court date.
3. The Respondents pay general and exemplary damages and interest thereon.
4. The Respondents pay costs of this application.

The grounds of the application are specifically set out in the Notice of Motion and also in detail in the affidavit of Dr Badru Ssessimba the Applicant herein, which shall be read and relied on at the hearing but briefly are that;

1. That in Judicial Review 048 of 2018 this court declared that the decision to terminate the applicant vide Min No. 24 of 2007 employment was illegal and the said minute was rescinded by court and decision to terminate the applicant was quashed on 26th October 2018.
2. That subsequent to that court in HCCS No.84 of 2016 did on 3rd March 2020 declare that the interdiction of the applicant was illegal.
3. Following the above decisions the applicant did on 01st November 2018 write to the head respondent district to recall and reinstate the applicant to his position as District Health Officer.
4. The respondent duly received the said letter but kept silent, with no likeness to act as expected of him (CAO) or the human Resource Centre officer.
5. That on 4th June 2020, the applicant through his lawyers wrote a reminder letter for the recall and reinstatement of the applicant.
6. That in the said letter (4th June 2020) the applicant cautioned the respondent the failure to recall, would result into initiation of proceedings
7. That to date the respondent has neglected and/or refused to have the applicant recalled and reinstated with act is inconsequential in defiance of the court order.
8. That the Applicant was a right to continue being in the employment of the respondent and to be paid all his salary arrears from date of termination.
9. The applicant continues to suffer the fate of unemployment, with no earnings and has been greatly inconvenienced for which all seeks for general and exemplary damages for among others depriving the applicant employment of the projected retirements benefits
10. That it's only fair and just that this court enforces the reinstatement of the Applicant.

The Respondents filed an affidavit in reply sworn by Bigirwa Kaliisa Samuel the Deputy Chief Administrative Officer of Nakaseke District Local Government the Respondent in charge of legal matters opposing the application whose grounds are briefly that;

1. Paragraph 2 of the Applicant affidavit, the Applicant's employment with the second respondent was terminated on grounds of irregular appointment upon which he applied for Judicial Review in Miscellaneous Cause No.16 of 2018, the Applicant in Miscellaneous Cause No. 16 of 2018 prayed for a consequential order that the Applicant be declared still appointed as District Health Officer for the Respondent.
2. The court in its judgment did not make an order for reinstatement of the applicant to his position as District Health Officer. That the court having declined to reinstate the applicant is now functus officio and the only remedy for the applicant was to appeal which he did not do.
3. Nevertheless, the second Respondent has since appealed the decision in Miscellaneous Cause No. 16 of 2018 that quashed the second respondent's decision to terminate the Applicant. The appeal is yet to be fixed and heard.
4. The court in Civil Suit 84 of 2016, only declared that the interdiction of the applicant beyond statutory period of 3 months from April 2012 to September 2015 period was illegal and the said interdiction was before the applicant's termination and consequential application for judicial review.
5. In response to paragraphs 4 to 10, the applicants employment record at the time of recruitment into service of Nakaseke District Local Government and found:-
 - i) That the Applicant was first employed by Masaka District Local Government as a clinical officer on 5th November 1993 and later promoted to medical officer on 15th February 2001.
 - ii) That the Applicant was thereafter interdicted in Masaka.

- iii) That during his interdiction, the applicant applied for a job of medical officer in Wakiso District Local Government.
- iv) That on 28th July 2004, the Chief Administrative Officer Masaka District wrote to the Chief Administrative Officer Waksio inquiring in what capacity the applicant was working with Wakiso.
- v) That in a letter dated 5th August 2004, the Chief Administrative Officer Wakiso confirmed that the applicant was employed on probation by Waksio District Local government.
- vi) That in a letter dated 16th August 2004, the permanent secretary to the ministry of local government advised the Chief Administrative Officer of Wakiso that following the interdiction, of the applicant in Masaka District, the Applicant should not be re-employed by any government department unless cleared.
- vii) That following that advise, the applicants employment in Wakiso was thereafter terminated.
- viii) That the applicant thereafter applied to the respondent and was employed as district health officer of the same.
- ix) On 28th July 2004, the Chief Administrative Officer Nakaseke wrote to the Chief Administrative Officer Wakiso requesting for some information on the applicant.
- x) On 14th August 2004, the chief Administrative Officer Wakiso responded that the applicant was employed and later terminated by Wakiso District which he never disclosed in his application form to the respondent.
- xi) That on 25th October 2004, the applicant was also dismissed from his employment in Masaka.

- xii) That on 14th February, 2005, the applicants appeal for review against dismissal by Masaka District Local Government was dismissed by the Public Service Commission (PSC).
 - xiii) That the applicant did not disclose these previous terminations on the application form to the respondent.
6. While at Nakaseke, the Applicant was interdicted after investigations by the Health Monitoring Unit found him guilty of gross mismanagement in his department which led to the applicant being indicted in the Anti –corruption court and later acquitted.
 7. The acquittal in the anti-corruption court does not entitle the applicant to be reinstated in his position. That the withdraw of vital information by the applicant on his record of employment to wit that he was previously dismissed, has caused fundamental breach of trust of the applicant by the second respondent.
 8. That if the applicant had disclosed this information, he would not have been employed and that his deliberate concealing of vital information was an act of dishonest tainted with fraud which disentitles him to further employment with the respondent an is in breach of both Public Service Regulations and the Leadership Code Act
 9. In reply to paragraph 11, the respondents have in no way impeded the applicant from finding alternative employment and that from the date of his termination, the applicant has always been at liberty to find alternative employment. That I have perused the applicants record and found that the applicant was born on 1st February 1960. By the government regulations, the applicant retired at 1st February 2020, when he clocked 60 years and cannot technically be reinstated beyond his retirement age.

Court directed all parties to file submissions which have been considered.

Counsel for the Applicant submitted that Judicial Review 48 of 2018 court ordered and declared that, *“The application for judicial review is hereby granted and the decision of Nakaseke District Service Commission terminating the appointment of the applicant and rescinding Min No. 24 of 2007 is quashed for illegality”*. In HCCS No.84 of 2016 court declared, *“It is declared that the continued interdiction of the plaintiff beyond the statutory period by the defendant was illegal.”*

Following the above 2 decisions the respondent was duty bound to recall and reinstate the applicant as of 01st November 2018 upon receipt of the letter from the applicant’s lawyers. The said letter of 1st November 2018 was followed by other letters from the applicant’s lawyers but the respondent adamantly and contemptuously without any written communication in reply to the letters refused to do so in the premise under looking the decisions of this court. It is our submission that when a decision to terminate is quashed by court, it follows that the respondent is duty bound to allow the applicant continue with his unemployment with the district respondent and such reinstatement is deemed automatic.

Counsel for the Applicant further submitted that the 1st respondent the Chief Administrative Officer Mr. John Katoroma who attended court on 20th August 2020 did not file an affidavit in reply. The legal consequence of that omission as per cases of **Charles Sanyura Vs H. Komunda HC Civil Appeal No. MMB and Shelton Okabo vs Standard Chartered Bank (u) Ltd (1992) KALR 115 –HCT MA No. 51 Of 1992** that; *“Failure to file an affidavit in reply to the support affidavit filed by counsel for the applicant , the statement of facts contained in the affidavit in support of the application remain uncontroverted it is an admission.”*

The District head by implication does not in law opposed the application and it ought to be granted as prayed for.

Plaintiff's counsel submitted that the respondent in paragraph 11 of its affidavit in reply recognizes that "the Anti-Corruption Court acquitted the applicant of any wrong doing. Therefore in view of paragraph 11 of the respondents' affidavit in reply paragraph 10 of the affidavit in reply is made out of ill will and/or malice in the view of the acquittal by the Anti-Corruption Court. The above four (4) listings entitle this court to grant the application for reinstatement. For the applicant to say that court is at this point functus officio is a misapprehension of the law, as court is not estopped from entertaining consequential applications in effectuation of judgment and/or in effectuation of justice. The respondent does not dispute that court has jurisdiction to entertain consequential order applications. Court has also dispute to ensure that its orders are observed and not made in vain. To argue the principle of functus officio in the circumstance of this application where consequential orders are sought is to curtail the powers of court as set under Section 98 CPA, which is entitled "**saving of inherent powers of court,**" and provides as follows;

"Nothing in this Act is shall be deemed to limit or otherwise affect the inherent power of the court TO MAKE SUCH ORDERS AS MAY BE NECESSARY FOR THE ENDS OF JUSTICE OR PREVENT abuse of process of court."

Plaintiff's counsel further submitted that section 98CPA gives mandate to this court to do such acts as may be necessary for the ends of justice. My Lord, the allegations set out in the affidavit in reply to wit from paragraph 9(i) to 9(ii) are made out context as they do not arise from the order and decree in Judicial Review 48 of 2018 and HCCS No. 84 of 2016 as extracted and sealed by court. Without prejudice to the foregoing all the said averments in paragraphs 9(i) to 9(iii) of the affidavit in reply were answered by the court in its Judicial Review application ruling No. 48 of 2018 at page 20 to 23 thereof and cannot therefore be raised as excuses for not readmitting the applicant to his employment. In paragraph (9) (xiii) of the affidavit in reply the respondent urges that the applicant in his application form annexure K never not there his previous work

terminations. This point is res judicata and was dealt with in the judicial review ruling without prejudice to that, it has nothing to do with reinstatement and that aside the form annexure K filled by the applicant did not and does not have provision for such disclosure. To date no person has ever been appointed in my place as District Health Officer.

Counsel for the Applicant submitted that the ruling in the Judicial Review case as delivered as 26th October 2018 under clause 2 (Notice of Motion) the applicant prayed for payment of all projected salary arrears from the date of January 2018 being the date to date of the ruling on this present application at the rate of Four Million Six hundred thousand shillings (4,600,000/=) per month as set out in paragraph 11 of affidavit in support when they allegedly terminated him. The applicant having been jointly and severally in contemptuous acts to recall and /or reinstate the applicant despite being formerly requested so to do ought to be condemned by way of exemplary damages as prayed for in clause 3 of the Notice of motion which we propose in the estimation of Ug.Shs.20,000,000 considering the space of one year from when court quashed the termination to date without them doing the needful to recall and reinstate the applicant and in the process to date the respondents continue in their overlook the import of the judicial review ruling. Even from the nature of the affidavit in reply it is evident that the respondents are adamant about reinstating the applicant and that's why it is only fair that exemplary damages are awarded.

Finally the Applicant's counsel prayed for general damages. These are in the discretion of court we submit that the respondents having intentionally kept out the applicant from his employment, with no earnings the applicant was greatly inconvenienced and for the foregoing we propose an estimation in the range of Ug.Shs.78,200,000 as sufficient in the circumstances calculated at 2,300,000/= (half salary rate) from Jan 2018

till date of the ruling the matter which comes to around/estimated at Ug.Shs.78,200,000 (Thirty Million Shillings).

Respondents' counsel submitted that the court having declined to grant an order for reinstatement and instead condemned the Respondents to general damages of Ug.shs.20,000,000/=, the respondents were not obligated to reinstate the applicant in his former position as District Health Officer. In *Omunyakol Akol Johnson versus Attorney General SCCA No. 06 of 2012*, it was held that *"under normal circumstances, the appellant would be entitled to reinstatement as the first option. I agree with the two courts below that reinstatement is not automatic and depends on particular circumstances of each case .The Court has discretion in order reinstatement after taking into account all the circumstances of the case."* It follows therefore that reinstatement of the applicant in this case was not automatic but had to be ordered by court. The court in its wisdom did not make the order. The Court in the above case of Omunyakol declined to order reinstatement among others due to the fact that the appellant who was born in 1961 was now 53 years of age and would have to retire in **seven years'** time on reaching the retirement age of 60 years.

Counsel for the Respondent submitted that the Applicant in his application to the respondent stated he was born on 2nd February 1960 as per provisions of Section 12(1) of the Pensions Act, which provides **"An offer shall retire on attaining the age of Sixty Years."** As a matter of fact and law this would dispose the issue of reinstatement. This fact that the applicant was born in 1964, was brought up in rejoinder. There is no evidence that this fact was ever brought to the attention of the respondent – the employer or Public Service Commission. Therefore the official date for the applicant's retirement in accordance with the Pensions Act is 2nd February, 2020. In any case even if the applicant was born in 1964, this would put the applicant's retirement age to only 4(four) years ahead. Basing on Omunyakol's case, where reinstatement was denied

because the applicant only had seven years to go, likewise, even if the applicant was born in 1964, this court ought to follow Omunyakols decision and decline to order reinstatement on account of shortness of time available to the employer before retirement.

Respondents' counsel cited the case of *Akugizibwe Francis and Another vs. Nyamahunge Kotido HCT-01-CA-0032 OF 2016* court relied on *Constantino Okwel alias Magendo vs Uganda SCCA No 12 of 1990*, where the Supreme Court laid down the law as to contradictions and inconsistencies. Court stated that; *in accessing the evidence of a witness, his consistency r inconsistency unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected, minor inconsistencies will not usually have the same effect, unless the trial judge thinks they point to deliberate untruthfulness.* In *Mujune Joshua vs. Uganda HCT-04-CR-CN-0033-2011* Justice Stephen Musota held that the *law now governing inconsistencies or discrepancy is that grave inconsistencies if not satisfactorily explained will usually result in the evidence of the witness being rejected. That grave inconsistency or contradiction is one that goes to the root of the case.*

The applicant leaves unexplained the inconsistency on his date of birth which is a fundamental fact since it goes to establish whether he is illegible for reinstatement. It is therefore the respondents' prayer that have failed to explain this inconsistency to his date of birth which goes to the root of the applicants eligibility for reinstatement, the testimony of the applicant asserting that he was born in 1964 be rejected by this honorable court and the applicants application for reinstatement be denied. The view against reinstatement is also supported by the case of *Waga vs. Chief Administrative Officer, Maracha & Anor; C.S. N.005 of 2016*, where the plaintiff was also among other reliefs seeking orders of reinstatement for wrongful dismissal. In rejecting to grant an order of reinstatement Hon. Justice Stephen Mubiru stated;

“Any breach of contract in such a case is enforced by suit for wrongful dismissal and damages. Just a contract of employment is not capable of specific performance. Similarly breach of contract of employment is not capable of providing a declaratory judgment of subsistence of employment. It seems to be generally recognized that wrongful repudiation of a contract of employment by employer effectively terminates the employment; the termination being wrongful entitles the employee to claim damages, but the employee cannot refuse to accept the repudiation and seek to treat the contract the contract of employment as continuing the claim for reinstatement is therefore rejected.”

This therefore is a proper case where reinstatement of the applicant ought to be declined by this court. The applicant has submitted that the Chief Administrative Officer Mr. John Katotoroma who attended court on the 20th August 2020 did not file an affidavit in reply. That the legal consequence of that omission as the cases of *Charles Sanyara vs H. Komunda HC Civil Appeal No. MMB and Shelton Okabo Vs. Standard Chartered Bank (U) Ltd (1992) KALR 115-HCT MA No.51 of 1992* that *“Failure to file an affidavit in reply to the supporting affidavit filed by counsel for the applicant, the statement of facts contained in the affidavit in support of the application remain uncontroverted it is an admission.”* The respondents filed an affidavit in reply on the 20th August 2020. The same was deponed by Bigirwa Kaliisa Samuel who states that he is the Deputy Chief Administrative Officer of Nakaseke District Local Government, the respondent in charge of legal matters and he depones this affidavit in that capacity, my Lord, this is the same officer that represented the respondent in High Court Civil Suit No. 84 of 2016 and several other legal matters.

Article 188(1) of the constitution of the Republic Of Uganda 1995 provides that *there shall be a Chief Administrative Officer and Deputy Chief Administrative Officer of the District.*

Article 188(3) provides that Parliament shall by law establish the qualifications and functions of the Chief Administrative Officer and Deputy Chief Administrative Officer.

Section 66(1) of the Local Government Act provides that there shall be a deputy chief administrative officer and such number of assistant chief administrative officers and other officers and employees of the district as the council may be determine.

Section 64(1) of the same Act provides that the Chief Administrative Officer shall be the head of the public service in the district and the head of administration of the district council and shall be the accounting officer of the district.

Under section 64(2)e the Chief Administrative Officer supervise and coordinate the activities of all delegated services and the officers working in those services. In exercise of the power granted to the Chief Administrative Officer as head of Public service in the district, the Chief Administrative Officer therefore delegated the duty of handing legal matters of the respondent to the Deputy Chief Administrative Officer who in that capacity deponed the affidavit in reply and the authorities cited by counsel for the applicant are out of context and distinguishable from the instant case. The Ministry of Public Service Job descriptions and Specifications for Jobs In Local Governments at page 16 for function of the Deputy Chief Administrative Officer among others to provide administrative support services to the district Council and technical departments and carrying out the role of deputizing for Chief Administrative Officer. It follows from the above that the Deputy Chief Administrative Officer having sworn in affidavit, the same is treated as the affidavit of the Chief Administrative Officer whom the deputy competently represented. Secondly having sued the 1st respondent whom the 2nd respondent who is in our view did not have a separate capacity. He acts for and on behalf of the district. It is our submission that the application in respect to the 2nd respondent was misconceived, had in law and should be struck out with costs.

Respondent's counsel further submitted that there is no law and or regulation in Uganda that provides for automatic reinstatement of dismissed employee after he/she has been acquitted by a criminal court. In **Omunyokol Akol Johnson vs. Attorney General** supra, court held that **reinstatement is not automatic and depends on particular circumstances of each case**. In the instant case therefore, the respondent having attained mandatory retirement age, it is not practical to reinstate the applicant in public service.

In rejoinder, counsel for the Applicant stated;

1. Page 1 thereto is in entirety a replica or reproduction of the title of the proceedings before court.
2. Pages 2 to 3 is wholesome word per word reproduction of the 1st respondents affidavit in reply and without any subtraction or addition
3. The respondent at page 3 last paragraph up to page 4 paras 1 to 5 reasons court never ordered for reinstatement of the applicant but in place thereof awarded the applicant/plaintiff damages Ug.Shs.20,000,000. That reasoning is misplaced in that, in reference to the ruling of court in HCCS No. 84 of 2016 court declared that the continued interdiction of the applicant was illegal. This implied mean he had to be reinstated cum let continue in empowerment of the respondent.

That aside in GHCMA No.48 of 2018 (Judicial Review) court gave the following reliefs (reproduced verbatim) as at

- (i) The application for Judicial Review is hereby granted and the decision Nakaseke District Service Commission terminating the appointment of the applicant and rescinding Min. No. 24 of 2007 is quashed for illegality.
- (ii) **The** respondent to pay Ug.Shs.20,000,000 being general damages.
- (iii) General damages above to carry interest at 15% from delivery of this ruling till payment in full.

(iv) Costs to the applicant.

Applicant's counsel further rejoined that clause 1 in the order/ruling impliedly meant that the applicant was to continue in this employment and was thus to be recalled/reinstated. Looking at page 25 para 1 of the ruling in Judicial Review No.6 of 2018 it reads;

"The court awards the applicant a sum of Ug.Shs.20,000,000 as damages for inconvenience suffered since the illegal termination of appointment ."

In the Omunyokol case (supra) as cited by counsel for the respondent, from the stage of the Trial proceedings/pleading up to Supreme Court level, no prayer for reinstatement was sought nor was there an application for consequential orders unlike in the present case, little wonder that in the Omunyokol case court held;

"I agree with the two court below the reinstatement is not automatic and depends on particular circumstances of each case. The court has DISCRETION."

In order reinstatement after taking into account all the circumstances of the case"

Following the court quashing the minute terminating the applicant, the applicant moved court for the consequential reinstatement, we now seek. Concerning argument by counsel for the respondent that the applicant could not be reinstated because he clocked retirement age on 02nd February 2020, we reply and submit as follows;

That the quashing by court of the minute terminating the applicant was done on 26th October 2018 prior to the alleged date of retirements (01st February 2020) was not part of pleadings in the judicial review application and is therefore and therefore an afterthought. The applicant is taken or presumed reinstated or in continuous employment as of 26th October 2018 when court quashed the minute terminating him and assuming that the date of 2nd February 2020 is the retirement date then the

applicant would be entitled to his salary dues from October 2018 to 31st January 2020 cause, it cannot be an excuse not to be paid his entitlements. Without prejudice to the above the applicant to his affidavit in rejoinder did attach his birth certificate indicating was born on 4th February 1964 and his retirement by calculation would fall around February 2024. We submit that if it is impractical to order reinstatement this court of justice has discretion to order that he be paid his salary entitlements from 26th October 2018 to 1st February 2020.

Determination

This court on the 26th of October 2018 granted the application for judicial review in the following terms:

“The application for Judicial review is hereby granted and the decision of Nakaseke District Service Commission terminating the appointment of the applicant and rescinding Min. No. 24 of 2007 is quashed for illegality.”

This order means the court quashed the earlier decision of terminating and automatically changed the status quo that was prevailing and brought back the applicant to his employment status before the illegal termination.

Under judicial review proceedings, once a decision has been proved to be illegal, the resulting effect of certiorari would therefore be to quash the said ultra vires and/or illegal decision and deprive the said decision of any effect whatsoever. In *Cooks v Thanet District Council* [1983] 2 AC 286 the court held that;

“By quashing the decision, certiorari confirms that the decision is a nullity and is to be deprived of all effect”

The effect of certiorari in most instances is to make it clear that the public body and public law powers have been exercised unlawfully, and consequently, to deprive the public body's act of any legal basis.

The effect of granting an order of certiorari is to establish that a decision is illegal or ultra vires, and to set the decision aside. The decision is retrospectively invalidated and deprived of any legal effect since its inception.

The court can only ensure that a decision has been reached lawfully, and if not quash the unlawful decision. The court cannot substitute an alternative decision for that of the decision-maker. In many circumstances, the decision maker will be free to reconsider the matter and make a fresh decision (which may even be the same as the original decision) provided that in doing so he/she does not repeat the error or make any further reviewable errors.

A decision-maker will not, however, be able to retake the decision where the court held he has no power to take the decision in question. Nor will he be able to reach an identical second decision if the initial decision was so unreasonable or irrational that no reasonable authority could have taken such decision unless possibly, circumstances have changed since the time the first decision was taken. See *R v Liverpool Crown Court, Ex p Lennon and Hongkins* [1991] C.O.D 127

This court does agree with the submission of the respondents that the court did not give a specific order for reinstatement of the applicant when it quashed the decision. The decision of this court deprived the early decision of any effect and no consequential order of reinstatement would arise.

The respondent had only one option to reinstate the applicant back to his employment and if possible find another reason of termination or dismissal if they are bent at not having him back in his employment. The actions of the respondents are contemptuous

in nature and this court cannot give orders in vain or allow the respondents give them funny interpretations in order to defeat its purpose. This abuse of office and authority must be curtailed in order to uphold the rule of law in this country.

It is deplorable that the taxpayers' money is being wasted in endless litigation and this has denied the people of Nakaseke District from being given essential services and yet the money is being spent on unnecessary litigation. The actions of those concerned are causing a Financial Loss to the district and taxpayers, and this ought to be investigated by the concerned offices like the Inspector General of Government.

This application succeeds and the following orders are granted;

1. That the Applicant be reinstated his position of District Health Officer.
2. The Respondents be ordered to pay all salary arrears from date of alleged termination up to time of reinstatement up to time with interest at court rate.
3. The Respondents pays damages of 10,000,000/=.
4. The Respondents pay costs of this application.

I so order

SSEKAANA MUSA
JUDGE
11th December 2020