

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO.71 OF 2020

PAUL MUKIIBI:..... APPLICANT

VERSUS

ATTORNEY GENERAL:..... RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application under **paragraphs I, XXVI, XXIX (a),(c),(f) & (g)** of the National Objections and Directive Principles of State Policy (**NODPSP**) under the Constitution of the Republic of Uganda, 1995; **Articles 8A, 17(i) (i), iii(1)-(3), 199(4)(c), 250 (1) & (2), 126(i), 128, 139(1), 164 & 174** of the **Constitution of the Republic of Uganda, 1995; Sec. 10** of the **Government Proceedings Act Cap.77; Secs. 21 & 45** of the **Public Finance Management Act, Sec. 10** of the **Public Service Act; Secs. 33, 36 (i), 38(i) & (2) & 39** of the **Judicature Act Cap.13; and Rules 3,3A & 6** of the **Judicial Review Rules, 2009** (as amended) for the orders that;

1. A prerogative order of *Certiorari* be issued by this Honourable court to quash the decision of the Head of the Public Service and Secretary to Cabinet *Mr. John Mitala* contained in the impugned letter of 26th July 2019 directing *Mr. Expedito Kagole Kivumbi* to go on forced leave with effect from 26th July 2019 as it is illegal, procedurally improper, unreasonable, irrational and abuse of law.
2. A prerogative order of *Certiorari* be issued by this honourable court to quash the Internal Auditor General’s report dated 3rd July 2019 on verification of responses from the Accounting Officer-Judiciary on the

unexplained mischarges of 36,076,576,196/= for outright impropriety, prejudice, malice, falsehood, procedural impropriety and illegality in so far as it reaches a conclusion that “...with respect to the foregoing, the Accounting Officer ought to have brought to the attention of the Secretary to the Treasury or Accountant General the absence or need for an appropriate Chart of Accounts Code applicable to the Unique activities of the Judiciary. There is no evidence this was done”, despite the Accounting Officer-Judiciary’s communication to the Accountant General dated 9th March 2016 and received on 10th March 2016 requesting the creation of a “ a new budget item on the Chart of Accounts” that was never considered.

3. A prerogative order of *Prohibition* be issued by this honourable court against the respondent, the Permanent Secretary/Secretary to the Treasury-Ministry of Finance, Planning and Economic Development, Permanent Secretary Ministry of Public Service or any Government Official from implementing the impugned letter.
4. A *Declaration* that the Respondent’s *Mr. John Mitala’s* acts of sending the said *Mr. Kagole Kivumbi* on the impugned “forced leave” are illegal, barred in law, ultra vires and a nullity, as there is no law that provides for the same.
5. A *Declaration* that the said impugned “Forced Leave” being the basis of the handover of the office of Permanent Secretary/Secretary to the Judiciary by the said *Mr. Kagole Kivumbi* to *Mr. Pius Bigirimana*, was an illegality for being based on illegal, unlawful and unknown term in the Public Administration, “Forced Leave”.
6. A *Declaration* that having the process of sending the said *Mr. Kagole Kivumbi* on the impugned “forced leave” was an illegality, highhanded, malicious act that is at law unlawful as it goes against every known principle of the right to a fair hearing and hence procedurally improper.

7. A *Declaration* that the respondent's Permanent Secretary/Secretary to the Treasury under the Ministry of Finance, Planning and Economic Development acted ultra vires, under undue influence and abused office when they considered the impugned communication from the Chairperson of the Public Accounts Committee of Parliament, *Mr. Nandala Mafabi*, by way of letter dated 30th July, 2019 to write a letter dated 01st August, 2019 to justify retrospectively, the actions of the Head of public Service *Mr. John Mitala* in sending the said *Mr. Kagole Kivumbi* on the impugned "Forced Leave" in which the said Chairperson PAC lays fictitious grounds for "...in depth investigation in matters for Financial Year 2018/2019...as there are clear indications of fraud on the part of the Accounting Officer..."
8. A prerogative Order of *Mandamus* be issued by this honourable court directing the Head Public Service and Secretary to Cabinet to immediately rescind and revoke the impugned, illegal and malicious "Forced Leave" imposed upon the said *Mr. Kagole Kivumbi*.
9. A *Declaration* that the open ended nature of the impugned "Forced Leave" is an abuse of the rights of any public Officer as it is illegal and unknown under the Public Service Standing Orders.
10. A *Declaration* that the practice of sending any Public Officer on "Forced Leave" is arbitrary, irrational and against the Public Service Standing Orders and the respondent ought to be held responsible for the gross omission.
11. A *Declaration* that the Respondent and its officers have failed to cause any "in-depth investigation" into the malicious and unfounded allegations against the said *Mr. Kagole Kivumbi*, as seen in the request for investigation reports made by Chairman PAC *Mr. Nathan Nandala Mafabi* in his 22nd January, 2020 communication to the Inspector general of Government, that has not received at the time of filing.

12. A *Declaration* that by virtue of the full benefits paid to the said *Mr. Expedito Kagole Kivumbi* as Permanent Secretary/ Secretary to the Judiciary, as seen in the letter of the Permanent Secretary of Ministry of Public Service dated 2nd September, 2019 on “*Payment of Salary for two permanent secretaries under one vote*”, the said “Forced Leave” is innocent of each and every allegation contained in the malicious, procedurally improper, illegal witch hunt mounted by the respondent’s officers and the Chairman PAC.
13. A prerogative Order of *Prohibition* be issued by this Honourable court against the Head of Public Service, or any other head of any administrative body from sending any Public Officers on the illegal and impugned “Forced Leave”.
14. And Order for Costs of the application.

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 Paul Mukiibi but generally and briefly state that;

- 1) The Applicant is an Advocate of the High Court with specific interest in the administration and administrative set up of the country and the rule of law and a lecturer of law.
- 2) That at all material times, the Accounting Officers to the Judiciary have written countless letters to the Accountant General and Permanent Secretary/ Secretary to the Judiciary to create different budget lines on the Chart of Accounts.
- 3) That the Auditor General issued a report on the financial Statement of the Judiciary for the year that ended 30th June, 2018, wherein it was the advance opinion of the Auditor General that there was a mischarge expenditure to the tune of 34,076,576,196/= which was incurred on various items without appropriately applying the Government of Uganda Chart of Accounts as prescribed by the Accountant General.

- 4) That following the said report, the Permanent Secretary/Secretary to the Treasury wrote to the Secretary of the Judiciary requesting him to provide an insight on the alleged misappropriation.
- 5) That the Chairman Public Accounts Committee of Parliament in a letter received on the 4th day of July, 2019 by the secretary to the Judiciary also wrote in respect of the Auditor General's report for the Financial year ending 30th, June, 2018 requesting detailed statements on the purported irregular advance of 32,841,734,617/= to Judicial staff personal accounts.
- 6) That on the 30th day of July 2019, the Chairman of the Public Accounts Committee of Parliament wrote to the Permanent Secretary/Secretary to the Treasury informing him of his purported findings about fictitious withdrawals by the Secretary to the Judiciary and how such withdrawals indicated fraud on the part of the Accounting Officer and thus would take an in-depth investigations in the matter.
- 7) That at all material times, the Public Accounts Committee of the Parliament of Uganda, and particularly its Chairman Nathan Nandala-Mafabi portrayed material bias, prejudice, undue influence and victimized the said Mr. Expedito Kagole-Kivumbi.
- 8) That the decision to send Mr. Expedito Kagole-Kivumbi on forced leave by the Head of Public Service/Secretary to Cabinet, was illegal, unlawful, malicious, strange and procedurally improper.
- 9) That subsequent to that illegal directive, the alleged fictitious accounts of impropriety allegedly perpetrated by Mr. Expedito Kagole-Kivumbi, the Permanent Secretary/Secretary to Judiciary, were supposed to be investigated, and to-date the same has not been done.

- 10) The Permanent Secretary to the Ministry of Public Service clarified the position that the impugned “Forced Leave” was an illegality by her communication for the creation of two positions of Permanent Secretary in the Judiciary.
- 11) That Constitutionally, there is no lawful order or directive of any person that can be issued to send any officer in the Public Service on “Forced Leave” and this is an affront and undermines his rights.
- 12) That the actions of sending public officers into unjustified and legally unfounded leave threatens their security of tenure and negatively impacts on individual performance and ultimate service delivery.
- 13) The Head of Public Service/Secretary to Cabinet acted with procedural impropriety when he acted unfairly in his decision making of placing the Secretary to the Judiciary to the Judiciary on “forced Leave” by not only failing to observe the rules of natural justice but in failure to observe procedural rules expressly laid down in the Public Service Standing Orders and other relevant laws and implementing orders which do not exist under the law.
- 14) The Head of Public Service/Secretary to Cabinet acted irrationally and with gross unreasonableness when he decided to place the Secretary to the Judiciary on “Forced Leave” which decision is in defiance of logic and acceptable moral standards.

The respondent filed an affidavit in reply through Dr John Mitala the Head of Public Service and Secretary of Cabinet who stated as follows:

1. That Mr Kagole Kivumbi was offered a renewal of appointment as Permanent Secretary for a period of 36 months with effect from 10th July 2018 as directed by H.E the President of Uganda in accordance with the Constitution.

2. That Mr Kagole Kivumbi was posted to the Judiciary as Permanent Secretary /Secretary to the judiciary where his duties as Accounting Officer involved in overseeing the Finances, Administration and accountability of funds in that Ministry or Department as provided by the Constitution.
3. That in August 2018, the Permanent Secretary, Ministry of Finance, Planning and Economic Development received allegations of financial impropriety allegedly perpetrated by the then accounting officer, Mr. Kagole Kivumbi in the Judiciary and forwarded the same to the Inspectorate of Government for investigation.
4. That the Inspector general of Government following the request from the secretary to the Treasury instituted investigations into the allegations.
5. That the Auditor General carried an audit of the accounts of the Judiciary for the Financial year ended 30th June 2018 and his report to Parliament expressed an adverse opinion regarding the Judiciary's accounts which indicated that the financial statements of the judiciary were not prepared, in all material respects, in accordance with the Public Finance Act.
6. That on 25th July 2019, he received a decision of H.E Yoweri K. Museveni, President of Uganda directing that Mr. Kagole-Kivumbi to go on Forced leave to allow the Treasury investigate some alleged irregularities in the financial activities of the Judiciary.
7. That on 26th July, 2019 the decision of the President was communicated to Mr Kagole Kivumbi and he was requested to hand over his office within the existing regulations so as to allow the Secretary to the Treasury to investigate the alleged irregularities of the financial activities of the Judiciary.

8. That I know that the law allows the temporary removal of a public officer from exercising his or her duties while an investigation over a particular misconduct is being carried out.
9. That the effect of forced leave is a temporary removal of the Applicant from office to pave way for investigations and not to remove him permanently as alleged by the applicant.
10. That the decision to temporarily remove the Permanent Secretary/Secretary to the Judiciary from exercising his duties is an administrative mechanism within the discretion of the Appointing Authority.
11. That I received a response from the IGG informing me that the investigations have been completed and the same have been forwarded to the prosecution team for perusal and further guidance.
12. That the decision made was not procedurally improper or unfair since I was implementing the directive of the Appointing authority.

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 the instant application is amenable for judicial review?*
2. *Whether the decision of the Head of public Service and Secretary to Cabinet directing Mr. Expedito Kagole Kivumbi to go on forced leave was proper and reasonable in the circumstances?*
3. *What remedies are available to the parties?*

The applicants were represented by *Mr. Kyeyune Albert Collins* while the respondent was represented by *Ms. Maureen Ijang*.

ISSUE ONE

1. *Whether the instant application is amenable for is amenable 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 case and in the process control the administration.

In this case, the applicant is challenging the decision of the Head of Public Service and Secretary to Cabinet Mr. John Mitala contained in the letter of 26th July 2019 directing Mr Expedito Kagole Kivumbi to go on forced leave with effect from 26th July 2019.

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 decision complained of did not emanate from the Secretary to Judiciary but rather from the His Excellency The President as rightly contended by the Head of Public Service; *“That on 25th July 2019, I received a decision of H.E Yoweri K. Museveni, President of the Republic of Uganda directing Mr. Kagole-Kivumbi to go on forced leave to allow the Treasury to investigate some alleged irregularities in the financial activities of the Judiciary”.*

Therefore, the decision under challenge should have been that of the President and since The Secretary to Cabinet only communicated a decision of the appointing authority. Otherwise to infer that he made a decision would mean that he usurped the powers of the President which is not true and would be very illegal.

Whether the decision directing Mr. Expedito Kagole Kivumbi to go on forced leave was proper and reasonable in the circumstances?

The applicant’s counsel submitted that the decision of sending mr Kagole Kivumbi on forced leave was illegal since there were ongoing investigations against the alleged mischief of expenditure under **Vote 101** of the Judiciary in the financial year **2017/18**.

Dr. John Mitala, the Head of Public Service and Secretary to the Cabinet confirms that **Mr. Expedito Kagole Kivumbi** was temporarily removed from office to pave

way for investigations and not to remove him from office permanently as alleged by the applicant.

It was further submitted that the decision to temporarily remove the Permanent Secretary (PS)/Secretary to the Judiciary from exercising his duties is an administrative mechanism within the discretion of the Appointing Authority in this case, H.E. the President of the Republic of Uganda. It was applicant's contention that since the said forced leave, the Office of the Inspector General of Government (IGG) has been investigating this case without concluding the same thus what he calls temporary remains vague and with no better explanation.

It is the applicant's contention that **Dr. John Mitala** told this honourable court a blatant lie under of his affidavit in reply when he deponed on Oath that;

18. "...I received a response from the IGG informing me that the investigations have been completed and the same have been forwarded to the prosecution team for perusal and further guidance.

To confirm that the impugned "Forced leave" was indeed illegal with no legal basis in the laws of this country, under of her response, Her Lordship (IGG) stated as follows;

3. "On the matter of forced leave that Mr. Kagole Kivumbi has been subjected to, I am unable to advice or offer any assurances as the Inspectorate of Government neither initiated nor directed that the officer be sent on forced leave. Indeed, the concept of forced leave is alien to me as it is not one of the types of leave provided for in the Employment Act, 2006 (SS.54, 56 and 57) or the Uganda Public Service Standing Orders (Section C).

The respondent counsel submitted that the decision to temporarily remove the Permanent Secretary/ Secretary to the Judiciary from exercising his duties is an administrative mechanism within the discretion of the appointing authority.

Under Order 3 Section F-s, the power to exercise disciplinary control is vested in the President, for officers of the rank of Head of Department and above. While for

the rest of the Public Officers, the powers are vested in the respective Service Commissions.

The Standing Orders provide for different disciplinary measures including interdiction provided for under Part F-s 8 and defined as “...temporary removal of a public officer from exercising his or her duties while investigations over a particular misconduct is being carried out”. It was thus there contention that Mr Kagole Kivumbi was properly sent on forced leave to allow investigations into the said allegations.

Analysis

The basis for the challenge of the decision is rooted in the fact that the ‘forced leave’ is not provided for under the laws. The applicant’s concern is also premised on the fact that the forced leave has become indefinite.

Forced leave as was used in the case of Mr. Kagole Kivumbi was not used as a form of punishment but rather as a means of allowing investigations to be carried out and concluded. It is also sometimes used to allow the person take his or her accumulated leave as the case may be.

The legality of the said forced leave can only be challenged if it violates the rights of the person who are abused or it used for other purposes than what it was intended for. In this case it was proper and justified to send Mr. Kagole Kivumbi on Forced leave to pave way for investigation. But after a period of over 15 months without any outcome of the investigations it becomes suspicious whether it was not made on baseless allegations.

In the beginning it was legal and reasonable in the circumstances but after such a long time it has become illegal and unreasonable since the Head of Public Service who communicated the decision has not given any definite answer when the forced leave will end. The unending investigations for this period of time would imply that there was no wrongdoing and the continued forced leave ought to be lifted so that Mr Kagole Kivumbi’s rights are not abused endlessly.

The applicant's counsel contended that the only known punishment available in Public Service Standing Orders is interdiction. It is this court's view that the forced leave is a better than an Interdiction which implies that the person under interdiction is under half pay for the period of interdiction. Forced leave is like a suspension from employment although there was no timeline for the said forced leave.

It ought to have been pegged for the period of leave not taken by Mr. Kagole Kivumbi and this would have expedited the investigations into the alleged financial impropriety in the Judiciary. But if the said leave has now become indefinite that would be contrary to the principles of rule of law and Constitutionalism and would amount to using lawful process for unintended purpose.

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 laws grant a wide discretion to the decision maker/administrator. The power to send an employee on forced leave ought to be checked with a timeframe within which it must end to check its potential abuse.

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 decision maker's choice may be in exercising his or her (wide) discretionary powers, the purpose in making that choice or his or her reasons for doing so must be aligned to what is authorised in within the Constitution and other enabling laws to be rationally justified.

The directive sending Mr. Kagole Kivumbi on forced leave was therefore legal and reasonable in the initial stages by the appointing authority but it has since become illegal and unreasonable since it has become an indefinite forced leave. Accordingly this issue fails.

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

The application succeeds in part with a declaratory Order that an Indefinite forced leave is illegal and unreasonable.

Each party shall bear its costs. Since the applicant was pursuing a public interest litigation with no direct interest but rather the interest was to vindicate the rule of law.

I so Order

Dated, signed and delivered be email and whatsApp at Kampala this 15th day of December 2020

***SSEKAANA MUSA
JUDGE
15th/12/2020***