

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANOUS CAUSE NO. 260 OF 2019

PHARMACEUTICAL SOCIETY OF UGANDA===== APPLICANT

VERSUS

ATTORNEY GENERAL===== RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application for judicial review seeking under rule 3 of the Judicature (Judicial Review) rules, Section 98 of Civil Procedure At and Section 36 of the judicature Act seeking the following judicial review reliefs and orders;

- (i) A declaration that the Trade(Licensing) Amendment) Act, 2017 and the licensing fees indicated in items 30 and 35 of PART A of the schedule to the Trade (licensing)(Amendment of Schedule) Instrument SI No. 2 of 2017, amount to double license fee collection and are therefore unfair, discriminatory, oppressive and arbitrary.
- (ii) A declaration that the provisions of Section 5 of the Trade(Licensing) (Amendment) Act, 2015 as well as items 30 and 35 of PART A of the schedule to the Trade (licensing)(Amendment of Schedule) Instrument SI No. 2 of 2017 created a duplicity of roles between the Trade Licensing Authorities and the National Drug Authority under the provisions of the National Drug Policy and Authority Act Cap 206 and the National Drug Policy and

Authority (Fees) Regulations SI No. 31 of 2014 contrary to the letter and spirit of either law.

- (iii) A declaration that the regulation, licensing and supervision of pharmaceutical businesses and drug store businesses is solely done by the National Drug Authority under the provisions of the National Drug Policy and Authority Act cap 206 and the National Drug Policy and Authority (Fees) Regulations SI No. 31 of 2014.
- (iv) An Order of Certiorari quashing the provisions of the Trade (Licensing)(Amendment) Act, 2017 and the Licensing fees indicated in item 30 and 32 of Part A of the schedule to the Trade (Licensing) (Amendment of Schedule)Instrument SI No. 2 of 2017 on the basis that they make it mandatory for the applicant members to pay licensing fees to both Municipality and National drug Authority which imposes an unnecessary financial burden on the applicant.
- (v) A permanent injunction and an Order of Prohibition, prohibiting and/stopping the respondent and/its representatives, local authorities or persons acting on their behalf from enforcing the provisions of the Trade (Licensing)(Amendment) Act, 2017 and the Licensing Fees indicated in Item 30 and 32 of Part A to the Trade (Licensing)(Amendment of Schedule) Instrument No. 2 of 2017.
- (vi) Costs of the application be provided for.

The grounds of this application are contained in the Notice of motion and also the affidavit in support of Mr Opio Samuel Acuti-Secretary of the Applicant. The respondent did not file an affidavit in reply. It is the courts view that this application is based on challenging a legislation and therefore an affidavit in reply was not necessary.

Issues for determination

1. *Whether the case is proper case for Judicial review?*
2. *Whether items 30 and 35 of (Part A) of the Trade (Licensing)(Amendment of Schedule) S.I No.2 of 2017 is ultra vires the Trade (Licensing)Act Cap 101 as amended by the Trade (Licensing)(Amendment) Act No. 28 of 2015.*
3. *What remedies are available for the parties*

At the hearing of this application the parties were advised to file written submissions which this court has considered in the determination of this application.

The applicant was represented by *Ms Clare Amanyia and Mr Horace Nuwasasira* while the respondent was represented by *Ms Josephine Kiyingi (PSA) and Mr. Musota Brian(SA)*

Whether the application raises issues for judicial review?

The applicant's counsel submitted that a delegated legislation passed by a Minister in form of a statutory Instrument is a decision that can be reviewed by way of judicial review in as far the National Drug Authority is a statutory body purposed with regulating the applicants profession. They relied upon a decision of *His Worship Aggrey Bwire v Attorney General CACA No. 9 of 2009* where court held that *Judicial review can only be granted on three grounds;-Illegality; Irrationality and Procedural Impropriety.*

The respondent argued that the application has not raised any issues for judicial review and that the applicant is merely raising matters for constitutional interpretation and the proper forum is the Constitutional Court.

Determination

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.

A delegate must exercise its jurisdiction within the four corners of its delegation and if he has acted beyond that, his/her action cannot have any legal sanction and is challengeable by way of judicial review. It is well recognised that a delegated legislation can be challenged by way of judicial review for being ultra vires any of the following reasons;

- i. Lack of legislative competence,
- ii. Violation of fundamental rights guaranteed under the constitution,
- iii. Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by parent Act,
- iv. Repugnancy to the laws of the land,
- v. Manifest arbitrariness/unreasonableness or vagueness or uncertainty.

While considering the validity of delegated legislation, the scope of judicial review is limited but the scope and effect thereof has to be considered having regard to the nature and object thereof. See Page 198 *Public Law in East Africa Lawafrica Publishers*.

The present application is challenging the Statutory instrument which amended the Schedule to the Act and the decision is the output of the Statutory Instrument which is amenable to judicial review.

This is a proper case for judicial review.

Whether items 30 and 35 of (Part A) of the Trade (Licensing)(Amendment of Schedule) S.I No.2 of 2017 is ultra vires the Trade (Licensing)Act Cap 101 as amended by the Trade (Licensing)(Amendment) Act No. 28 of 2015.

This is the general issue that shall be resolved and it addresses the different sub-issues raised by both parties.

The applicant's counsel submitted that The Schedule is irrational since the Minister of Trade is imposing trade licensing fees on persons practising the profession of pharmacy and drug store business, which already has license fees imposed on its practitioners under Section 14 and 15 of the National Drug Policy and Authority Act and the National Drug Policy and Authority (Fees) Regulations SI No. 31 of 2014 as a specific legislation meant for the subject being the regulation of the business of Pharmacy and drug stores in Uganda.

Counsel further submitted that the Minister's decision is devoid of logic in as far as it imposes dual or double license fees on the persons dealing in pharmacy and drug store business and has a resultant effect of curtailing the applicant's members constitutionally protected right to practice their profession as protected by Article 40(2) of the Constitution.

The levying of trade licensing fees under the Trade(Licensing)(Amendment of Schedule) Instrument SI No. 2 of 2017 is therefore an affront of the *generalia specialibus rule* of statutory interpretation that was upheld in *Amrit Goyal v Hari Chand Goyal Commercial Court Civil Suit No. 432 of 2011*, which is to the effect that a specific legislation over a specific subject takes precedent over a general legislation.

The applicant's counsel further submitted that, the pharmacy and drug store business are regulated and licensed by National Drug Authority under the National Drug Policy and Authority Act.

It is therefore contrary to the Constitution and the National Drug Policy and Authority Act and thus illegal or unlawful for the schedule to include Pharmacy and Drug stores as one of the items upon which trading license can be levied by a local government.

The respondent's counsel submitted that the trade licensing fees are levied against the applicant as a business of sale of drugs.

It was counsel's case that Section 8(2)(f) of the Trade (Licensing) Act was repealed and this lifted the exemption of trading license fees on entities engaged in trades and businesses in respect of which a separate license is required by or under any written law, in this instance pharmacy's/ drug stores business from sale of drugs

According to counsel, the applicant cannot in good faith or in good conscience submit that levying and payment of trade license is irrational or unfair or otherwise illegal or ultra vires yet it is duly authorized under the parent Act.

The respondent contended that the applicant's arguments are merely fanciful since the purpose of levying trading licence by a Municipality, town Council and urban Council is completely different from that of Central Government.

They contended that by the time the Legislature passed the said law it was aware of the existence of the other licensing laws.

Determination

The courts will normally determine the validity of delegated legislation by applying the test of *ultra vires* i.e Illegality, Irrationality and procedural impropriety.

The Court considering the validity of a subordinate/delegated legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether delegated legislation conforms to the parent Act.

Where a rule/regulation is directly inconsistent with a mandatory provision of the statute, then, of course the task of court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.

Secondly, the applicant is challenging the spirit and policy of Trade Licensing regulations and other regulating laws under National Drug Policy and Authority Act since the applicant's members are licensed under that legal regime (National Drug Policy and Authority (Fees) Regulations SI No. 31 of 2014.

Once an entity is licensed by the regulator, it would be erroneous to be subject to trading licenses since their business involves inspection of premises to be satisfied that it is fit to be a drug store or a pharmacy.

A delegated legislation can be questioned on ground that it is inconsistent with provisions of the parent Act or that it is contrary to some other statute

applicable on the same subject matter. It can also be questioned on ground that it is manifestly arbitrary and unjust or irrational.

In the case of *Stanbic Bank of Uganda Ltd, Barclays Bank of Uganda Ltd, Centenary Rural Development bank Ltd and Standard Chartered Bank Ltd vs Attorney General HCT-00-CC-MA 0645-2011* court held that;

“It is also my view that the issuance of two licenses for the same business, one by the Central government and another by the local government cannot be a rational manner of improving the collection of revenue. Given the financial linkages between the central government and the local governments it appears to be double collection that would be unfair to the licensee....”

This Court concurs with the reasoning by the learned Judge in the above matter since it is similar in principle with the present case. The conferment of rule-making power by an Act does not enable the rule making authority to make a rule that travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto or affects other existing legislations.

The argument by the respondent that section 8(2)(f) of the Trade (Licensing) Act which provided for exemption was repealed is very hollow and devoid of any merit and baseless. By repealing this provision under the Amendment Act, it should not be construed that the Minister was given a blank cheque of power to exercise of discretion to require licences for those businesses/professions which are already licensed under different legal regimes. A delegated legislation may be struck down or challenged on ground of non-application of the mind of the delegate to the relevant facts and circumstances in taking decisions. See *Uganda Law Society v Kampala Capital City Authority & Attorney General Misc. Cause No. 243 of 2017*

Thus, while adjudging the *vires* of delegated legislation, the courts do not concern themselves with the merits, demerits, wisdom of the underlying policy. A court never quashes a rule because, in its opinion, the policy

underlying it is not wise or prudent. The Court's only concern is to see whether the impugned delegated legislation falls within the scope of the rule making power conferred on the concerned authority by the parent Act and does not conflict with other legislations.

In the case of *I.R.C v National Federation of Self-Employed and Small Businesses [1981] 2 All ER 93 at 107* court noted thus;

"They [Ministers] are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."

The inclusion of pharmacies and drug stores among the areas of issuance of trading licenses is illegal and contrary to the National Drug Policy and Authority Act and it conflicts with specific legislation. Where two legislations conflict i.e between general legislation and specific legislation, the specific legislation overrides the general legislation on the subject matter. *Generalia specialia derogant* or *Generalia specialibus non derogant*. No latter general Act can prevail over an earlier special Act. Meaning general things do not derogate from special things. See *Eaton Towers Uganda Limited v Attorney General & Jinja Municipal Council Misc. Cause No. 84 of 2019*

This issue is resolved in the affirmative.

What remedies are available to the parties?.

- 1. An order of Certiorari issues to quash the items 30 and 35 of (Part A) of the Trade (Licensing)(Amendment of Schedule) S.I No.2 of 2017 is ultra vires the Trade (Licensing)Act Cap 101 as amended by the Trade (Licensing)(Amendment) Act No. 28 of 2015 and National Drug Policy & Authority Act Cap 206.*

2. *The applicant's members are not liable to pay for trade licence fees in respect of their pharmacies and drug stores pursuant to item 30 and 35 of Part A of the Trade (Licensing) (Amendment of Schedule) Instrument No. 2 of 2017.*

3. *This application is allowed with no order as to costs (Each party to bear its costs).*

I so order

Dated, signed and delivered be email at Kampala this 8th day of May 2020

SSEKAANA MUSA
JUDGE