

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 190 OF 2017

DR. ENG. JOHN TUMWESIGYE :::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. THE ATTORNEY GENERAL

2. DIANA ATWINE:: DEFENDANTS

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The Government of Uganda represented by Ministry of Health and Ministry of Finance, Planning & Economic Development executed a Public Works Investment Agreement (PWIA) with M/s Finasi/Roko Construction SPV Ltd for the financing, design, construction and equipping of International Hospital of Uganda (ISHU) a 240 bed International Specialised Hospital in Lubowa, on Kampala-Entebbe Road. In accordance with the terms of the PWIA, the plaintiff was engaged by the Government of Uganda to act as a Project Coordinator under a three-year contract executed on 15th June, 2016, and commencing on 1st July 2016.

However, the plaintiff's contract was terminated by a letter dated 24th February 2017 signed by the 2nd defendant who is the Permanent Secretary Ministry of Health.

The plaintiff brought this suit seeking amongst other things:

1. A declaration that the 2nd defendant had neither authority nor the power or mandate to terminate the said contract;

2. A declaration that the 2nd defendant is incompetent and unfit to hold public office of the Permanent Secretary;
3. Specific performance of the contract;
4. In the alternative damages in lieu of specific performance assessed at a contract value of USD 180,000, being the contract sum, less the amount belatedly paid;
5. General;
6. Exemplary;
7. Aggravated damages
8. Costs of the suit.

The defendants contended that the plaintiff had been redundant from the time he received the contract in June 2016 not carrying out any of the functions he was contracted to do which made the government incur losses. They contended that the plaintiff's services were terminated because the investor who was supposed to construct the hospital was still sourcing for funds and that there was no provision in the budget for FY 2016/2017 to cater for the plaintiff's pay.

The following issues were formulated by the parties for determination of this court as per their joint scheduling memorandum;

1. *Whether the Plaintiff's claim against the defendants is frivolous, vexatious, and barred in law.*
2. *Whether the 2nd defendant had the authority, power, or mandate to terminate the plaintiff's contract and whether her act of doing so was ultra vires.*
3. *Whether the 2nd defendant is incompetent and unfit to hold public office of a Permanent Secretary.*
4. *What remedies are available to the plaintiff?*

At trial, the plaintiff was represented by *Benson Tusasirwe*, while *Mwebesa Raymond* represented the 2nd defendant and *Jeffery Atwine (Principal State Attorney)* for the 1st defendant. The plaintiff called one witness Dr. Eng. John Tumwesigye the plaintiff whereas the defendants called Ms. Diana Atwine the 2nd defendant. The parties filed submissions that were considered by this court.

Determination

Whether the plaintiff's claim against the defendants is frivolous, vexatious, and barred in law.

Order 7 Rule 11 of the CPR provides that a plaint may be *rejected* if the plaint appears to be barred by law, or if the suit is shown by the plaint to be frivolous or vexatious.

The defendant contended that the suit was barred by law because the plaintiff's contract for service was not procured pursuant to the procurement law and that the plaintiff lacked a cause of action as against the 2nd defendant. Counsel for the 2nd defendant submitted that the plaintiff had not adduced any evidence to confirm that the contract was executed in compliance with the procurement laws of Uganda.

Counsel submitted that the plaintiff ought to have provided evidence of a bid award decision of a contracts committee that led up to the contract showing that the appropriate approved procurement or disposal procedures were followed which the plaintiff had not alluded to.

Counsel further submitted that **section 2(1)(a)(i) of the Public Procurement and Disposal of Public Assets Act of 2003**, made it mandatory for all contracts such as Ex. P1 to be procured and executed through the procurement process as provided by the Act and Regulations made there under.

In response, counsel for the applicant submitted that the defendant's submissions that the plaintiff led no evidence that due process was followed in awarding him the contract for services and that as a result the same is illegal was diversionary and misconceived as the validity of the plaintiff's contract was never in issue.

This court agrees with the plaintiff's submission to the extent that the validity of the contract was never in issue. The defendant did not plead the illegality of the contract and neither was its validity raised as an issue during trial nor during the term of the contract's existence. The court will therefore not delve into questions about whether the same was executed in compliance with the procurement laws of Uganda.

With regard to the suit lacking a cause of action against the 2nd defendant, counsel for the 2nd defendant submitted that the 2nd defendant was sued in her individual name whereas a perusal of the entire plaint did not disclose any facts forming the basis for a private suit against her in her individual capacity. That the suit was a private dispute as between the plaintiff and 2nd defendant whereas that was not the case. The suit was premised on termination of the plaintiff's contract by the 2nd defendant exercising her power as Permanent Secretary thus rendering it public and not private.

In response counsel for the plaintiff submitted that in certain aspects of her conduct, the 2nd defendant drifted into a frolic of her own, making her personally liable to that extent.

Analysis

According to the facts and evidence on the record it is disclosed that the plaintiff's grievances against the 2nd defendant arose out of her actions as the Permanent Secretary of the Ministry of Health. There is no evidence adduced by the plaintiff to prove the allegation that in certain aspects of

her conduct she drifted into her a frolic of her own making her personally liable to that extent.

The plaintiff's case against the 2nd defendant is frivolous. There is absence of seriousness or lacks the validity or legitimacy. It is vexatious in that its effect would be counterproductive in the determination of the suit. It is clear that the suit is oppressive and it obstructs the court from gaining full understanding of the issues and it would appear the plaintiff is acting with an ulterior motive as can be deduced from the orders sought against the 2nd defendant: *A declaration that the 2nd defendant is incompetent and unfit to hold a public office of a Permanent Secretary.*

The plaintiff's case against the 2nd defendant is obviously unsustainable and wrong; it is merely intended to insult the integrity of the 2nd defendant. An action is deemed vexatious if the party bringing it is not acting bona fide and merely wishes to annoy or embarrass the opponent, or when it is not calculated to lead to any practical result. See *Chia Kok Kee v Tan Wah [2012] SGHC 36; Goh Koon Suan v Heng Gek Kiau [1990] 2 SLR (R) 705.*

Furthermore, the orders sought by the plaintiff are not executable privately against the 2nd defendant but rather the office of the Permanent Secretary. It is also noteworthy as submitted by the plaintiff that the office of the Permanent Secretary Ministry of Health cannot be sued in that capacity but rather the Attorney General is the right party to sue as they are vicariously liable for the actions of the Permanent Secretary- Ministry of Health.

I find that the facts and evidence failed to disclose a cause of action against the 2nd defendant and her inclusion as a party (2nd defendant) was frivolous and vexatious hence the suit is dismissed against the 2nd defendant with costs.

The suit against the 1st defendant subsists.

Whether the 2nd defendant had the authority, power, or mandate to terminate the plaintiff's contract and whether her act of doing so was ultra vires.

The plaintiff's contract was terminated by a letter dated, 24th February 2017 signed by the 2nd defendant. It was the plaintiff's case that the 2nd defendant in terminating the plaintiffs' contract was ultra vires.

Counsel for the plaintiff submitted that since it was not contested that the plaintiff was awarded a **contract for services** by the contracts Committee of Ministry of Health. Such a contract, having been procured as "services", could only be terminated through by a decision of the very body which procured the service, to wit the Ministry's Contracts Committee, in accordance with the **Public Procurement and Disposal of Assets Act and Regulations. Part N – a** of the **Public Service Standing Orders 2010**, item 1 thereof.

The 1st defendant submitted that the 2nd defendant was acting squarely within the provisions of the contract in terminating the plaintiff's contract. Counsel for the 2nd defendant also submitted that the contract in issue clearly indicates that the signatory to the same is a Permanent Secretary and the letter of termination was also issued by a Permanent Secretary in accordance with **article 174(3) (d) of the Constitution** which entrusts a Permanent Secretary with the function of proper expenditure of public funds.

Analysis

A quick read of the contract indicates that the contract was executed between the Government of Uganda represented by the Ministry of Health referred to as the employer and the plaintiff referred to as employed person. The contract was not challenged by the plaintiff which was indicative that the he agreed to it and the terms thereto.

The contract was executed by the then Permanent Secretary of the Ministry of Health and the same could be terminated by the Permanent Secretary in accordance with the terms of the contract.

The contract which was signed between the plaintiff and the Permanent Secretary Ministry of Health created an employer –employee relationship and therefore was a matter for contract or employment law. The plaintiff was not an independent contractor as he contends and is clearly described as person employed.

A review of the contract shows it was an employment contract and not a consultancy contract and the law to govern it was the prevailing laws of contract, employment and the Human Resource Policy and Manual and not the Public Procurement and Disposal of Assets Act. This is buttressed by clauses in the contract on deductions of NSSF, Gratuity, Transport Allowances, Leave which are never paid to Consultants. There was therefore no requirement for the contracts committee to adjudicate on any matter with respect to the termination of the said contract. The termination of this contract of employment was an administrative duty vested with the responsible officer/Accounting officer- Permanent Secretary Ministry of Health.

The termination of the contract was a measure aimed at saving the government from further loss by the PS Ministry of Health which was within her constitutional function and duty under **article 174(3)(d)**. DW1 led evidence to show that five months after the execution of the agreement, the project for which the plaintiff was hired to manage had not yet commenced and as a result, the plaintiff did not have any work and yet he was being paid his salary which evidence was uncontroverted.

DW1 brought the loss of public funds where no work was done to the attention of the senior top management committee (STMC) who agreed

with the 2nd defendant and resolved to seek the Solicitor General's advice in regard to terminating the services of the plaintiff. The Solicitor General advised that the plaintiff's contract be terminated in accordance with clause 15 of the contract.

It was on the basis of the Solicitor General's advice and in accordance with clause 15 of the contract that the plaintiffs' services were terminated by notice through a letter dated 24th February, 2017 with payment in lieu of notice.

I find that the 2nd defendant in her capacity as the Permanent Secretary Ministry of Health acted within her mandate, authority and power in terminating the plaintiff's contract.

Whether the 2nd defendant is incompetent and unfit to hold public office of a Permanent Secretary.

Bearing in mind my ruling on issue 2 and the evidence on record, I find no evidence of incompetence by the 2nd defendant making her unfit to hold the office of permanent secretary. This issue was only intended to annoy and vex the 2nd defendant.

What remedies are available to the plaintiff?

Basing on my findings above, the plaintiff in this case is not entitled to the remedies sought. This suit is therefore dismissed with costs.

I so order.

SSEKAANA MUSA

JUDGE

23rd July 2021