

IN THE REPUBLIC OF UGANDA

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

MISC. CAUSE NO. 161 OF 2020

JABBE PASCAL OSINDE OSUDO :::APPLICANT

VERSUS

1. ATTORNEY GENERAL

2. CIVIL AVIATION AUTHORITY::RESPONDENTS

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This application is brought by Notice of Motion under the provisions of Section 36 (1) Judicature Act Rule 3, 6 & 7 of the Judicature (Judicial Review) Rules 2009.

The applicant seeks orders that;

1. An order of Certiorari doth issue to quash the Respondents’ decision of requesting the applicant to go for forced leave as the Director Human Resource and Administration, on 29th May 2020 as the same decision is tainted with illegality, impropriety, irrationality and ultra vires on the face of the record.
2. An order of Prohibition doth issue against the respondents from further subjecting the applicant to any process that is contrary to the law and abuse of his fundamental rights of fair hearing and his right to work.

3. The cost of this application be provided for.

The grounds upon which this application is based are as follows;

1. The applicant is employed as the director Human Resource and Administration of Uganda Civil Aviation Authority was served a letter on 29th May 2020, to proceed for leave for 6 months.
2. The Applicant was served a letter on 29th May indicating that he proceeds for 6 months leave to pave way for investigation that he has been involved in in-fighting and that this has prejudiced the image of the organization and affected the productivity.
3. This arose from a meeting on the 15th May 2020, called to discuss measures in combating COVID-19 and issues to do with middle managers. The meeting was attended by Hon. Minister of State for Works and Transport and Hon. Joy Kabatsi, Director of Transport and UCAA committee.
4. The agenda moved in the meeting discussed minutes of the previous meeting to which the applicant had no clue or copy. The applicant is aggrieved by the actions of the 2nd respondent, who acted ultra vires by sending the applicant for a 6 months leave until investigations are done and completed without any basis of the law, which is illegal.

The Minister of State for Transport in her affidavit in reply stated as follows;

1. That ordinarily, the Board of Directors of Civil Aviation Authority is mandated to deal with all issues relating to the management of the Institution, including recruitment and affairs of senior management.

2. That the Ministry of Works and Transport performs a role of political and policy leadership of the works and transport sector, under which the 2nd respondent institution lies.
3. That the Board of Directors' tenure expired/ended on 30th April 2020.
4. That the Ministry of Works and Transport was informed through several individual and union representatives complaints of a state of disharmony within the 2nd respondent institution, which reflected in the media, creating public outcry and threatening day to day operations of the institution leading to a loss of confidence in the institution by the public.
5. That upon receipt of this information the Ministry of Works and Transport convened independent meetings with CAA Union Representative on 17th March 2020 and Consequently Top Management of the 2nd respondent on 15th May 2020.
6. That during the interactions with the 2nd respondents' staff, it was revealed that the disharmony in the institution was occasioned by back-stabbing, infighting, persistent friction among members of top management, particularly the applicant. In addition, there were several complaints and disgruntlement among staff over the applicant's recruitment, which threatened the entire human resource function.
7. That in absence of the 2nd respondent's Board of Directors, whose term had expired on 30th April 2020, the Minister decided in exercise of the Ministry of Works and Transport supervisory role, to guide that a thorough investigation be undertaken by a competent government institution to provide a lasting institution to the state of affairs of the 2nd Respondent institution.

The 2nd respondent filed an affidavit in reply through Joseph Okwalinga who is the Manager Legal Services stating as follows;

1. That on the 15th day of October 2019 the *High Court vide Misc. Cause No. 100 of 2019 Matagala Valentine vs Civil Aviation Authority and Jabbe Pascal Osinde Osudo* issued an Order that the applicant was ineligible for appointment as the Director Human Resource & Administration at the time he was shortlisted and subsequently appointed by the Board and an Order of Certiorari quashing the CAA Board Decision appointing him to the said position.
2. That on 15th October 2019, the applicant obtained an interim order of stay of execution of the Judgment and Orders in *Misc. cause No. 100 of 2019* pending the hearing and determination of the main application for stay of Misc. Application 1063 of 2019.
3. That on the 17th day of August, 2020, the applicant's application for stay of execution of the Judgment and Orders in *Misc. Cause 100 of 2019* was dismissed and the interim Order was consequently set aside.
4. That following the dismissal of the application for stay of execution of the orders of the Court, the Board of directors terminated the applicant's employment with effect from 17th August 2020 in compliance with the ruling and Order.
5. That this application is overtaken by events as the applicant's employment has been terminated by order of court and there is no live dispute for determination and orders sought cannot be granted.

The applicant was represented by *Wakabahenda Teopista* holding brief for *Rwabogo Richard* while *Frankline Uwizera* represented the 1st respondent and *Thomas Ocaya* represented the 2nd respondent.

The parties raised the several issues for determination; but in courts view the major issue the

Whether the decision of the 2nd respondents to send the applicant on a forced leave of 6 months leave upon directive of the minister was lawful?

Counsel for the Applicant submitted that the as an employee of the 2nd Respondent as evidenced by his letter of appointment dated 1st March 2019 as the Director of Human Resource and Administration. The 2nd Respondent is a well-structured organization and public body, with clear policies and procedures in as far disciplinary, suspension and dismissal are concerned. These procedures are contained in the **Civil Aviation (General terms and conditions of service) Regulations, 2013. Article 78** provides for mechanisms of suspension, where it provides that; *“Whenever the Authority is conducting an inquiry, where it reasonably believed that the employee may interfere with the investigation or evidence, the authority shall give that employee with half pay in any case for a period not exceeding 4 weeks or the duration of the inquiry, whichever is shorter”*

Counsel further submitted that the suspension of the Applicant was further not in tandem with the provisions of the **Employment Act, Section 63(2)** that states *“the employer in conducting an inquiry that he/she has reason to believe may reveal a cause for the dismissal of an employee, may suspend the employee for a period not exceeding 4 weeks or period of inquiry whichever is shorter.”* Therefore the suspension of the applicant was not only in total disregard of the well established

procedures, but it was further in total disregard of the well established procedures, but it was further in total disregard of the provisions of the Employment Act 2006.

Counsel also noted that the Applicant did not appear before any impartial tribunal with a legal representative of his choice, to rebut what was alleged, which affects the Applicant not only in his future career development path, the Respondents or any other body, as the allegation remain a reference on his personal file and perpetual torture. Counsel cited **Article 80 of the Civil Aviation (General terms and conditions of service) Regulations, 2013**, which the 2nd Respondent used as a list of offences considered as violations with their punishment in its employment but none of these violations amount to a suspension for 6 months or forced leave.

Counsel submitted that it is well enunciated that judicial review is applicable to every public body that makes a decision, and such a decision can be challenged in court by a person aggrieved by it and from the facts, it is evident that the decision made by the 2nd respondent through the Minister of state for works and transport, Hon Joy Kabatsi, clearly raises issues for judicial review as it is tainted with illegality, irrationality and procedural impropriety. In the case of **Commissioner of Land v. Kunste Hotel Ltd (1995-1998) 1 EA (CAK)** court noted that... *“... Judicial review is concerned not with the private rights of the merits of the decision being challenged but with the decision making process. Its purpose is to which he/she is being subjected.”*

Counsel cited the **Section 55 of the Civil Aviation Authority Act Cap 354**, which states that *“the minister may give written directions as to the performance of its functions and which directions are to be of a general nature, not specific*

directions.” With reference to the case at hand, the minister is supposed to give general directions but she instead gave specific directions in this regard.

Counsel further cited **Article 78.8 of the Civil Aviation (General Terms and Conditions of Service) Regulations, 2013** which also provides that the employee is to be given an opportunity to defend themselves against the allegations however the decision that was made by the 2nd respondent under the assumed “guidance” even blocked the applicant from making an appeal to the board because, the board reports to the minister and therefore, could not rescind a guidance from the decision of its appointing authority. Thus the guidance was illegal, as suspension of 6 months is nowhere provided for under the laws of Uganda, coupled with blatant, decision of not providing the applicant with opportunities to appear and defend whatever allegations that were made against him, to know his accuser and be able to cross examine him on the allegations, and therefore, the guidance of the minister was illegal, or to be exact, misguided. The illegality is clearly demonstrated in her letter dated 29th May, 2020, directing the 2nd respondent to suspend the applicant for 6 months.

Counsel for the 1st respondent contends that forced leave is not a punishment or disciplinary procedure. In this case, it was not used in the context of punishing or disciplining as the applicant alleges. The affidavit in reply deposed by Hon. Joy Kabatsi, the Minister of State for Transport is very clear as to the intent behind the directive to require the applicant to proceed for forced leaves. Paragraph 14 of the affidavit in reply states that *“I decided, in exercise of the Ministry of works and transport supervisory role, to guide that a thorough investigation be undertaken by a competent government institution to provide a lasting solution to*

*the state of affairs of the 2nd respondent.” Furthermore, paragraph 15 of the affidavit in reply to this application provides that the forced leave was to “permit the investigation into the issues raised to be conducted smoothly,” counsel also noted that this court has pronounced itself regarding the legality of forced leave, as in the case of **Paul Mukiibi v. Attorney General, HCCM No. 71 of 2020, Justice Musa Ssekaana** held that “Forced leave as used in this case for the applicant is not a form of punishment but rather a means of allowing investigations to be carried out and concluded”*

Counsel then argued that the decision to send the applicant on forced leave was not irrational since there was a legitimate reason behind the decision, which was to ensure that the investigations into the affairs of the 2nd respondent maybe carried out properly.

Counsel for the 1st respondent contends that there were exceptional circumstances in this case warranting the Minister’s intervention. These circumstances are contained in the affidavit in reply to the application deponed by Hon. Joy K. Kabatsi on the 18th January 2020. Paragraph 8 of the 1st respondent’s affidavit in reply stipulates that ordinarily, the board of directors of the second Respondent is mandated to deal with all issues relating to the management of the institution, including all management, recruitment and related aspects of the organization. However, pursuant to paragraph 10 of the 1st Respondent’s affidavit in reply, at the material time when the issues arose, the 2nd Respondent’s Board of Director’s tenure had expired on 30th April 2020, and new and substantive board of directors had not yet assumed office. Therefore, there was a critical vacuum of leadership of the institution at the material time.

Counsel submitted that the guidance by the Minister falls within the powers granted by **Section 55 (1) of the Civil Aviation Authority Act Cap 354**, which provides that *“The minister may give the authority written directions as to the performance of its functions, which directions shall be of a general nature.”* Thus the directions contained in the letter dated 29th May 2020 did not go to a decision regarding the Applicant’s employment nor to take any disciplinary action against the Applicant. The letter merely offered general guidance on how the minister and the board can be later advised by a competent government institution on a permanent solution to the problems facing the institution, which necessitates an investigation into the matters that caused the disharmony in the institution.

This meant that the guidance offered was legal because it did not amount to a disciplinary action or suspension as alleged by the Applicant. The intent of the guidance was to allow for an investigation into the dire state of affairs in the 2nd Respondent institution. The state of affairs is described in paragraph 11, 12 and 13 of the 1st Respondent’s affidavit in reply as *“disharmony occasioned by back stabbing, infighting, and persistent friction among members of top management. In addition, disgruntlement over the applicant’s recruitment which threatened the entire human resource function of the authority.”*

This demonstrates that there was a clear need for an investigation into these affairs because the Applicant was at the center of the same. It was necessary for an independent investigation. It was not to punish the Applicant. It is also the position of the 2nd Respondent contacted the Inspectorate of Government who launched an investigation into the affairs of the 2nd Respondent and the same are on-going.

Analysis

The Minister in her affidavit stated that by the time she gave the directive or guidance, the term of the board had expired on 30th April 2020. That ordinarily, the Board of Directors of Civil Aviation Authority s mandated to deal with all issues relating to the management of the Institution, including recruitment and affairs of senior management. That the Ministry of Works and Transport performs a role of political and policy leadership of the works and transport sector, under which the 2nd respondent institution lies.

The ***Civil Aviation Authority Act*** provides;

The governing body of the authority shall be a board of Directors consisting of the managing director and not less than four and not more than eight directors one of whom shall be the chairperson.

Functions, duties and powers of the board.

The board shall be responsible for the general control of the performance and management of the undertakings and affairs of the authority;

The basis for the challenge of the applicant is that the Minister acted without authority or contrary to the law when he directed the applicant to be sent on forced leave for 6 months.

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. See ***Dr. Wilberforce Wandera Kifudde v National Animal Resources Centre and Data Bank (NAGRC & DB) & 2 Others High Court Misc. Cause No. 82 of 2020.***

For every action that an administrator or decision-maker takes, there must be a valid authorisation in an empowering provision. In absence of such authorisation the administrative action will be unlawful. The decision made by the Minister could have been lawful in the circumstances of the case but there was no properly constituted Board to receive directions.

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 Minister is given powers under Section 55 of the Civil Aviation Act to give the authority general directions; *The Minister may give the authority written directions as to general performance of its functions, which directions shall be orderly of a general nature.*

The above provision envisages that the directions are given to an authority that is fully constituted and in its existence. The law does not envision a situation where the Minister would be directly dealing with Managing Director without a Board of Directors. This would be contrary to the spirit of the Civil Aviation Authority Act which vests the general control of the performance and management of the undertakings and affairs of the authority.

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 administrator's purpose in making that choice or his or her reasons for doing so must be aligned to what is authorised in the empowering provision. The Minister of State for Transport seems to have had good intentions in sending the applicant on forced leave but her actions fell short of authority because there was no board in existence to allow such an action of management.

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. It would be recipe for disaster if the Minister refuses to constitute a Board required under the law and later give directives to only an individual (Managing Director) when the management is vested in an entire Board.

Parliament cannot be supposed to have intended that the power of the Minister to give directions should be given to the Managing Director of Civil Aviation Authority alone in absence of a Board. It must have assumed that the Minister of Transport 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 in order to be given the general guidance. 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 Minister is supposed to ensure that the board is always constituted within three months of notification. This would ensure that there is no power vacuum which would render the authority incapacitated to execute its mandate. *The chairperson shall notify the Minister as soon as a vacancy occurs in the membership' of the board, and the Minister shall fill the vacancy within three months of receiving the notice.*

Therefore, the decision (directive) of the Minister of Transport given to the Managing Director without a properly constituted Board of Directors to send the applicant on 6 months forced leave was illegal.

What remedies are available?

A declaratory Order that the decision of the Minister requesting the applicant to go for forced leave on 29th May 2020 in absence of the Board was unlawful.

The applicant's employment was terminated in other court proceedings where his appointment was challenged in *High Court Miscellaneous Cause No. 100 of 2019 Matagala Valentine vs Civil Aviation Authority & Jabbe Pascal Osinde Osudo*. This court cannot give any orders affecting his employment since he is no longer in the same employment.

The application allowed in those terms and I make no order as to costs.

I so Order.

SSEKAANA MUSA

JUDGE

15th/07/2021