THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
[CIVIL DIVISION]

MISCELLANEOUS CAUSE NO. 244 OF 2017

NDANGWA RICHARD::APPLICANT

VERSUS

ATTORNEY GENERAL :::RESPONDENT

BEFORE: JUSTICE HON. SSEKAANA MUSA

RULING

The application was brought by way of Notice of motion under the Judicature Act Cap 13 as amended by Act No. 3 of 2002, rule 6 of the Judicature (Judicial Review) Rules S.I No. 11 of 2009 was seeking orders that;

1. *Declaration that the decision by the permanent secretary of the Ministry of Public Service dated 9th May, 2017, unilaterally recalling the applicant from retirement purportedly by the withdrawing his early retirement is tainted with illegality, irrationality and procedural impropriety.*

2. *In the alternative, declaration that the decision by the Judiciary not to deploy the applicant to any magisterial area, give him assignments and pay his salary since June 2016 to date amounts to constructive or implied acceptance of the applicant's early retirement from public service as a Judicial officer.*

3. *In the further alternative, declaration that the decision by the Judiciary not to deploy the applicant to any magisterial area, give him assignments and pay his salary since June 2016 to date amounts to constructive or implied dismissal or discharge of the applicant from Judicial Service.*

4. *Certiorari doth issue to quash the impugned decision of the Permanent Secretary of Public Service dated 9th May 2017.*

5. *General and punitive damages.*
6. *Costs of the application.*
7. *Any other or further relief court may deem fit*

The application was supported by an affidavit of the applicant, which set out the grounds but briefly are;

1. That the applicant joined public service in 1995 as Magistrate Grade III and rose through the ranks until 2010 when he was elevated as Magistrate Grade I.

2. That the applicant was accused of corruption and abuse of office by the IGG in 2016 and after bargaining with the IGG the applicant was allowed to leave judiciary early without drawing benefits before attaining the mandatory retirement age of 60 years.

3. That the applicant applied for early retirement Public Service and he was retired on 31st June, 2016 at the age of 47 years. Consequently, the IGG discontinued the criminal charges against the applicant.

4. That sometime in May 2017, the applicant received a letter dated April 5th 2017 from the Secretary, Judicial Service Commission asking him to respond to allegations made against him by the Chief Registrar by his letter dated 21st march, 2017.

5. That the applicant on 24th May 2017 filed a response against the allegations indicating that Judicial Service Commission had no locus over him because he had ceased to be a public servant after his early retirement and or constructive dismissal by Judiciary.

6. That the applicant on 9th May 2017 received a letter from Public Service Commission withdrawing his early retirement until Judicial Service Commission concludes its disciplinary case against him.

7. That the unilateral decision withdrawing the applicant's retirement was made on allegation the applicant had a disciplinary case with Judicial Service Commission which is not true and was without hearing his side contrary to law and natural justice.

8. That ever since the applicant was discharged from criminal proceedings by IGG on 24th June 2016, the Judiciary has never redeployed him or given him any judicial assignments or Magisterial area or even paid a salary.

9. That the impugned decision of the Permanent Secretary Ministry of Public service dated 9th May 2017 is illegal, irrational and contrary to natural justice.

The applicant was represented by ***Mr. Kamugisha Gastone*** *holding brief for* ***Mr.Candia Alex*** and the respondents were represented by ***Mr. Ojambo Bichachi***

The issues for determination are;

1. *Whether the impugned decision is illegal, irrational and procedurally improper*
2. *Whether the applicant is entitled to the remedies sought*

Counsel for the applicant submitted that judicial review "is the jurisdiction of the superior court to review the acts, decisions and omissions of public authority to establish whether they have exceeded or abused their powers" through the case of **Gen. David Sejusa v. AG HCMC No. 176 of 2015**

Counsel submitted that the purpose of judicial review is to ensure that an individual is given treatment by the authority to which he/she has been subjected. In order to succeed, it must be proved that the impugned decision is either illegal, irrational or procedurally improper as in the case of **Firdoshali Madatali Keshwani Habib & Anor v. AG & 2 ors HCMC No. 11 of 2019.**

Counsel further noted in **Gen. Sejusa's case (Supra)** that in judicial review, courts seek to ensure four principles;

a) The Acts of parliament have been correctly interpreted

b) The discretion conferred by statute have been lawfully exercised

c) That the decision maker has acted fairly

d) That the exercise of power by a public body does not violate human rights

Counsel submitted that the decision was unlawful as per annexure B since the applicant had retired on the 10th June 2016, nearly one year later, public service purportedly to unilaterally withdraw his retirement on 9th May 2017 as annexure G. Counsel argued that **Article 28 and 44(c)** of the 1995 Constitution was not considered as the decision was made and thus the applicant should have been heard before making the decision. As in was the decision in the case of **National Council for Higher Education v. Anifa Kawooya Bangirana Constitutional Appeal No.4 of 2011** rendering the impugned decision ultra vires.

Counsel also defined Procedural Impropriety as in the case of **Twinomuhangi v. Kabale district & Ors 2006 HCB 130** "*as when there is failure to act fairly on the part of the decision making authority in the process of taking a decision."* He further explains that the unfairness may be in the non-observance of the rules of natural justice or to act with procedural fairness towards one affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislation by which such authority exercises jurisdiction to make the decision.

Counsel submitted that to appreciate this irrationality, we find it imperative to quote a passage in the impugned decision to show this court the reasons for withdrawal. It states that "*it has been drawn to the attention of this ministry that you have a disciplinary case with the judicial service commission which was never brought to our attention earlier while forwarding your request for early retirement*"

Counsel in his submissions framed a question as to if there was a disciplinary case against Ndangwa at Judicial Service Commission at the material time? He further stated as an answer to the question that the disciplinary complaint was made on 21st March 2017 as per annexure D to the applicants supporting affidavit and thus was belatedly 9 months after Ndangwa had been retired on the 31st June 2016 and concluded that there was no disciplinary case against the applicant.

Counsel submitted that irrationality occurs when the decision maker takes into account relevant matters. He further stated that the impugned decision was irrational for the following reasons;

1. It was based on non-existent fact, namely that the applicant had a disciplinary case then whereas there was none.

2. The applicant was not heard before making a decision.

3. The evident purpose was to send the applicant to Judicial Service Commission for disciplinary hearing yet the impugned decision itself addresses the applicant as a retired Magistrate G 1 and that Judicial Service Commission had no jurisdiction to discipline retired employees. Thus without a subsisting employment contract disciplinary proceedings have no legal basis.

In conclusion, counsel submitted that in regards to the above reasons, the impugned decision is irrational.

For the remedies, counsel submitted that the applicant seeks 3 alternative declarations based on resolution of issue 1. He further prayed for certiorari as in the case of **Firdoshali Madatali Keshwani Habib & Anor v. AG & 2 Ors (Supra)** court held that *"the purpose of certiorari is to quash an ultra vires decision thereby confirming that the decision is a nullity and is to be deprived of all effect."*

Counsel for the respondent submitted that incases of illegality the decision maker must understand correctly the law that regulates his/her decision making power and must give effect to it. He then cited the **Public Standing Orders, Section L** on the responsibility of the permanent secretary to grant a pensionable officer early retirement as per the case before us, the permanent secretary was notified by the chief registrar court of judicature indicating that the officer had pending disciplinary action, a matter which had not been brought to the attention of the ministry as in annexure D

Counsel argued that upon receipt of the information relating to pending disciplinary action, the ministry of **Public Service Standing Orders 2010, Section L-C paragraph 5,** wrote to the applicant withdrawing the authority granting him early retirement. The section provides that;
"If disciplinary proceedings are pending against a public officer at the time of his/her request to retire. This fact must be mentioned by the respondent office when submitting the officers' application to retire."

Counsel further submitted that the decision by the permanent secretary of the Uganda Public service dated 9th May 2017, to unilaterally recall the application

from retirement and withdrawing his early retirement was and is within the confines of the law and was neither irregular, illegal nor tinted with illegality, irrationality and procedural impropriety.

Counsel submitted that the Permanent Secretary of Uganda public service being and administrative office does not hold a hearing as envisaged under **Article 28** of the constitution. However Article 28 of the constitution is for hearings before judicial bodies. The permanent secretary of Ministry of Public Service being an administrative office does not need to hold a hearing, accept submissions nor call witnesses or cross examine the applicant. It suffices if the reasons for the decision are given to the applicant; it suffices if the reasons for the decision are given to the applicant. It suffices if the reasons for the decision are given to the applicant as in the case of **Lord Denning M.R Regina v. Race Board, Exparte Selvarajan 1975 [WLR] Pg. 1986** "*the administrative or investigating board is however a master of its own procedure. It needs not allow lawyers. It need not put every detail of the case against the man. Suffice if broad grounds are given*"

Thus the decision by the permanent secretary of Uganda Public service was neither irregular, illegal nor tinted with illegality, irrationality and procedural impropriety.

Analysis

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 with 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 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.

The applicant counsel submitted that the right to fair hearing under Article 28(3) of the constitution is a non-derrogable right under the constitution. That is indeed the correct position of the Law, which is in accordance with the principles of natural justice. As was held in the case of **Kulwo Joseph Andrew & others v. Attorney General & 6 others Miscellaneous Application No. 106 of 2010 by Y Bamwine J (**as he then was) judicial review, involves the assessment of the manner in which the decision is made. The jurisdiction is exercised in supervisory manner, not to vindicate the rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality.

The argument by counsel for the applicant that the he was denied a right to a fair hearing before the decision was made is devoid of merit. The right to be heard under Article 28 & 44(C) of the Constitution is very not applicable to all cases before administrative bodies.

The question whether the principles of natural justice have to be applied or not, is considered bearing in mind the express language and basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of the power. It is only upon a consideration of all these matters that the question of application of the principles of natural justice can properly be determined. See

Sahara India(Firm), Lucknow v Commissioner of Income Tax, Central-1, [2008] 14 SCC 151

In the case of ***Lloyd v Mc Mahon [1987] AC 625 at 702*** *Lord Bridge* succinctly put it:

> *" the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirement of fairness demands when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making, the kind of decision it has to make and the statutory or other framework in which it operates."*

The Permanent Secretary of Ministry of Public Service had no duty to give the applicant a hearing since no such right to be heard is envisaged in the circumstances of the case. The Articles of the Constitution Article 28 and 44 cited by the applicant are not applicable to public bodies taking decisions in the course of executing their duties. The said Articles of the Constitution are applicable strictly to court or tribunal established by law.

The decision of the Permanent Secretary Ministry of Public Service is also being challenged for irrationality. The applicant's counsel contended that the impugned decision was irrational since it was based on non-existent fact; namely that Ndangwa had a pending disciplinary case whereas there was none. Secondly, counsel contended that Judicial Service Commission has no jurisdiction to discipline retired employees.

Although the terms 'irrationality' and 'unreasonableness' are often used interchangeably, irrationality is only one of facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification.

Absurd or perverse decisions may be presumed to have been decided in unreasonable manner and may contain reasons which are unintelligible. The courts should set aside decisions of public bodies or authorities if unsupported by substantial evidence. See ***R (on application of British Sky Broadcasting Ltd) v Central Criminal Court [2011] 3451(Admin); 2012 QB 785: R (on application of MD (Gambia) v Secretary of State for Home Department [2011] EWCA Civ 121***

The decision of the Permanent Secretary Ministry of Public Service was not supported by evidence since there was no evidence of pending disciplinary

proceedings being instituted prior to the grant of the early retirement. The applicant in a letter dated 17th June, 2016 was granted early retirement in the following word;

"This is to inform you that on the basis of your length of service, it has been decided to grant you early retirement with effect from 31st June, 2016 however your benefits will be frozen until you attain the mandatory retirement age of sixty years."

The same Permanent Secretary in another letter dated 09th May 2017 wrote rescinding the earlier early retirement letter and stated as follows;
"It has been drawn to the attention of this Ministry that you have a disciplinary case with the Judicial Service Commission which was never drawn to our attention earlier while forwarding your request for early retirement.

Accordingly, this is to inform you that my earlier communication of 07th June 2016 accepting your request for early retirement and that of 15th February 2017 granting authority to pay your benefits, are hereby withdrawn until the proceedings of judicial Service Commission in your matter are concluded and this Ministry is advised appropriately"

The applicant has led evidence to show that the Chief Registrar lodged a complaint against him on 21st March 2017 contending that; *"Ministry of Public Service acted irregularly in allowing Mr. Ndangwa to take early retirement. The Ministry of Public Service does not have power to retire judicial officers. Judicial officers are hired, retired or dismissed by the judicial Service Commission. Therefore, any judicial officer who wishes to resign or take early retirement must go through the Judicial Service Commission which Mr Ndangwa did not do."*

The office of the Chief Registrar was moved to act in a letter dated 15th March 2017 by the Inspectorate of Government, which acknowledged the irregularity of allowing the applicant to have an early retirement instead of resignation.

They noted; *" this was an irregularity and in view of the evidence already gathered against him, we agree that it should be corrected by having disciplinary proceedings taken against Mr. Ndangwa, instead of rewarding him with the payment of his full retirement benefits."*

By the time the Chief Registrar tried to reverse the 'clock' it was already passed the time of recalling the applicant to face disciplinary proceedings. The Ministry of

Public Service had already allowed the applicant an early retirement. The decision to rescind the earlier decision was premised on an allegation that the applicant had a pending disciplinary case.

The respondent never made any specific response to this assertion. (Actually the respondent never filed any affidavit in reply at least I did not see one on record). In our legal system, the failure of a party to adduce evidence will lead the court necessarily to infer that the silence should be converted into proof against that party.

The applicant contended that ever since he received his letter for allowing his early retirement effective 31st June, 2016 the Judiciary has never redeployed him or given him any judicial assignment or magisterial area or even paid him any salary. This confirms that the applicant was indeed retired and the Permanent Secretary to Ministry of Public Service could not purport to rescind the earlier acceptance of the applicant's early retirement.

In addition, the reason advanced by the Permanent Secretary that there was a pending disciplinary case which was never brought to their attention is completely false since the complaint or case at Judicial Service Commission was lodged on 22nd March 2017. The decision of the Permanent Secretary Ministry Public Service was therefore premised on a material mistake or disregard of a material fact which therefore renders the decision contained in the letter dated 09th May 2017 irrational or unreasonable.

A decision which is unreasonable or irrational offends the values of the rule of law. The concept of unreasonableness or irrationality in itself imputes arbitrariness which is an antithesis of the rule of law. The applicant had already taken benefit of the early retirement and it would be unfair and irrational to be deprived of such benefit and be subjected to disciplinary proceedings after accepting his early retirement.

There could have been challenges in the process of retiring the applicant but the same should not be visited on him. The process should streamlined to avoid similar occurrences (uncoordinated retirement of judicial officers).

The decision to withdraw the letter dated 07th June 2016 was irrational in the circumstances of this case.

Whether the applicant is entitled to the remedies sought?

In the case of **Firdoshali Madatali Keshwani Habib & Anor v. AG & 2 Ors (Supra)** court held that *"the purpose of certiorari is to quash an ultra vires decision thereby confirming that the decision is a nullity and is to be deprived of all effect."*

The effect of granting an order of certiorari is to establish that the decision is *ultra vires* and set the decision aside. *Certiorari* is a discretionary remedy, and may be refused where the error made is not fundamental or has not caused any prejudice. In this case, the letter dated 09th May 2017 deprives the applicant of some benefit of early retirement.

An Order of ***Certiorari*** issues to quash the letter dated 09th May 2017.

Each party shall bear their costs.

I so order.

SSEKAANA MUSA
JUDGE
30th June 2021