THE REPUBLIC OF UGANDA

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

MISCELLANEOUS CAUSE NO. 339 OF 2020

1. **CITIZEN ALERT FOUNDATION (CAF) LTD**
2. **BYARUHANGA BARIGYE ENOCH**
3. **OKWAPUT DEO::APPLICANTS**
4. **ATANGO CLEFUS MALLISA**
5. **AANYU LYDIA**

VERSUS

1. **ATTORNEY GENERAL**
2. **THE JUDICIAL SERVICE COMMISSION**
3. **HON JUSTICE RICHARD BUTEERA::::::::::::::::::::RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This is an application for judicial review brought under Section 30,33,36 & 38 of the judicature Act Cap 13 and Section 98 of the Civil Procedure Act and rules 3, 3A, 5 & 6 of the Judicature (Judicial Review) Rules, 2009 as Amended for Declarations and Orders:

1. The decision of the President in appointing Hon. Justice Richard Buteera as the Deputy Chief Justice of Uganda contravened Articles 142 and 147 of the Constitution of the Republic of Uganda 1995, provisions of the Judicial Service Commission Act, 2005 thus illegal, irrational and is tainted with procedural irregularity.

2. A Declaration that, the President in appointing the said Hon. Justice Buteera a candidate that had been recommended to him for appointment as Chief Justice was ultra vires his mandate wherein, he usurped the powers of the Judicial Service Commission by declaring a vacancy to himself, initiating the recruitment process and acted without advice of the Judicial Service Commission.

3. A Declaration that, the act of the President in handpicking candidates to fill the vacancy for the second top position (Deputy Chief Justice) in the judiciary without regard to due process undermines the independence of the judiciary and rule of law.

4. A Declaration that, the decision of the President of handpicking a Deputy Chief Justice disenfranchised many qualified Ugandan Lawyers and Judicial Officers from competing for the said job thus were discriminated since the President acted to ring fence the said position in favour of one person without regard to the merit.

5. A Declaration that, at the material time the President appointed Hon. Justice Richard Buteera there was no vacancy as the position of deputy Chief justice was substantively filled by Hon. Justice Owiny Dollo is as far as he had not resigned, assumed or accepted the Office of Chief Justice.

6. A Declaration that, the judicial Service Commission and Parliamentary Commission failed in their mandates to prevail over the President's illegal appointment of the Deputy Chief Justice.

7. A Declaration that, the Judicial Service Commission has a well-established neutral, fair and transparent way of declaring vacancies, advertising, interviewing and assessing integrity of applicants before recommending them for appointment by the President, hence a practice and public expectation which it is bound to follow to the letter.

8. An Order of certiorari doesth issue calling for the decisions of the President wherein nominating/appointing Hon. Justice Richard Buteera as Deputy Chief Justice dated about or after 20th of August, 2020 to the High Court and the same be quashed and set aside for being ultra vires the mandate vested in the President by Constitution.

9. An Order of Certiorari doth issue calling the proceedings/ minutes of Parliamentary Appointments Committee wherein approving the appointment of the said Hon Justice Richard Buteera dated about or after 26th August, 2020 and the same be quashed and set aside for being premised on an irregular and void appointment.

10. An Order directing Hon. Justice Richard Buteera to vacate the Office of Deputy Chief Justice.

11. An Order of Prohibition doth issue restraining Hon. Justice Richard Buteera from holding out or exercising the functions of the Office of Deputy Chief Justice arising from the impugned appointment.

12. A Declaration that, the Hon Justice Richard Buteera acted unprofessionally when he accepted an illegal appointment to an office in the Judicial Service for which he was never an applicant, interviewed or recommended, whereby he ought to be barred from contesting for the same in the subsequent interviews.

13. An Order directing the 1st, 2nd & 3rd Respondents to comply with due process of the law in appointing the Deputy Chief Justice with 3rd respondent being the initiator of the process.

The grounds upon which this application is based are set out briefly in the Notice of motion and the affidavit of the 2nd applicant as follows;

1. The 1st applicant is company limited by guarantee duly incorporated in Uganda whose activities/objects includes inter alia; to provide a

platform for dialogue and peaceful dispute resolution and other activities incidental thereto, including public interest litigation on any matter of human rights, rule of law or public interest and brings this application in public interest.

2. The 2nd , 3rd, 4th, & 5th applicants are Ugandan Citizens of sound mind and directors of the 1st Applicant and bring this application jointly and severally with the 1st applicant in public interest.

3. That on or about 20th August, 2020 the President simultaneously Hon. Justice Alfonse Owiny Dollo as Chief justice and Hon Justice Richard Buteera as Deputy Chief Justice respectively, thereby filling the vacancy of Deputy Chief Justice for which no candidate was recommended, nor declared vacant or advertised and without initiation or prior advice of Judicial Service Commission.

4. That the, President in appointing Hon Justice Buteera as candidate recommended to him for appointment as Chief Justice was ultra vires his mandate wherein he usurped the powers of Judicial Service Commission by declaring a vacancy to himself, initiating the recruitment process and acted without advice of the Judicial Service Commission.

The respondents filed affidavits in reply and opposed the application through the affidavit of *Jane L Kibirige*-Clerk to Parliament, *Ronald Ssekagya*-Acting Secretary to the Judicial Service Commission and the 3rd respondent in his personal capacity;

1. The Parliamentary approval for the nominees for the position of the Rt Hon. Chief Justice and Deputy Chief Justice of the Republic of Uganda was done in compliance with the Constitution of the Republic of Uganda.

2. That the process of substantively appointing a Chief Justice and Deputy Chief Justice comprise a tripartite formula of (i) advice by the Judicial Service Commission: (ii) Appointment by the President; and (iii) Approval by Parliament.

3. That the approval of the appointment of the Rt Hon Justice Buteera Richard as the Deputy Chief Justice of Uganda was done in accordance with the Constitution of the Republic of Uganda.

4. That Rule 162(2) of the Rules of Procedure specifically states that the proceedings of the Committee shall be closed. It follows therefore that its records of proceedings is closed to the public.

5. That the Parliamentary Committee on Appointments considered the appointment of the Chief justice and Deputy Chief Justice in accordance with Article 142(1) of the Constitution and Rules of Procedure.

6. That the Committee duly considered the nominees and found no justification not to approve the Rt Hon Alfonse Owiny-Dollo and Rt Hon. Richard Buteera as the Chief Justice and Deputy Chief Justice of Uganda respectively.

The Secretary of the Judicial Service Commission contended that;

7. That Justice Richard Buteera responded to the advert for the position of Chief Justice which was to fall vacant upon attaining the age of 70 years.

8. That there were three candidates that went through an interview session at the Judicial Service Commission and were graded and ranked in terms of their performance.

9. That the Judicial Service Commission then rendered advice to the Appointing Authority pursuant to Articles 147(1)(a) and 142(1) of the

Constitution if the Republic of Uganda from amongst the names submitted.

10. That in exercise of his prerogative power to appoint under the Constitution, H.E the President of Uganda appointed Justice Alfonse C. Owiny-Dollo as Chief Justice of the Republic of Uganda and furnished his name to the Speaker of Parliament of Uganda for Approval of appointment.

11. That upon appointment of Hon. Justice Alfonse C. Owiny-Dollo, the then Deputy Chief Justice as the Chief Justice of Uganda, *ipso facto* the position of Deputy Chief Justice became vacant as a result of the Executive and in Sovereign act of the President in accordance with Article 99 of the Constitution of the Republic of Uganda.

12. The President in the exercise of his prerogative power to appoint in terms of Article 147 and 142 of the Constitution appointed Hon. Justice Richard Buteera as Deputy Chief Justice of the Republic of Uganda which was one of the names recommended to him by Judicial Service Commission to choose the person to occupy the position of Chief Justice of Uganda.

13. That the position of the Judicial Service Commission is that a candidate that is suitable for appointment as Chief justice having gone through due process for interviews is certainly suitable for appointment as Deputy Chief Justice without having to go through another interview process.

14. That Hon Justice Richard Buteera was qualified to be appointed as Chief Justice and there was nothing to disbar him from being appointed as deputy Chief Justice and he was duly approved by Parliament of the Republic of Uganda.

15. That there was never any complaint from any other person that the appointment of Hon. Justice Richard Buteera denied him or her any opportunity to contest for appointment to contest for appointment if a vacancy had been declared.

16. That the appointment of Hon Justice Richard Buteera was cost effective and saved Government funds which would have been spent through a lengthy and expensive recruitment process.

The 3rd respondent responded to the application as follows;

17. That the Executive actions of the President taken under the Constitution are not amenable to judicial review and that the remedy of removal of an appointee to the Constitutional office of Deputy Chief justice is not available under judicial review as it is not held in temporary or Acting capacity.

18. That any orders preventing the 3rd applicant from carrying on the functions and exercising the powers of the office of the Deputy Chief Justice would be unconstitutional and contravene Article 142(3) of the Constitution.

19. That this court is not vested with jurisdiction to try or determine any of the matters that form the basis of the present application and it seeks to circumvent and undermine the constitutional immunity of the office of the President.

20. That the 3rd respondent is not aware of any constitutional or statutory provision that requires that the position of Deputy Chief justice must be specifically applied for, advertised or preceded by any formal interviews process.

21. That I have served in different capacities as a judicial officer, rising from Magistrate Grade One through the ranks to the position of Supreme Court Judge. In only some cases was I required to respond

to an advertisement or attend an interview and in some instances there was no advertisements and no interviews were conducted.

22. That the 3rd defendant never acted unethically or professionally in accepting a position to which he was appointed. He appointed to a lesser position of Deputy Chief justice after successfully sitting for a higher position of Chief Justice.

23. That the position of Deputy Chief Justice is minor and cognate to that of the Chief Justice and that both attract similar qualifications in terms of academic qualifications, experience and competence. Therefore he was duly qualified for the position of Deputy Chief Justice.

24. That the Constitution preserves a discretionary power and grants ultimate executive authority to the President to appoint a Deputy Chief Justice so long as he has received the advice of the Judicial Service Commission that the proposed appointee is qualified for the position. In this case the President had been duly advised that the 3rd respondent was competent and qualified to occupy the highest judicial office envisaged under the Constitution.

The applicants were represented by *Moses Ingura* whereas the 1st and 2nd respondents were represented by *Jeffrey Madette* and *Akello Suzan Apita*, 3rd respondent was represented by *Byenkya Ebert* assisted by *Bazira Anthony*.

The parties were directed to file written submissions which they did and the same have been considered in this ruling.

Issues for determination

1. ***Whether the application for judicial review in the present case is competent?***

2. ***Whether the nomination and subsequent appointment of Hon Justice Richard Buteera as deputy Chief Justice by the President was illegal and procedurally improper?***

3. ***What remedies are available to the parties?***

<u>Determination</u>

Whether the application for judicial review in the present case is competent?

The 3rd respondent counsel raised an issue of competency of the application contending that the application is incurably incompetent since it is based on allegations that; The President of Uganda acted in contravention of specific Articles of the Constitution i.e Article 142 and 147. It was their case that the present action is an action seeking declarations that the President acted in violation of the Constitution and therefore could only be presented to the Constitutional court by way of a constitutional petition in accordance with Article 137(3) of the Constitution.

The 3rd respondent's counsel further contended that the judicial review orders being sought would themselves contravene or be inconsistent with the Constitution. The remedies seek the removal of the person appointed by the President as Deputy Chief Justice from office and an order barring the person so appointed from exercising the duty and functions of Deputy Chief Justice. The process of removal of a Deputy Chief justice must be premised on Article 144 of the Constitution.

Thirdly, it was their case that any person appointed permanently to an office as is the case of a judicial officer appointed under the Constitution, cannot be removed by way of judicial review. Counsel relied on interpretation of section 38(2) of the Judicature Act which provides for injunction being granted restraining any person from acting in any office.

Fourthly, counsel submitted that the actions of the President of Uganda taken in the exercise of his executive functions are not amenable to judicial review. The rules governing judicial review make no reference to the institution of the Presidency. It was further submitted that the President is given Constitutional precedence over all others in Uganda and also given immunity for judicial proceedings of any sort while in office for that reason. This means that this court does not exercise any supervisory power over the Presidency by way of judicial review.

Fifthly, the 3rd respondent contended that the application seeks to challenge by way of judicial review, the exercise of special prerogative powers vested by the Constitution in the President. The appointment of the Deputy Chief Justice and Chief justice, as in the appointment of Cabinet Ministers, is a prerogative of the President that is not amenable to judicial review.

Lastly, the 3rd respondent counsel submitted that the applicants have not established any direct or sufficient interest in the subject matter of the suit and consequently have no *locus standi*.

The applicants' counsel in reply submitted that the decision of the President in nominating and subsequent appointment of the 3rd Respondent is amenable to judicial review. The applicants as citizens and lawyers have sufficient interest and duty to defend the Constitution and duty to defend the Constitution and Articles and promote, accountability, transparency, independence of the judiciary and rule of law in their country.

The applicants' counsel contended that this application raises no question of Constitutional interpretation since the constitutional court has pronounced itself on the position of the law regarding the tripartite process of appointing judicial officers to the high bench.

The applicant's counsel challenged the narrow interpretation given under section 38 of the Judicature Act to the words 'acting' to mean only persons holding an interim position or serving temporarily. In their view such an interpretation creates an absurdity.

Analysis

The question this court has to consider is whether the applicant has sufficient interest in instituting this application for judicial review or is a mere busy body. The task of the court in assessing whether a particular claimant has standing is a balancing act between the various factors. Sufficient interest is a standard which could sufficiently embrace all classes of those who might apply and yet permit sufficient flexibility in any particular case to determine whether or not 'sufficient interest' was in fact shown.

Rule 3A of the *Judicature (Judicial Review) (Amendment) Rules, 2019* provides that;

Any person who has direct or sufficient interest in a matter may apply for judicial review

The court is duty bound to determine the issue of *locus standi* since our rules of procedure removed the application for leave to apply for judicial review which was a sieving stage of frivolous applications which would never proceed to be filed in court. The permission/leave stage was a good check for hopeless cases and would avoid claimants who are simply meddlers or busy bodies. The preliminary evaluation of standing at permission stage enabled the court to prevent abuse by busybodies, cranks and other mischief-makers.

The standard of sufficiency has been relaxed in recent years, the need to have an interest has remained and that the fact that…..a sufficient interest [is required] undoubtedly shows that not every applicant is entitled to judicial review as of right. It is important that the courts do not by use or

misuse of the weapon of judicial review cross that clear boundary between what is administration, whether it be good or bad administration, and what is an unlawful performance of the statutory duty by a body charged with performance of that duty. See ***R v Inland revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd [1982]AC 617.***

The law is equally concerned with 'representative standing' which involves associational standing which claims on behalf of (interests of) identifiable individuals who are its members or whom it claims to represent; and public interest standing, which involves an individual, corporation or group purporting to represent "the public interest" rather than the interests of any identified or identifiable individuals. The court would probe in any detail the relationship between the claimant and the class they claim to represent.

The 1st applicant is a company limited by guarantee incorporated in Uganda whose objectives include inter alia to provide a platform for dialogue and peaceful dispute resolution and other activities incidental thereto, including public interest litigation on any matter of Human rights, rule of law or public interest having capacity to bring this application.

It is equally not clear whether the 1st applicant is merely operating as a company limited by guarantee or a Nongovernmental Organisation with licence to operate as such.

The fact that some people join together and assert that they have an interest does not create an interest if the individuals did not have an interest. The fact that those without interest incorporate themselves and give the company in its memorandum power to pursue a particular object does not give the company an interest.

The affidavit of Byaruhanga Barigye Enoch states that he is an Executive Director of the 1st applicant and only attaches a certificate of Incorporation

and does not attach the Memorandum of Association to assist this court in evaluating the *locus standi* of the 1st applicant or threshold of direct or sufficient interest. There is no evidence or proof of authority to institute such proceedings in public interest as the 2nd respondent has contended in his affidavit in support.

The 2nd applicant has not stated whether he is duly authorized or permitted by the 1st applicant to file to file an affidavit in support on behalf of the company. He merely states that *he is subscriber, Executive Director of the 1st applicant and 2nd applicant well conversant of this case authorized to depone this affidavit.* There is no such authority from the 1st applicant by way of resolution or authority by the other applicants.

The application states that 2nd 3rd 4th and 5th applicants are Uganda Citizens of sound mind and directors of the 1st applicant and bring this application jointly and severally with the 1st applicant in the public interest. There is no scintilla of evidence about the status of the applicants as citizens or directors of the 1st applicant.

He does not state what interest he possesses to lead him to file this application for judicial review. The threshold for instituting an application for judicial review is to show sufficient interest in an application in order to be allowed access to the temple of justice. This would enable the court assess the level of grievance against what is being challenged and to sieve out hopeless applications.

The interest required by law is not a subjective one; the court is not concerned with the intensity of the applicant's feelings of indignation at the alleged illegal action, but with objectively defined interest. Strong feelings will not suffice on their own although any interest may be accompanied by sentimental considerations. Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

In particular, a citizen's concern with legality of governmental action is not regarded as an interest that is worth protecting in itself. The complainant (applicant/petitioner) must be able to point to something beyond mere concern with legality: either a right or to a factual interest. Judicial review applications should be more restrictive to persons with direct and sufficient interest and should not be turned into class actions or *actio popularis* which allow any person to bring an action to defend someone else's interest/rights under Article 50 of the Constitution. See ***Community Justice and Anti-Corruption Forum v Law Council & Sebalu and Lule Advocates High Court Miscellaneous Cause No. 338 of 2020***

The 'unqualified' litigants or persons without direct and sufficient interest (meddlers) are more likely to bring flimsy or weak or half-baked actions/cases and that these are likely to create bad or poor precedents. It may be a bar for other genuine persons with sufficient interest from challenging the actions or decisions affecting them directly. The courts should be satisfied that a party has sufficient interest and ensure that they are presented with concrete disputes, rather than abstract or hypothetical cases. In the case of ***Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others 1996 (1) SA 984 CC para 164*** Chaskalson P stressed that:

> *"The principal reasons for this objection are that in an adversarial system decisions are best made when there is a genuine dispute in which each party has an interest to protect. There is moreover the need to conserve scarce judicial resources and to apply them to real and not hypothetical disputes."*

The court should attach importance to a track record of concern and activity by the applicant in relation to the area of government decision-making body under challenge. Standing in judicial review matters should remain a matter of judicial discretion contingent on a range of factors identified in that decision, for the most part, those factors do not operate to prevent worthy public interest cases being litigated: is there a justiciable issue? Is the applicant raising a serious issue? Does the applicant have

genuine interest in the matter? Is this a reasonable and effective setting for the litigation of issues?

In any legal system that is strained with resources, professional litigant and meddlesome interloper who invoke the jurisdiction of the court in matters that do not concern them must be discouraged. An application will have standing to sustain public action only if he fulfills one of the two following qualifications: he must either convince the court that the direction of law has such a real public significance that it involves a public right and an injury to the public interest or he must establish that he has a sufficient interest of his own over and above the general interest of other members of the public bringing the action.

Therefore any citizen who is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the citizens in this country; the door of the court will not be ajar for him. But if he or she belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busy body, he could be locked out at the gates of the temple of justice.

It is the duty of the courts to protect the scarce state resources and the over-burdened court system by ensuring that litigants who appear in court in matters of judicial review have a direct or sufficient interest to come to court. Precious resources would be wasted on the adjudication and defence of claims if mere busybodies could challenge every minor or alleged minor infraction by the state or public officials. Without sufficient interest threshold for standing the floodgates will open, inundating the courts with vexatious litigation and unnecessary court disputes.

The protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by court….there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court.

Thus, there are limits on public interest standing and these limits operate in the light of policy concerns such as the court being flooded with claims, or authorities being harassed with vexatious review challenges. The court will assess the sufficient interest against all the factual and legal circumstances of the case. It is a mixed question of fact and degree.

The applicants for reasons herein stated lacked standing or locus in this matter and this would render the application incompetent.

In addition, the 2nd applicant has deposed an affidavit without authority of the other applicants contrary to Order 3 rule 2 and Order 1 rule 12. It is a mandatory requirement that the persons deposing a single affidavit purportedly on behalf of others must do so with their authority. The deponent must aver that he is deponing also on behalf of the other applicants with their authority. The authority must be in writing attached to the affidavit. See ***Nteyafa Kaddu Mukasa & Another versus Zion Construction HCCS 901 of 2015 and Ready Agro Suppliers Limited versus Uganda Development Bank HCT-CC No. 039 of 2005.***

Likewise, this breach would render the application incompetent.

Whether the nomination and subsequent appointment of Hon. Mr. Justice Richard Buteera as deputy Chief Justice by the President was illegal and or procedurally improper?

The applicants' counsel submitted that decision of the President in nominating and appointing the Deputy Chief Justice violated the Constitution and the provisions of the Judicial Service Commission. The contention of the applicants is that it violated the mandatory requirement to act on advice of Judicial service Commission under Article 142(1) and 147(1)(a) of the Constitution.

They applicants submitted that the process is a tripartite one at the initiation of the Judicial Service Commission, nomination by the President acting on mandatory advice of the Judicial Service Commission while Parliament approves nominations before one is appointed. In their view the process and procedure which has always been practiced was not followed in nomination and it is immaterial as to whether it is provided for under the law because the commission has created a legitimate expectation that the same shall always be followed whenever recruitment to fill a substantive position is to be filled in the judiciary.

The 1st and 2nd respondents' counsel submitted that the President of Uganda, the Judicial Service Commission and Parliament of Uganda, as the appointing authority, recommender and vetting body respectively whose decisions are under challenge, knew the law and acted within its corners in appointing the Deputy Chief Justice. It properly afforded the process natural justice giving rise to legal and proper process leading to the appointment. Therefore there was no illegality or unlawfulness committed in the process of recommending, appointing and vetting of the Deputy Chief Justice.

The 3rd respondent's counsel submitted that the office of Deputy Chief Justice is minor and cognate to that of the Chief Justice. Therefore it is interlinked with and closely related to that of the Chief Justice and was created to enhance the functionality and viability of the Chief Justice's office. The President appointed the 3rd respondent from persons from whom the 2nd respondent had advised as being eligible for the highest judicial office of Chief Justice.

Counsel further submitted that the 2nd respondent is not under mandatory obligation to advertise vacant judicial positions like the applicants allege in their application. Regulation 14(1)(a) of the Judicial Service Commission

Regulations provides for the 2nd respondent making its own procedure for applications for appointments.

Regulation 16(1) further provides that where a vacancy exists in any judicial office or in a tribunal, the vacancy may be advertised.

There is no institutionalized practice or procedure that requires that any judicial position first be advertised to the general public prior to making of appointments.

Analysis

The 3rd respondent applied to Judicial Service Commission for the appointment to the position of Chief Justice which had fallen vacant and duly sat interviews and his name was among those forwarded to the President for consideration.

Article 142(1) of the Constitution provides for appointment of Judicial Officers as follows;

The Chief Justice, the Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court or a Justice of Appeal and a Judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with approval of Parliament.

The applicants seem to contend that a specific procedure must be followed whenever a vacancy is available which in their view should be as follows; Declaration of the vacancy, advertisement, assessment and interview before forwarding any candidate to the President for nomination and subsequent appointment to fill the substantive position.

However, the above procedure is not supported by any law but rather what has sometimes been used to fill some vacancies. The applicants argue

that the practice has created a legitimate expectation that the same shall always be followed wherever recruitment to fill a substantive position is to be filled in the judiciary.

This court does not agree with this submission since the 2nd respondent has always adopted any procedure best suited in the circumstances to fill any vacancy and this court would not impose any specific process for selecting appropriate candidates for any vacancy. They can advertise and invite applicants, or invite nominations for the suitable candidates as it has been used at times or select from their own data base of potential candidates. Therefore, there is no legitimate expectation that the alleged standard procedure should always be followed and it is not supported by any law.

Regulation 16(1) of Judicial Service Commission Regulations provides that where a vacancy exists in any judicial office or in a tribunal, the vacancy may be advertised.

The Constitution, the Judicial Service Commission Act and Judicial Service Commission Regulations do not provide for any manner or specified conditions or circumstances under which the advertisement for any vacancies should take. The 2nd respondent is given some discretion to determine when to advertise or not to advertise under the regulations.

The procedural steps required is advice by Judicial Service Commission on who is the appropriate person to be nominated, and thereafter the nomination by the President and later vetting or approval by Parliament and later appointment by the President which in this case was done. The applicant's complaint is that the advice was for a higher position of Chief Justice and not for a Deputy Chief Justice. This cannot be understood to be illegal within the discretionary and administrative powers that are allowed to the appointing authority.

The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. It is the courts to determine whether the authority has made an error of law bearing in mind the broad degree of discretion in decision making. The court should identify the all-important dividing line between decisions that have been reached lawfully and those that have not. There are two questions: (i) was the decision taken within the powers granted? and (ii) if it was, was the manner in which it was reached lawful?.

The courts have in practice had sufficient room for manoeuver to be able to avoid being driven to reach unsatisfactory conclusions in interpretation of the law by the pressure exerted by conceptual reasoning. The court will employ the elasticity provided by the law giving such power and discretionary nature in executing of the said duties under the law. In the present case the decision to appoint the 3rd respondent was done within the powers granted by the Constitution Article 142 and the manner in which the decision was reached cannot be construed by stretch of interpretation to be outside the law. The applicants have not cited any legislation which was breached but rather they are alluding to what they think is the standard procedure that has allegedly been used in filling vacancies in the judiciary in some previous recruitment.

What the applicants are basing their fluid arguments are not statutory requirements but rather the manner of internal management on how the advice should have been rendered. There is no specific form of advice that has to be given from Judicial Service Commission but rather it is their action of forwarding a name of any person as a candidate duly identified or nominated. All statutory requirements are prima facie mandatory. The violation of a provision will, in the context of the statute as a whole and the

circumstances of the particular decision, not render statutory provision directory or discretionary. The breach of the particular provision is treated in the circumstances as not involving a breach of the statute taken as a whole.

In order to decide whether a provision or act that has been ignored is mandatory, the whole scope and purpose of enactment must be considered, and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. It is not enough to allege that there is breach of the law rather the scope and purpose must be exhaustively analysed in the interpretation and application of the law. The matter should be judged upon the overall intent of the legislation, and interests of justice. In particular, if there had been 'substantial compliance' with the requirement, and if the irregularity was capable of being waived, whether the non-compliance could be justified depended upon the consequences of non-compliance. See ***London and Clydeside Estates v Aberdeen DC [1980] 1 WLR 182***

Ugandan judicial review operates within the context of a constitutionally entrenched separation of the judicial power from legislative and executive powers. The separation of the judicial power is seen as constitutionally entrenching a distinction between the merits of an administrative decision and its legality. Separation of powers prevents a judicial review court from judging an administrative decision to have been unlawful simply because it was unfair, or resulted in an injustice, or appeared to the court to be in disconformity with the principles of good administration. The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and legality of its exercise.

The courts need to recognize that there is always need to justify their intervention or non-intervention in administrative matters. The courts constitutional role in judicial review is sometimes limited in their capacity to decide matters which admit of no generalized or objective determination. The judicial willingness to appreciate the constitutionally ordained province of administrative agencies and this is their preserve and act with restraint in assessing their decisions taken in exercise of their discretionary powers. In the case of ***Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs 2004 (4) SA 490(CC)*** O'Regan J emphasized that in treating administrative decisions in a court is not expressing servility but simply recognising the proper role of the executive within the Constitution:

> *"a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to the other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field….A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker……"*
>
> *"respect for the decision does not mean simply rubber-stamping an unreasonable decision in recognition of the complexity of the decision or the identity."*

The appointment of the 3rd respondent was an act involving the other arms of government which applied their mind to the exercise of power and followed the law as prescribed should not be interfered with in absence of justification or any breaches of the law. There was advice duly rendered to

the President to appoint the 3rd for the top most position in the Judiciary of Chief Justice and in exercise of his prerogative powers, the President opted to act on the advice to appoint him to the position of Deputy Chief Justice. The court will not lightly presume abuse or misuse of power and will make allowance for the fact that the decision-making authority is the best judge of the situation. See ***Rameshwar Prasad (IV) v Union of India [2006] 2 SCC 1 168-169***

This application fails and is dismissed with costs to the respondents.

It is so Ordered

SSEKAANA MUSA
JUDGE
24th January 2022